EMERGENT GOVERNANCE: THE POLITICS OF COMPETITION IN DIGITAL MARKETS

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ABSTRACT

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This dissertation examines a series of US policy debates to provide an account of how policymakers attempt to address gaps in existing policy frameworks to tackle challenges arising in digital platform markets, ranging from mass data collection, the spread of hate speech and misinformation, to increasingly concentrated market power among a few dominant firms. The focus falls on competition policy, which has emerged internationally as one of the most prominent policy frames for governing these sectors. Specifically, I explore how the boundaries of competition policy are discursively contested and negotiated in response to dramatic changes in digital communications by stakeholders ranging from policy experts to regulators to public interest groups to the regulated industries themselves. Drawing on policy documents, stakeholder interviews, and fieldwork in Washington, D.C., I identify the range of interests invested in clashes over policy, including competing definitions of digital platform markets; characteristics of competitive dynamics in them; proposed policy interventions and expectations about their outcomes; and the proper role of the state and of market competition in digital markets. First, this dissertation provides an account of how this politics animates the emergence of a governance framework for digital platform markets, which privileges stronger antitrust enforcement and economic regulation, in response to regulatory gaps introduced by technological convergence and digitization and neoliberal reforms. Second, I assess this framework, whose committed pursuit of competition in digital markets reveals blind spots in addressing the systemic problems posed by platformization and datafication, with significant noneconomic concerns remaining outside its field of vision. Cumulatively, this dissertation illuminates how these policy debates, fundamentally about the role of law, policy, and market competition vis-à-vis new technologies, both enable and constrain imagining and defining a governance regime over rapidly transforming digital markets.

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Chapter 1 – Introduction

Competition is the market's chief regulatory tool for disciplining firms. However, competition has always been elusive in communications markets and therefore these markets have always posed regulatory challenges. These challenges, which have always loomed over communications policy, are compounded by the noneconomic role communications systems play in democratic societies: how these markets are governed shapes culture, economic opportunity, and political life. The predominantly technocratic approach to modern communications policy does its best to evacuate these noneconomic goals from policy debate, while obscuring the politics underlying policymaking. Yet even a cursory glance at the communications policy arena reveals often fervent political conflict among industry lobbyists, public interest groups, policymakers and other stakeholders deeply committed—financially and politically—to its outcomes. As established and emerging digital business models challenge existing regulatory frameworks, this politics has only intensified in defining a new governance paradigm for digital communications.

Unsurprisingly, significant scholarly attention has been dedicated to mapping the rapidly evolving political economy of the communications sector in the digital age, revealing the changing nature of information flows, access choke points, growing, self-regulated data reservoirs, and new strategies of market dominance (e.g., Arsenault & Castells, 2008; Crawford, 2013; Evens & Donders, 2018; Nieborg & Helmond, 2018; Winseck, 2017). From vertical integration between internet service providers (ISPs) and content companies (e.g., Comcast-NBCU and AT&T-Time Warner) to the data-driven market power of dominant tech firms, whose platform services constitute an increasingly fundamental component of the modern communications landscape, competition issues intersect with other policy concerns, like information access, digital rights, and online privacy. Indeed, as digital platforms' economic and infrastructural models expand to other sectors, a process known as platformization (Poell et al., 2019), they extend data collection and mass individualization to new domains of social life, fueling an emerging order alternatively theorized as platform (Srnicek, 2017) or surveillance capitalism (Zuboff, 2019). These developments have both systemic implications—for example, the dataification and commodification of a whole range of human experience—and concrete, immediate ones, like massive data breaches, the spread of hate speech and misinformation online, algorithmic discrimination, and political manipulation by foreign actors.

As a global pandemic exposes and compounds our technological dependencies—cementing the market dominance of the most powerful tech firms—and as right-wing populist regimes have weakened democratic institutions in the United States and abroad—undermining states' ability to effectively tackle these developments—these problems mount and strain existing policy frameworks. Amid deepening cracks in regulatory oversight of communications, the question of how to design remedies becomes central to communications policy and, more broadly, to the democratic governance of modern information and communication technologies. As Rahman (2018) puts it, "how should we conceptualize and regulate new forms of concentrated private power, particularly when these firms control the terms of access to vital services—such as finance, broadband internet, or information—upon which many communities, constituencies, and economic actors depend?" (p. 1621). The challenge is expansive in scope, the stakes are high, and a broad range of actors are involved in defining the solutions in states across the globe. The emergent governance frameworks will shape the conditions for information access and diversity; for civic engagement and for self-actualization; and for political and economic participation.

This study engages these policy debates in the US context, which form part of intensifying conversations occurring globally, from Australia to India to the European Union. Though often confined to the policy elite arena, their fervor signals what Schlesinger (2020) calls the present "'regulatory turn' [during which the] still-emerging regulatory agenda has opened up a contestable space for potential reform" (p. 1546). These policy contests, fundamentally about the democratic governance of communications and media systems and the role of government in these markets, build on more than a century of historical precedent (e.g., Crawford, 2013; Holt, 2018; Horwitz, 1989; John, 2010; Pickard, 2015a). Likewise, this dissertation draws on and contributes to critical scholarship assessing struggles over communications policy by examining how policymakers and other stakeholders grapple with challenges arising in digital communications and tech markets in the arena of US competition policy.

Specifically, I explore how discourses underpinning competition policy are negotiated and contested in response to dramatic changes in digital communications markets by stakeholders ranging from policy experts to regulators to public interest groups to the regulated industries themselves, all under the banner of antitrust reform. My research foregrounds the politics bubbling beneath the seemingly scientific, objective, and technocratic language of antitrust and competition law, tracing the range of interests invested in clashes over policy, including competing definitions of digital platform markets; whether and where competition exists in them; characteristics of their competitive dynamics; policy interventions and expectations about their outcomes in this arena; and, fundamentally, about the proper role of the state and of market competition in digital markets.

My goal is twofold. First, this dissertation provides a preliminary account of pressing and increasingly global debates about designing policy frameworks for digital communications markets in response to regulatory gaps introduced by technological convergence and digitization and by tangible political and economic problems. By examining how various stakeholders engage such debates, the power dynamics and tensions between them, and the range of interests they represent, this research uncovers the confluence of political, legal, economic, and technological factors shaping emergent governance frameworks. Focusing on these debates in a period of immense uncertainty, indeterminacy, and flux emphasizes the contestable and contested over the settled, revealing how taken-for-granted policy ideas become the subject of politics. In attending to how policy actors define policy problems and regulatory challenges arising in the digital economy, and how they justify their embrace or rejection of various policy proposals—discursively shaping policy solutions—my research follows scholars who critically dissect communications policymaking under neoliberalism (e.g., Ali, 2017; Freedman, 2008; Newman, 2019). Thus, "competition" emerges as an elusive market feature, a contested policy goal, a strategic ideological tool, and a key component of modern policymaking.

Second, I assess the emergent governance frameworks, whose committed pursuit of competition in digital markets reveals blind spots in addressing the systemic problems posed by platformization. By examining how they define the problems they purport to address we can glimpse more clearly what concerns remain outside their field of vision. Cumulatively, then, this dissertation illuminates how policy debates about the relationship between market competition, law, policy, and politics both enable and constrain imagining and defining a governance regime over rapidly transforming digital markets, with significant political and economic consequences. In the next section, I characterize the concrete policy challenges arising from platformization and the stakes involved in articulating solutions to address them.

Policy in the Age of Platformization

The communications policy debates this dissertation examines unravel against the backdrop of two developments: convergence arising from digitization and the emergence of digital platforms. Since the 1980s, digitization, namely the conversion of analog information to digital bits, drove attendant technological convergence across sectors (e.g., between computing, media, and telecommunications) and across media (e.g., a smartphone may fulfill both traditional telephony and computing functions) (Balbi, 2017; Brennen & Kreiss, 2016; Peil & Sparviero, 2017; Pool, 1983). Such economic and technological change challenged, and in many cases undermined, existing communications policy predicated on clear distinctions between sectors, technologies, and their uses (Balbi, 2017; Bar & Sandvig, 2008; Van den Bulck, 2008).

The rise of digital platforms, themselves convergent entities often fulfilling some traditional communications functions, also complicates regulatory oversight. Although the definition of platforms is “surprisingly hard to pin down” (Coyle, 2018, p. 51), broadly they are “programmable architecture[s] designed to organize interactions between users” (van Dijck et al., 2018, p. 9). As van Dijck et al. (2018) argue, this organizing activity is data-driven, automated through algorithms, structured through web interfaces, and governed by terms of service user agreements. The organization of interactions on platforms is also shaped by their business models, namely ways in which they create and extract economic value. While platforms offer traditional products and services for money (e.g., Amazon selling its own products), they also collect user data, monetizing user attention and interactions by leasing or selling this data to advertisers as well as by better marketing their own products to users. By leveraging data collection and offering value through information (e.g., about products, as on Amazon, by users, as on Facebook, or about services, as on Uber) (Coyle, 2018; Mansell & Steinmueller, 2020), platforms constitute communicative media. Economically, they occupy intermediary positions in multi-sided markets, using digital technology to connect "multiple suppliers and consumers or citizens" (Mansell & Steinmueller, 2020, p. 1). Consequently, platforms have "characteristics of firms *and* of markets, involving both production and exchange [and denoting] a business strategy as much as a kind of organization" (Coyle, 2018, p. 51, emphasis in original).

Rhetorically, the success of dominant platforms like Amazon, Facebook, and Google was initially touted as disrupting old business models, bringing content diversity, and democratizing communications, and served as an argument against policies protecting public goods like journalism or media ownership regulations. However, dominant digital platforms strategize to dominate markets much like traditional telecom and media giants (Freedman, 2012b; McChesney, 2013). They maintain their dominant status by harnessing network effects, capitalizing on big data, exerting control over technical standards, expanding into various sectors, and acquiring nascent competitors (Barwise & Watkins, 2018; Khan, 2017a; Srnicek, 2017). Moreover, platforms animate processes of "platformization," namely "economic, governmental, and infrastructural extensions of digital platforms into the web and app ecosystems" (Nieborg & Poell, 2018, p. 4276), which fundamentally alter cultural production and distribution. They also reshape existing markets, such as media (Evens & Donders, 2018) and transportation, healthcare, and journalism (Myllylahti, 2019; Poell et al., 2019). Platformization involves vertical integration, as when platforms purchase startups; infrastructuralization, namely fulfilling functions that resemble those of traditional infrastructure by extending platform services across a growing range of social activity like communication via Facebook services or information-seeking via Google (Plantin et al., 2018); and cross-sectorization, namely expanding into other sectors like Amazon's foray into healthcare and the grocery market (Van Dijck, 2020).

Such reconfigurations facilitate the accumulation of gatekeeping power over online traffic with a concurrent, growing dependence upon platforms of various stakeholders, like advertisers and gig workers, to conduct a host of activities. Consequently, platformization accrues platforms' power to "interfere with social and democratic functions in society" (van Dijck et al., 2019, p. 3). Platforms exert significant control over data flows, serving as a prominent source of news access (Helberger, 2020; Iosifidis & Andrews, 2019; Napoli, 2015), and increasingly over consumers, content, and physical infrastructure (Evens & Donders, 2018). Indeed, the centralization of communication on these oligopolistic platforms, which increasingly resemble "social utilities and forms of social infrastructure" (Iosifidis & Andrews, 2019, p. 10), yields significant vulnerabilities and potential for market failure, including high-profile data leaks, pervasive online hate speech, and electoral interference. Thus, concentration of power among these companies not only impacts competition, but also privacy, speech rights, and political communication.

The groundwork for the current critique of tech has its immediate roots in over nearly two decades of scholarly research into tech concentration, privacy threats, data collection, and platform power (e.g., boyd & Crawford, 2012; Laidlaw, 2008; McChesney, 2013; Price & Verhulst, 2005; Scholz, 2008; Vaidhyanathan, 2012). However, support for any significant regulatory intervention into these markets remained on the political periphery as big tech became synonymous with progressive capitalism (Broockman et al., 2018; Levina & Hasinoff, 2017; Turner, 2006). Despite nominal regulatory fines imposed on Facebook for privacy violations, an antitrust investigation into Google, and Edward Snowden's disclosures about tech companies' role in a global surveillance apparatus, big tech played an increasingly central role in US politics, particularly beginning with the Obama Administration (Popiel, 2018).

Only following reports of foreign, coordinated misinformation campaigns via social media during the 2016 US election and the subsequent scandal involving the political consulting firm Cambridge Analytica's harvesting of 87 million Facebook users' data did these companies begin to face concerted political scrutiny. Animating a growing public backlash, critics articulated key concerns about their business models: the large-scale spread of disinformation; immense unregulated data collection subject to breaches and non-consented sharing with third parties; siphoning profits from the already struggling news sector transitioning to digital advertising; the socio-political consequences of inherently flawed content moderation at scale; and growing concerns about market power.

However, digital platforms elude traditional communications regulations used to address market power, speech, and disinformation issues. First, tech companies have positioned themselves as beyond the regulatory scope, strategically deploying the term "platform" to imply neutrality vis-à-vis activities occurring across their services to avoid liability for them (Gillespie, 2010, 2018). Likewise, their resistance to classification as media companies shields them from potential content and ownership regulations that curtail vertical integration in the broadcasting media and mass communications sectors (Napoli & Caplan, 2017). As Gillespie (2010) put it:

> Tech companies raise both traditional dilemmas about free speech and public expression, and some substantially new ones, for which there are few precedents or explanations. We do not have a sufficiently precise language for attending to these kinds of interventions and their consequences. And the discourse of the 'platform' works against us

> developing such precision, offering as it does a comforting sense of technical neutrality and progressive openness (p. 360)

The effectiveness and durability of these tactics draws political strength from a decades-long project of cultural and eventually political alignment of Silicon Valley libertarianism with neoliberal market fundamentalism—the Silicon Valley ethos or the California ideology (Levina & Hasinoff, 2017; Mosco, 2005; Streeter, 2011; Turner, 2006).

Second, these factors contributed to the foreclosure on discussions about evolving regulatory frameworks to address these new technologies—existing regulatory and legal frameworks do not map onto digital platforms' business models easily (Flew et al., 2019; Iosifidis & Andrews, 2019). There are multiple characteristics of platform business models that facilitate this, including their two-sided market structure that obscures pricing and cost mechanisms from users; their offer of seemingly "free" services that eludes traditional antitrust triggers; and their leveraging of data at the heart of their core services which enables expansion into non-tech sectors, like education or government services (Fourcade & Kluttz, 2020; Khan, 2017a, 2019; van Dijck et al., 2018; Zuboff, 2019). Concurrently, historically massive fines for privacy harms and violations of consent decrees imposed by regulators ultimately represent a small percentage of the total annual revenue of the biggest of these companies and are written off as cost-of-doing-business. Legislation intended to address these problems focuses on individual concerns related to competition or speech, instead of tackling the structural interdependencies between them. Existing competition policy, influenced by the neoliberal Chicago School, overlooks new forms of market power and dominance, including threats posed by vertical integration and data collection (Khan, 2017a; Stucke & Grunes, 2016; Turow, 2012; Wu, 2018; Zuboff, 2019).

Ultimately, such critiques coalesce into a call for policymakers to cohesively address platform power, which underpins platformization. Platform power has economic dimensions, manifesting as market power and as control over the production of goods and services for instance (Khan, 2018b; Moore & Tambini, 2018), but also extends beyond them to other forms, like power over access to knowledge and information (Evens & Donders, 2018), control over social infrastructures, and power to impact the well-being of citizens (van Dijck et al., 2019). Moreover, rather than being confined to individual firms, platform power resides in a broader ecosystem characterized as an "inter-relational, dynamic structure" (van Dijck et al., 2019, p. 4). As van Dijck et al. (2018) point out, "What is missing is a comprehensive approach that tackles the widespread structural disparities of power, welfare, and economic opportunity in an online world — an approach that recognizes the interdependent nature of all these legal frameworks" (p.157; see also Rahman, 2018). Many platform market features, including data flows, lock-ins, acquisitions of nascent competitors, "are not part of a common legal discourse [and] concepts of regulatory oversight are still moored in a predigital, pre-networked system of governance" (p.157). Consequently, as the authors argue, a key task involves developing "a fitting vocabulary to capture the socio-technical finesses of an evolving ecosystem of platforms that threatens to undermine many established societal arrangements" (p.157).

The policy debates examined in this dissertation involve efforts to do just that. Occurring between 2017 and 2020, they concern the articulation of new governance frameworks for digital communications and technology markets. Since policy solutions implicitly flow from how policymakers define platform power, much is at stake in these discussions. My focus falls on these debates in the competition policy arena—rather than privacy regulation or speech rights for example—because competition policy and economic regulation have emerged as the most prominent policy frames for defining and addressing platform power. A survey of the leading, widely circulated and much discussed policy expert reports on digital platforms from countries like Australia, France, India, the UK, and the US reveal that this focus is international in scope (Lancieri & Sakowski, 2020; Puppis & Winseck, 2020). This is consistent with the neoliberal reticence to advance non-economic goals through regulation, intervening "only when markets fall short of delivering either sufficient levels of competition … or when the consumer is unable to act rationally" (Lunt & Livingstone, 2011, p. 19) to influence market behavior—a key trend I return to below. Moreover, as I show in subsequent chapters, the competition policy frame is also more capacious, beginning with a diagnosis of market malfunction but inevitably intersecting with other policy domains, both due to the work of various stakeholders and because media and communications markets, traditional and digital, have long-established socio-political dimensions. Indeed, part of my goal here involves tracing the politics animating the rise to prominence of the competition policy frame in the US and its evolution as an oversight mechanism for digital markets.

In the judicial context, I trace how stakeholders in the AT&T-Time Warner merger case fought over the role of antitrust law in adjudicating a process of platformization, namely legacy media and telecommunications elites' entry into over-the-top platform markets. In the policy expert arena, I examine activist efforts to reform competition policy to address concerns arising in digital platform markets, tracing debates in prominent venues like the Stigler Conferences on digital platforms and the Federal Trade Commission's (FTC) hearings on competition in the 21st century. Finally, in the legislative arena, I explore how policy experts, regulators, representatives from digital platforms, and their competitors offer competing definitions of platform power and propose different policy solutions as part of an 18-month congressional inquiry into these markets—the first such investigation in 50 years. My analysis highlights the work involved in reorienting established policy logics to tackle new problems, dissects the blind spots and contradictions, and considers the broader consequences of these efforts for the governance of digital markets.

In the remainder of this chapter, I outline my theoretical framework, which draws on platform studies, critical political economy, and critical policy studies, and I describe my methodology and case studies. The policy conversations I examine about policy responses to rapid technological changes have historical antecedents in traditional communications regulation. In fact, the dismantling of these regulations under neoliberal has left the state woefully unprepared for the oversight of emerging business models that characterize platform markets, which ironically share commonalities with these older markets. Concurrently, due to convergence, traditional communications firms are increasingly imbricated in these changes. Because of its persistent relevance and centrality to these debates, I begin by outlining the role of competition as a political and economic value in traditional communications regulation and the challenges in fostering it. Because the political developments I examine follow and respond to a historical policy trajectory, I briefly chart how competition as a regulatory principle supplanted other regulatory values in communications amidst ascending neoliberalism, ironically resulting in the abandonment of economic regulations that preserved competition in these markets (Horwitz, 1989). This story highlights how deeply important state oversight was to market competition and how the rhetoric of competition worked to facilitate growing convergence and concentration. A parallel story unraveled in another key arena, namely that of antitrust, which increasingly filled the gaps in areas from which regulatory oversight was withdrawn. I introduce this story by providing a brief overview of US antitrust law and its enforcement, followed by an account of how the neoliberal Chicago School defanged competition policy, revealing a similar withdrawal of the state in adjudicating these markets.

Against this contextual backdrop, I introduce a theoretical framework for understanding media policymaking as a form of political, often discursive conflict over policy construction. Indeed, I argue that even something seemingly objectively measurable like competition is fundamentally a political construction, underpinned by specific discourses—and as a result can be contested and redefined. I conclude by introducing my research questions, the methodology, and an outline of the case studies.

Competition in Communications Policy

Competition as an economic and political value

The persistence of competition as a desirable goal for markets in democratic capitalist states has roots in traditional neoclassical economics and liberal democratic theory. Theoretical concepts rooted in these traditions provide the key rationales for regulatory oversight of communications markets and promoting competition has long been one of the central goals pursued by communications policymakers (Napoli, 2001; Streeter, 1996). In neoclassical economics, which serves as the basis for media economics (Flew, 2011), rivalry between self-interested, rational firms disciplines their behavior and advances general social economic welfare through efficient resource allocation (Delp & Mayo, 2017). As a disciplining mechanism, the presence of competitors incentivizes firms to charges lower prices and improve products and services to avoid losing customers to them. Such competition is associated with lower costs, greater choice, better quality products, economic growth and efficiency, and innovation (Buch-Hansen & Wigger, 2011; Motta, 2004; Stucke, 2013).

Beyond neoclassical economic justifications, promoting competition in media markets is intended to preserve a robust "marketplace of ideas"—a notion associated with the liberal pluralist tradition and political philosophers like John Milton, John Locke, and J.S. Mill (Napoli, 2001). Liberalism has influenced the design of Western media and telecommunications regulatory systems and its values represent guiding regulatory principles in many countries, even if they are not always realized (Freedman, 2008; Hallin & Mancini, 2004). In this tradition, creating an environment that enables citizens to arrive at political consensus through unfettered public debate is a foundational political project—a prerequisite for political self-determination and the legitimation of state power in a democratic society (Habermas, 1989). Speech rights constitute a fundamental component of this project and, as a political value, competition is deeply linked to them: it implies both the presence of dispersed, diverse ideas available to citizens and the mechanism by which the best, implicitly most socially and politically valuable, ideas emerge as the political will of the public to be enacted by the state.

As producers and conduits of ideas within the public sphere, media and communications markets occupy a key position in the liberal democratic state. As Aufderheide (1999) argues, "[c]ommunications networks map the nation's access to information, resources, and the basic social inclusion that is a prerequisite of citizenship. ... The way in which they operate also reflects a society's priorities and possibilities" (p. 2). However, competition in these markets is elusive. Yet, the socio-political function of communications systems is intimately linked to their economic organization. In fact, social "communicative activity is structured by the unequal distribution of material and symbolic resources" (Murdock & Golding, 2005, p. 62) not least because communications industries tend toward concentration—a result of these industries' economic properties, including economies of scope and scale, high first copy costs, and network effects. Media and telecom companies also tend to consolidate, pursuing mergers to serve larger markets, to invest in economies of scale and scope, and to diversify holdings to reduce economic risk (Harcourt & Picard, 2009). As firms consolidate, they accumulate market power, increasing their control of access to resources and distribution mechanisms, and the incentives to abuse that power to guard their new market position (McChesney, 2003), further diminishing competition.

The problems of consolidation extend beyond anti-competitive harms to social ones, including by reducing the diversity of media sources and content and restricting the flow of information, thereby undermining the marketplace of ideas (Harcourt & Picard, 2009; Napoli, 2001; Stucke & Grunes, 2001). As Baker (2007) argues, "democracy implies as wide as practical a dispersal of power within public discourse" (p.7). Such dispersal provides important democratic safeguards against what he calls the "Berlusconi effect" (p.17), namely the abuse of one's dominant position in the media market to advance and legitimate one's political views and decisions. Consequently, market power in concentrated media markets can translate into communicative power, or the ability to ideologically influence media content to advance one's political or economic project.

Market concentration also concentrates political power among a few corporate players (Picard & Pickard, 2017; Pitofsky, 1979), diminishing the presence of competitors who may dilute it. As firms increase their share of a market, their stake in legislative and regulatory debates expands along with incentives to influence these debates to their advantage (Baker, 2007, pp. 48-49). At the same time, concentration facilitates the exercise of political influence on legislative and regulatory processes by dominant firms: political interests are more homogenous between a smaller number of firms than among many and there are fewer conflicts, organizational costs, coordination costs, and messaging and lobbying costs (Khan & Vaheesan, 2017). As Teachout and Khan (2014) argue, concentration affects key democratic processes by imposing private governance regimes that are less accountable to citizens than public ones. These governance tools include firms' ability to set policy through campaign funding; recruiting former regulators (i.e. animating the revolving door); directing the politics of their employees and contractors; lobbying to support and defeat government legislation and regulation, contributing to the capture of regulatory agencies; as well as growing "too big to fail" to secure state protection (Kwak, 2013; Popiel, 2018; Teachout & Khan, 2014). Accordingly, market competition disciplines more than economic inefficiency and potential welfare loss; it also guards against the political accumulation and exercise of private power.

Thus, competition draws its normative strength from neoclassical economics, which emphasizes benefits like innovation, lower prices, and a greater choice of goods, and from liberal political thought, which ties its disciplining function to a greater dispersal of political power and, in media markets, a more robust marketplace of ideas. These assumptions about the benefits of competition, particularly economic ones, pervade policy discourses about the governance of the media and communications markets, including the platformized markets examined here. However, competition has always been elusive in these markets because of their economic properties, compounded by active political and economic strategizing, and materialized only after careful state intervention. Therefore, in communications markets "competition was always contrived" (John, 2010, p. 275). At the same time, precisely because of the socio-political role attributed to the communications industries, competition was a third-order regulatory principle, underpinning other values like universal service and diversity, all in the service of the regulatory lodestar, the public interest (Napoli, 2001). That began to change in the 1980s amidst technological change and emerging neoliberalism, which undermined the rationale for public interest regulation (Aufderheide, 1999, 2002; Fowler & Brenner, 1982; Napoli, 2001). Under the discursive banner of competition, this robust policy framework became displaced by active pro-market re-regulation, rhetorically disguised as "deregulation," which advanced the private interests of the communications industries (McChesney, 2003). This historical process left a vacuum in regulatory oversight, leaving the state unprepared to address the processes of platformization examined here.

Antecedents in communications policy: regulatory rationales and transformation

As in the debates examined here, policymakers have grappled with how to govern communication markets by balancing different values and goals. Recounting the regulatory history of US telecommunications and media is beyond the present scope, but a brief overview illustrates both the principles that animated early communications regulation and the dramatic policy shifts that prefigured the existing gaps policymakers strive to address today.

Like the role of competition, the rationale for the regulation of communications systems is both economic and socio-political. On the one hand, media and telecommunications markets are prone to market failures: the underproduction of public goods, failure to internalize externalities, and monopoly power (Napoli, 2001). Public goods like investigative journalism are non-rivalrous (the marginal cost of supplying additional consumers is near zero) and nonexcludable (buying a media product does not prevent others from consuming it, including those who do not pay for it). Consequently, the market fails to extract full value from them and therefore underproduces them (Baker, 2001, 2007). Moreover, such goods produce externalities, namely effects on those not involved in the direct transaction—investigative journalism can contribute to more informed public debate, while digital misinformation may increase polarization and undermine political processes. Externalities create problems markets fail to internalize—it may be profitable to host propagandistic clickbait on a social media platform or unprofitable to produce quality journalism—and therefore cannot be addressed strictly through market mechanisms (Baker, 2001). Finally, as discussed above, industries like telecommunications have natural monopoly qualities, benefiting from large economies of scale, and consequently tend to concentration, eradicating competition. Dominant firms in these markets acquire incentives to exercise their market power to inflate prices or undersupply products, for example (Baker, 2007; Crawford, 2013). However, economically, competition in these markets is impossible or impractical: for instance, creating competition in early telegraphy resulted not in universal provision, but in wasteful duplication and costs (Horwitz, 1989, p. 130). Since these types of market failure cannot be resolved through competition, they provide an economic justification for state regulation to address them.

On the other hand, communications industries "appear historically always imbued with something larger [...] than private interest. This 'something' is ... the public interest" (Horwitz, 1989, p. 11). As Horwitz (1989) argues, in establishing the Communications Act of 1934 to regulate communications, the US government recognized that these markets serve an important democratic role by providing channels for discourse in society, essential to cultivating an informed citizenry. The Federal Communications Commission (FCC), which the Act brought into existence, arose in the New Deal era amidst growing concentration and commercialization of newspapers and radio broadcasting, which progressive critics feared undermined the marketplace of ideas (McChesney, 1993; Williams & Delli Carpini, 2011). Grounded in terms of social equity and democracy, regulating communications in the public interest meant to affirm the public value of ultimately private enterprises. Although the FCC's mission sought to protect the public interest *and* encourage competition, the articulation of these as two separate goals “suggests that the economic objective of competition and the more ambiguous objective of protecting the public interest are not always congruent” (Napoli, 2001, p. 18).

In practice, communications regulation involved both economic and social regulation. The telegram and telephony were initially construed as public utilities, classified as “common carriers.” This designation required the provision of fair and equitable access to their communication channels, or nondiscrimination, and the separation of content from the conduit through which it traveled—a precursor to net neutrality. Thus, rather than create competition in telecommunications, the FCC monopolized AT&T to maximize universal service in telephony, subjecting it to rate regulation. However, the agency placed ownership restrictions to preserve competition in broadcasting. It also subjected broadcasters to social regulations, like the Fairness Doctrine, namely the requirement for balanced coverage of controversial issues in exchange for broadcasters’ access to scarce public airwaves (Horwitz, 1989). This governance framework reflected the “social democratic” (Pickard, 2013, 2015a) model of regulation aimed to both maximize participation in the marketplace of ideas and to protect it from excessive private influence by preventing owners of communication channels from also distributing content through them (Aufderheide, 1999; Crawford, 2011, 2013; Horwitz, 1989).

Just as this regulatory regime arose in response to new technological developments in communications, its dismantling also coincided with broad changes in these markets, as the rationale for it became increasingly contested. While emerging new technologies, like cable and satellite, undermined the spectrum scarcity rationale for the government’s broadcasting regulations, the growing public suspicion of government regulation and concerns about regulatory capture signaled a political shift (Horwitz, 1989; Krasnow & Goodman, 1998; Levi, 2008). Although these charges were sometimes valid, the backlash also became “co-opted by those who opposed regulation purely on ideological grounds” (Mayo, 2013, p. 128). Ideological opposition to any state governance of markets that did not actively liberalize them or facilitate the privatization of previously public domains characterized ascendant neoliberalism (Harvey, 2005). Beginning in the late 1970s and early 1980s, this ideological shift fueled the marketization of public interest regulation. This new paradigm equated a robust marketplace of ideas with a competitive, self-regulated market (Horwitz, 1989, 2005; Napoli, 2001). The emphasis fell on economic efficiencies promoted by reduced market controls over social democratic values. At the same time, ironically, while the neoliberal deregulatory fervor targeted social regulation, like the Fairness Doctrine, it ultimately also resulted in economic deregulation (Horwitz, 1989). In 1982, a lengthy antitrust suit ended with the break-up of the AT&T monopoly, opening telecommunications up to competition.

Competition took center stage in policymaking discourse and as a regulatory principle, serving as the centerpiece of the 1996 Telecommunications Act, the largest communications legislation since the 1934 Communications Act (Aufderheide, 1999; Freedman, 2008; Napoli, 2001). However, market competition not only creates incentives to produce and price goods efficiently, but also “for a market enterprise … to gain power in relation to other resource owners (e.g. labor or other competitors)” (Baker, 2001, p. 7). Media corporations grew, becoming fewer and more powerful, as media ownership regulations were eliminated (Horwitz, 2005). AT&T began to reconstitute itself, while the competition in cable soon yielded an oligopoly with skyrocketing prices and a digital divide (Crawford, 2013). The shift to the marketplace approach that began in the early 1980s resulted in decades of deregulation and convergence (Atkin et al., 2006; McChesney, 2013; Noam, 2006, 2009).

These changes were compounded by increasingly pervasive digitization and convergence, which led to the emergence of new media business models (including eventually digital platforms) that blurred the line between traditional media and telecom (Evens & Donders, 2018; Flew, 2016; Hesmondhalgh, 2015; Holt, 2011; Krämer & Wohlfarth, 2018; Van den Bulck, 2008). Since existing regulatory paradigms require a clear distinction between the two, these new business models evaded regulatory oversight. After the dismantling of public interest regulation, there was no regulatory framework for addressing content-side issues associated with these new business models, like disinformation and hate speech. Concurrently, new concerns arose, such as privacy threats. A testament to emerging governance gaps, the FCC's policy efforts to preserve competition and privacy in internet markets involved the eventually repealed net neutrality regulations, which the agency only had narrow authority to impose on ISPs.

Although these new business models initially brought competition to traditional communications and media markets, they too began to consolidate and concentrate. As Just (2015) argues, competition law historically played a minor role in communications sectors because they were protected from competition by the state. However, "in the media and communications sector, competition law and competition have gained increased prominence" (p. 1) as these protections were eroded and as the internet raised new competition concerns. Indeed, antitrust is at the heart of the debates examined in this dissertation. However, like communications regulation, US antitrust law underwent a parallel shift, which undermined its ability to effectively address emergent forms of market power. In the next section, I provide an overview of US antitrust law, its enforcement, and its narrowing under the neoliberal Chicago School.

US Antitrust Law and Its Narrowing

US antitrust law is developed through judicial precedent demarcated by three major pieces of legislation. The first is the Sherman Act of 1890, which Congress passed in response to emerging business trusts following the Civil War (Just, 2015). The act outlawed "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" ("Sherman Act," 1890). The Act was intended to rein in 1) the exercise of market power to impose horizontal and vertical restraints on trade, namely agreements between firms at the same (horizontal) or different (vertical) production and distribution levels, and 2) monopoly power, defined as a company's total control over a market such that it prevents entry for potential competitors.

However, these goals were stymied. First, the Sherman Act lacked precision in describing practices that constitute its violations, giving courts significant leeway in determining how to enforce it (Just, 2015). For instance, the Supreme Court interpreted the practices delineated in Section 1—coordination between companies to restrain trade—as limited only to unreasonable restraints, determined through the *rule of reason*, or case by case assessment (Just, 2015). Likewise, Section 2 forbids monopolization, namely exclusionary activities and practices that prevent others from entering its market but does not specify the activities in question. However, some practices that almost always restrain competition are *per se* illegal, namely by default. Second, to bypass the Act's restriction on forming cartels, companies strategically began to pursue mergers. A testament to the Act's vagueness and the attendant failure of common law enforcement, this growing consolidation would become known as the Great Merger Movement, reaching its apex at the turn of the 20th century (Just, 2015; Lamoreaux, 1985).

To address these dramatic economic changes, in 1914 Congress passed the second key legislation, namely the Clayton Act, which outlawed horizontal mergers—those between companies at the same production or distribution level—that "may be substantially to lessen competition, or to tend to create a monopoly" ("Clayton Act," 1914, § 7; Department of Justice, 2020). The Clayton Act clarified some of the ambiguities in the Sherman Act. For instance, Section 2 prohibits price, service, and facility-based discrimination, while Section 3 outlaws tying and exclusive dealing, namely a seller prohibiting a buyer from purchasing goods and services from competing sellers (Hovenkamp, 2005). Section 7 also specifies the rules regarding merger review, including pre-merger notification guidelines (later explicitly codified in the Hart-Scott-Rodino Act of 1976), and prohibits the formation of interlocking directorates via memberships on competing company boards (Just, 2015). By delineating such practices, the Clayton Act provided guidance to courts, curbing their extensive authority over antitrust, and laid the foundation for contesting anticompetitive mergers and acquisitions. Moreover, while the Sherman Act addresses threats to competition after the fact, the Clayton Act was enacted to stop anticompetitive threats in their incipiency (Just, 2015).

That same year, Congress passed the third key legislation, the Federal Trade Commission (FTC) Act, which created the enforcement agency and gave it extensive authority to investigate and address anticompetitive behavior ("Federal Trade Commission Act," 1914),[1] a subject I return to below in the discussion of enforcement.

[1] The 1938 Wheeler-Lea Amendment extended that authority to consumer protection from deceptive advertising—the source of the FTC's privacy oversight jurisdiction (Just, 2015).

Though Congress passed other competition laws, these three statutes provide the legal foundation for US antitrust—a blueprint for both the formulation of competition policy and its enforcement.

Enforcement

The enforcement of these legal provisions falls to the Department of Justice's (DOJ) Antitrust Division, the FTC, state attorneys general, and private parties—companies or individuals. The DOJ enforces Sections 1 and 2 of the Sherman Act, and the Clayton Act and its amendments, while the FTC draws enforcement authority from Section 5 of the FTC Act and merger review authority from the Clayton Act. Key practices prohibited by the Sherman Act also fall under the FTC Act. FTC enforcement involves administrative proceedings and federal court actions, selected based on cease-and-desist orders targeting anticompetitive activity. State attorneys general, like private parties, may also bring antitrust cases. Indeed, states have their own antitrust statutes, which may extend beyond the requirements of federal law. Finally, and importantly, the FCC also has merger review authority in cases of broadcast license transfer (Just, 2015), which extends beyond anticompetitive harms to broader public interest considerations.

Though it receives much attention, public enforcement by government agencies addresses only a small percentage of antitrust violations. Most of these involve horizontal mergers between large companies, while vertical ones, like AT&T-Time Warner examined here, are exceedingly rare.[2] Likewise, the FTC only rarely pursues cases of price discrimination and, despite prominent interventions like the 2001 Microsoft case, monopolization is infrequently challenged. Public enforcement largely

[2] Compounding this, the agencies do not review mergers valued below $94 million at the time of this writing in 2020 (FTC, n.d.-b).

focuses on “practices related most closely to horizontal price-fixing, where there is a strong consensus finding competitive danger [such as] collusion and mergers of competitors” (Hovenkamp, 2005, p. 60). This consensus is both historical and increasingly contested.

Due to the focus on horizontal mergers, enforcement—the application of statutes to institutional and enforcement practice—is largely inscribed in the Merger Guidelines. The Horizontal Merger Guidelines were written in 1968 and last revised in 2010 (Department of Justice & Federal Trade Commission, 2010). As Just (2015) observes, the historical revisions of these guidelines reveal “a shift in emphasis from sociopolitical to economic concerns in US competition policy” (p. 8), attributed to the Chicago School’s influence over antitrust, which significantly narrowed its application (Khan, 2020; Vaheesan, 2017; Wu, 2018), as discussed in more detail below. The Non-Horizontal Merger Guidelines, written in 1984 (Department of Justice, 1984), also bear this stamp, and they were revised for the first time as this dissertation was being written, on June 30, 2020, following a series of FTC hearings on competition in digital markets (Department of Justice & Federal Trade Commission, 2020). The Chicago School’s ideological imprint along with limited agency resources and, often, politics contribute to the DOJ and FTC intervening conservatively, despite at least the FTC’s expansive enforcement authority. Instead, private enforcement or private right of action—consumer complaints and lawsuits brought by competitors, other market players, labor unions, and others—has become the most prevalent form of antitrust intervention.

Since the FTC largely has refrained from exercising its power and since the foundational antitrust statutes are open to interpretation, the courts have exerted immense influence over the shape of antitrust informed by evolving economics (Hovenkamp, 2005; Vaheesan & Paul, 2020). In the landmark 1911 Standard Oil antitrust case, the Supreme Court established the *rule of reason* approach to antitrust: a balancing test for the case-by-case analysis of what constitutes unreasonable restraints of trade in violation of the Sherman Act ("Standard Oil v. United States," 1911). The test weighs the anticompetitive effects of a given activity against potential procompetitive effects, allowing antitrust laws to evolve with economic learning. In modern practice, under the influence of Chicago School economics, the test often examines whether potential reduction of consumer prices outweighs potential anticompetitive harms of an activity or merger.

Though central to modern antitrust, economics does not shield antitrust from uncertainty, value judgments, or politics. As Ezrachi (2017) emphasizes, "[t]he transition from economic theory to practice is often imprecise" (p. 62) and requires subjective interpretation. Key concepts like market definitions and market power—essential to showing anticompetitive harm in antitrust cases—rest on "numerous assumptions as to market dynamics, barriers to entry and behaviour of economic actors" (p. 62). Increasingly complex economic models aiming to evaluate dynamic markets, like telecommunications and tech, are approximations whose accuracy depends on these assumptions and the quality and availability of data they use. Moreover, judges who may be unfamiliar with the underlying economics, may incorrectly evaluate such models. Consequently, the rule of reason adjudication of antitrust cases leaves significant room for interpretation.

Several key cases illustrate the judicial impact on the communications and tech sectors at the heart of this study. Although exceedingly rare, two monopolization cases have dramatically shaped these markets. Perhaps the most important was the 1982 structural dismantling of AT&T—the biggest company in the world at the time. The case represents the last major antitrust intervention into communications markets, and not only weakened the entity’s political power, but also opened telecommunications to competition, reducing barriers to entry and allowing early ISPs like AOL and CompuServe to emerge (Wu, 2018). Likewise, the government’s lawsuit against Microsoft in the late 1990s arguably unleashed the wave of innovation that produced tech giants like Facebook and Google. The monopolization case concerned Microsoft bundling its browser, Internet Explorer, modeled after its competitor Netscape, to its Windows operating system. The DOJ argued that such bundling foreclosed on browser competitors. Although the DOJ pursued a breakup of the company, the agency decided to settle as the political winds shifted following the contested election of George W. Bush (Wu, 2018). Notably, both cases were introduced with Chicago School antitrust at its height, suggesting aggressive antitrust intervention can be consistent with neoliberal legal and economic thinking.

Yet, these prominent exceptions belie judicial narrowing of antitrust. As a notable example, the Supreme Court’s significant ruling in *Verizon v. Trinko* (2004) refused to extend essential facility claims in an industry that was regulated. The essential facility doctrine is an antitrust concept whereby a dominant firm violates Section 2 of the Sherman Act if it “refuses to share certain ‘essential’ inputs with rivals” (Hovenkamp, 2005, p. 247), which competitors require to survive but cannot provide on their own, such as access to poles carrying telecommunications wires. The Supreme Court’s ruling interpreted antitrust and regulation—two tools to address corporate power—as substitutes, not complements. Consequently, the case curtailed the scope of antitrust, made enforcers more reticent to bring antitrust lawsuits in regulated sectors, and expanded the power of regulated industries to escape antitrust scrutiny. The ruling is consistent with the influential Chicago School approach, which I outline in detail below and which played a significant role in eroding antitrust's ability to address competition problems arising in digital markets.

The narrowing of antitrust

Competition law is a dynamic, changing policy, shaped within specific historical, political, and cultural contexts. This is reflected in the numerous theories of competition, including classical (perfect) competition associated with Adam Smith, Hayekian neoclassical competition focused on maximizing social and consumer welfare, and workable and effective competition associated with the Harvard School and later critiqued by the Chicago School (Just, 2015; see also Flew, 2011)—all of which have different implications for antitrust enforcement. Its malleability allows antitrust "to address a wide range of market and social realities, while retaining its conceptual core" (Ezrachi, 2017, p. 67). As Ezrachi (2017) argues, it reflects "the changing political landscape and forms part of the democratic process" (p. 67). Thus, while antitrust initially addressed monopoly power stemming from post-Civil War industrialization and protected those affected by market power, like unions, in the last hundred years it has evolved. However, this analytical flexibility and adaptability is subject to political economic forces, which influence how competition policy is interpreted, implemented, and enforced.

In the United States, competition policy reflects an ongoing and evolving series of debates about the economic and political implications of market power and the proper role of enforcement agencies and, more broadly, the state in overseeing private markets (e.g., Baker, 2001, 2007; Conrad, 1997; Hovenkamp, 1985, 1991; Wu, 2018; Yoo, 2002). Moreover, they attempt to respond to changes in the economy, including the emergence of new market sectors and technologies: the debates examined here grapple with the challenges proliferating digital business models dependent on advertising and user data pose for existing antitrust policy (Hovenkamp, 2018; Khan, 2017a; Stucke & Grunes, 2016).

Over these debates looms the enduring shadow of the Chicago School, whose roots lie in the 1950s, in the work of economists and legal scholars like George Stigler, Aaron Director, and Robert Bork who shifted the focus of antitrust from competition as a process to the utilitarian maximization of "consumer welfare" (Davies, 2014), a standard which reigns to this day. The Chicago School emerged as a critique of the Harvard School of antitrust, which was prevalent since the 1930s (Holt, 2011; Hovenkamp, 1985, 1990). Also known as the structuralist approach, this antitrust philosophy emphasized the importance of examining market structure when adjudicating mergers between firms. The structuralists found concentrated markets conducive to coordination among dominant firms, to facilitating the exercise of market power to erect barriers to entry for new entrants, and to tipping the bargaining balance of power from consumers, firm employees, and suppliers to monopolies and oligopolies (Khan, 2017a). When this view was dominant, regulators pursued curbing the emergence of concentrated markets as a crucial goal of antitrust and merger review was industry- and case-specific (Conrad, 1997; Holt, 2011).

The Chicago School's zealous faith in market mechanisms pervaded most regulatory arenas, replacing the Harvard School's stamp on antitrust. Part and parcel of a larger neoliberal imprint on state institutions, antitrust turned a blind eye to political dimensions of accumulated market power in concentrated markets (Blalock, 2014; Teachout, 2014)—a radical departure from both traditional neoclassical economics and liberal democratic theory, which acknowledged the disciplining value of competition and the political danger of concentrated markets (e.g., Davies, 2014; Pitofsky, 1979; Wu, 2018). Instead, Chicago School theorists shifted the focus from market structure to the impact of market dynamics on consumer pricing. In effect, they redefined processual competition, namely rivalry between firms, in terms of outcomes. A seismic change, this meant that market concentration was permissible if it *potentially* resulted in lower prices, thereby maximizing consumer welfare.

This shift placed greater trust in the market's ability to correct anti-competitive behavior and diminished the role of antitrust enforcement (Khan, 2017a; Khan & Vaheesan, 2017; Wu, 2018). The approach ultimately sidestepped the issue of the accumulation of market power by ignoring concerns about barriers to entry and other potential non-price harms resulting from market concentration. These blind spots reflect the Chicago School's belief that rational actors in monopoly and oligopoly markets will be driven by pursuit of economic efficiency, having little incentive to engage in anti-competitive behavior. Moreover, this antitrust paradigm has little to say about non-price harms arising in digital platform markets (Khan, 2017a; Wu, 2018).

The Chicago School's narrowing of antitrust had lasting effects on economics, antitrust enforcement agencies, courts and, inevitably, markets. Although "competition law … is a social construct … embedded in society's evolving norms" (Ezrachi, 2017, p. 51), the ideological assumptions and values underlying the Chicago School approach were naturalized so effectively that many continue to be taken for granted and surface in the debates examined here. If "[c]ompetition does not exist abstractly but is influenced by the existing legal and informal institutions" (Stucke, 2013, p. 162), the Chicago School antitrust paradigm effectively refashioned those institutions, privileging economics above the law. As Davies (2014) argues,

> A precise grammar is introduced and policed by economists, which establishes the limits within which lawyers are free to act. The replacement of political 'metaphysics' (language of freedom, rights,

> conscious intentions, justice, agency) by political 'physics' (language of effects, price, unconscious intentions, efficiency and consumer welfare) is achieved through designating that only the latter is relevant to an enquiry. Where once the economist provided economic evidence, within the limits and requirements of a legal procedure, now the economist employs the presuppositions of neo-classical economic methodology in order to shape what those limits consist of. The lawyer works within the rhetorical and procedural limits as defined by a particular Chicago definition of competition. (p. 103)

The effect was the discursive erasure of politics from antitrust enforcement. Values core to competition policy became economized, with economists ensuring "substantive notions of 'justice' and 'fairness' are not creeping back into the application of economic law" (p. 96). Yet, competition policy decisions are inherently political because they "are *always* distributive decisions [even if they are masked by] the neutral-sounding language of efficiency" (Grewal & Purdy, 2014, p. 18, emphasis in original).

These "constructivist elements" (Davies, 2014, p. 199) of the neoliberal approach to competition are necessary because competition itself is often elusive. Its fleeting nature is emblematic of the structural and contradictory dynamics of capitalism, which is "driven by competition, yet capital must always seek to thwart competition" (Wood, 2003, p. 22). However, more specifically, this elusiveness also characterizes the media and digital platform sectors, which rely on network effects, massive sunk costs, and economies of scope and scale, resulting in concentrated markets with significant barriers to entry. Such contradictions must be resolved or legitimated through policy discourse which, especially when naturalized, shapes the contours of policymaking: "policy discourse is properly understood … as a constitutive part of … power relations. … Policy is one of the places where one can see the state creating capital" (Streeter, 2013, p. 495) by masking distributive decisions with discourses like promoting competition or leveling the playing field. Indeed, competition policy "like all regulation, is based on particular discourses" (Buch-Hansen & Wigger, 2011, p. 17), which reflect not only specific ideas about regulatory approaches and objectives, but also broader notions about the relationship between regulation and the economy in a capitalist system. These include privileging objective economic analysis over societal considerations (Buch-Hansen & Wigger, 2011) and conceptualization competition as negative freedom from government interference over competition as equality, fairness, and freedom from market power in economic concentration (Peritz, 2000).

Such discourses and their contradictions emerge in the debates examined here as they respond to economic and technological changes that put existing competition policy to the test. By challenging Chicago School antitrust, they expose its assumptions, while introducing their own along with new sets of values, in an attempt to reform competition policy to address these changes. These reform efforts are not a technocratic process, but a political one. Consequently, to capture the political conflicts and alliances inherent in them I theorize policymaking as a site of asymmetrical stakeholder power dynamics, which I outline in the next section. Moreover, I situate policy discourses as crucial to the increasingly complex communications policymaking landscape, outlining how they function to influence policy outcomes and to reflect broader power relations.

The Politics of Policymaking

Policymaking constitutes an arena where discourses can translate into tangible policy action—a space where discourses function as more than just discourses. Since policymaking involves developing and articulating the goals and norms that set the parameters of regulatory and legislative action or inaction vis-à-vis the communications system (Freedman, 2008, p. 14), discursive framing can have concrete policy effects. As Lunt and Livingstone (2011) put it, policy "discourses and practices cannot easily be disentangled" (p.7). In this section I theorize the relationship between the two to provide an account of communications policymaking.

Policymaking, as Streeter (1996) argues, is predominantly an interpretive activity rather than a scientific one. For instance, competition as a regulatory principle is "as ill-defined and malleable as the notion of the public interest" (Holt, 2018, p. 179). As one media lobbyist put it, "competition law is not some kind of purist theory. You are still making value judgments about what you think is the right level of competition in the marketplace" (Freedman, 2008, p. 99). Disagreements over methods, definitions, results, and goals reveal political and economic fault lines of competition policy (Freedman, 2008, 2014b; Peritz, 2000; Streeter, 1983, 1996). Therefore, policy analysis and decision-making are equally political, consisting of "a balancing act between the need to promote the public's needs, government interests, and the demands of the corporate sector" (Iosifidis & Andrews, 2019, p. 4). The communications policy arena features a growing number of stakeholders and is an increasingly contested and politicized space in which the government's, private sector's, and publics' interests intersect and diverge, but rarely align (Iosifidis & Andrews, 2019; Napoli & Dwyer, 2018; Winseck, 2017). Even elites comprise various actors, including interest and lobby groups, the wealthy, and policymakers, with different goals (Baumgartner et al., 2009; Price, 1992). Consequently, policymaking is often a site of struggle between various stakeholders for their desired policy goals (Ali & Puppis, 2018; Just & Puppis, 2012; Van den Bulck, 2012), without necessarily determined outcomes (Fischer, 2003; Pickard, 2015a, 2015b; Streeter, 2013). Consequently, providing an account of policymaking requires "link[ing] politics and policies" (Galperin, 2004, p. 160).

Moreover, policymaking is an inherently communicative process, with the policy arena serving as a forum for political communication among various stakeholders (Ali &

Puppis, 2018; Baldwin et al., 2012, p. 52; Black, 2002; Puppis et al., 2014). Examining the discursive dimensions of policy debates lays bare the power relations underlying the policy process since policy discourses function as both expressions of strategic goals and specific ideological commitments and projects (Lentz, 2011; Streeter, 2013). For example, as critical policy studies literature reveals, power often resides in strategically and effectively defining a policy problem, which contributes to policy agenda-setting (Barbehön et al., 2015; Fischer, 2003; Hendrik, 2015a). Problem definitions "set the scope of possible solutions to the problems that policy ideas address" (Schmidt, 2008, p. 306), and thus imply, if not necessitate, specific analyses, courses of action, and policy interventions (Fischer, 2003, p. 55). Thus, defining platform power as market dominance implies one set of possible legal and regulatory interventions, whereas defining it as political power likely implies another.

The rhetorical repertoire that stakeholders deploy to define and minimize policy problems, to introduce solutions and cast them aside, and to legitimate their positions can reveal "wider ideological positions … connected to values and priorities and that are by no means natural or inevitable" (Freedman, 2014b, pp. 176-177). For example, Streeter (1996) traces how media policy discourses of competition, by targeting monopoly power as the problem, naturalize "the legitimacy of private, for-profit control of the [media] system itself" (p. 185) and write off noncommercial alternatives. In the debates I examine here competition discourses unsurprisingly play a similarly prominent role. As Stucke (2013) puts it:

> Competition's virtues are so ingrained within the antitrust community that competition often takes a religious quality. The Ordoliberal, Austrian, Chicago, post-Chicago, Harvard, and Populist schools, for example, can disagree over how competition plays out in markets, the proper antitrust goals, and the legal standards to effectuate the goals. But they unabashedly agree that competition itself is good. (p. 166)

The degree to which these assumptions persist in debates about digital markets which resist competition, how the role of competition in these markets is defined, and what policy frameworks should be applied to them reveal value judgments, trade-offs and contradictions, and ideological positions.

In this context, policymaking power manifests as the ability to influence the discursive contours of policy discussions and to shape policy narratives such that they maintain or disrupt existing policy frameworks. Policymaking elites can promote policy frames that "marginalize broader theories of the public interest, citizenship and, in particular, democracy" (Freedman, 2014a, p. 83), resulting in "media policy silences" (Freedman, 2014a, p. 70), namely ignored policy options and values. Such discursive work has a tangible impact on the communications system. For instance, framing digital technologies in the language of inevitability and personal freedom contributed to lax oversight (Mosco, 2005; Streeter, 2011), resulting in the problems debated here. However, such discourses can be contested and therefore power also resides in the ability of stakeholders to denaturalize assumptions holding in place a particular policy paradigm—such that it is questioned, disrupted, and reformed or replaced. Theoretically, such policy change can occur when crises and shocks to the status quo disrupt institutional path-dependencies and the socially and discursively constructed legitimacy of longstanding policies (Ali & Puppis, 2018; Pickard, 2015b).

Thus, the dynamics between stakeholders, their policy positions, and the discursive projects to which they commit are essential to understanding the politics underlying competition policy with respect to digital markets and the emergent governance frameworks I examine here. In the next section, I restate the goals of this dissertation and introduce the research questions.

The Politics of Competition Policy

In their analysis of the striking and systemic changes within the news media landscape in the first decade of the 21st century, Williams and Delli Carpini (2011) conclude that "the media regime in place for the latter half of the twentieth century has been dismantled and the contours of a new regime have yet to be formed" (p. 283). The same can be said about the policy paradigms governing the new digital communications landscape.

Among the most pressing contemporary communications policy problems, including proliferating digital misinformation and hate speech, growing market power, unfettered data collection and commodification, and systemic privacy concerns persist in these sectors. However, amid political, economic, and technological changes, traditional communications policy has increasingly little to say about the developments in them. When massive combinations like the AT&T-Time Warner merger escape the FCC's public interest review, triggered only by the increasingly infrequent broadcast license transfer, "the growing disconnect between the scope of the FCC's regulatory authority and the structure of the contemporary media ecosystem" (Napoli & Dwyer, 2018, p. 7) becomes apparent. Equally, giant digital platforms like Facebook and Google operate outside of any public interest considerations, while emphasizing they are not media companies (Gillespie, 2010; Iosifidis & Andrews, 2019; Napoli & Caplan, 2017). Meanwhile, the concerns associated with platform power fall nearly exclusively under the narrowed gaze of traditional antitrust, which is ill-prepared to address them (Khan, 2017a). Moreover, antitrust law is a poor substitute for public interest regulation, since "[c]ompetition alone … does not address issues of market failure" (Picard & Pickard, 2017, pp. 32-33).

Although the contours of the broader communications regime have become clearer, only recently have policymakers begun to collectively grapple with its policy implications. The debates examined in this dissertation ultimately concern attempts to address oversight gaps and evolving dynamics in digital platform markets. Cumulatively, they constitute efforts to design a governance framework that captures these dynamics and provides meaningful oversight over these markets. I use the term "governance" throughout this dissertation slightly differently than in traditional communications and platform studies literature. In communications policy scholarship, governance includes collective efforts by non-governmental actors like civil society and private industries, denoting a broader range of rules structuring communications systems than regulation, which is the domain of the state (Freedman, 2008; Just & Puppis, 2012; Puppis, 2010). Likewise, platform studies literature draws on political science—particularly Francis Fukuyama's (2016) account—to define platform governance as both state and nonstate (civil society and industry) as well as nation-state and international oversight mechanisms that decenter traditional governments (e.g., Gorwa, 2019b; van Dijck et al., 2018). These broader notions of governance imply a division of power between state, industry, and civil society oversight, partly to accommodate the ways in which platforms shape activity across their services via technological design and terms of service, among other tools (Gorwa, 2019b). However, these notions concurrently signal a growing privatization of internet regulation (Freedman, 2012a; Musiani, 2013) and platform oversight, while the debates examined here comprise efforts to wrest governance from platforms. Policy stakeholders participating in them—many of them lawyers and legal scholars—use the term to imply the use of law and policy to oversee markets, which rests in the authority of the state. Indeed, governance in this context centers the state's role. This narrower definition refers to "changing polities, politics, and policies" (Puppis, 2010, p. 136) as well as laws that exert authority over digital markets, with a close analogue in the notion of "policymaking" in communications policy scholarship. I use this narrower definition partly out of fidelity to how stakeholders use it in the policy arenas I examine and partly because, amid significant changes in digital communications markets, the term "communications policy" itself has become slippery.

Although the debates I examine here venture outside it, due to a confluence of reasons I explore here they focus largely on the role of competition policy and reforms to it as key to constructing this governance framework. In mining the discourses circulating in these debates, my research is guided by the following questions:

1) What politics shapes competition policy debates?
    a. Who are the stakeholders involved?
    b. What interests do they represent?
    c. How do stakeholders conceptualize competition in digital markets?
    d. What are the areas of agreement and disagreement in these debates?
2) What governance frameworks, if any, emerge from these debates?
    a. How do stakeholders define problems in these markets?
    b. What policy solutions do stakeholders introduce?
    c. What policy approaches are embraced and rejected?
    d. What are the ideological justifications for these proposals?
3) How do these frameworks address platform power?
    a. How do these policy proposals define oversight of digital markets?
    b. What dimensions of platform power do they tackle?

Importantly, I use the term "competition policy" here because it encompasses antitrust laws and their enforcement by regulatory agencies and the courts, but it also involves a host of regulations that shape the economy. While these policy discussions began as a critique (and defense) of existing antitrust, their boundaries eventually, if unevenly broadened. I conceptualize competition policy as the product of political power dynamics among policymakers, antitrust experts, industry actors, academics, think tanks, and advocacy organizations. The arena comprises a patchwork of varying interests and goals, and ultimately of conflict and consensus. The policy discourses that emerge within it entail specific problem analyses and definitions and imply or outright declare specific policy solutions. However, they also communicate distinctive visions of the relationship between digital communications, private markets, the role of the state and, more broadly, society. Their insights are as telling as their blind spots, and they have immense consequences for the design and governance of our communications systems.

A growing abundance of scholarship examines the policy problems posed by the emergence of digital platforms. For example, a notable strand focuses on designing governance regimes to address content moderation issues in platform markets (e.g., Gillespie, 2018; Gorwa, 2019a, 2019b; Klonick, 2020). Likewise, a burgeoning literature analyzes the issue more holistically, considering policy concerns from competition problems to privacy and speech-related concerns, and proposing solutions that draw on lessons from media and communications policy (e.g., Flew, 2018; Iosifidis & Andrews, 2019; Moore & Tambini, 2018). This work makes significant inroads in expanding the range of policy tools to address these problems.

However, remarkably few scholars examine the politics underlying the formulation of new governance paradigms within the policy arena (e.g., Andrews, 2020), even though this politics determines what, if any, policy solutions are to be implemented. Fewer still engage the policy discourses and strategies bolstering the wider regulatory regime within which these problems arise (e.g., Freedman, 2012a; Napoli & Caplan, 2017), particularly in moments of contestation as in the case of the policy debates here.

Yet, such analysis can illuminate the symbolic and tangible roadblocks to reform, recentering political action as key to achieving it. At the same time, narratives of regulatory capture, namely state intervention exclusively in the service of the private sector, elide key tensions and complexities in communications policymaking, failing to fully capture the power dynamics in this arena (Popiel, 2018). As Winseck (2017) puts it, "[t]he state intervenes … with an eye to ensuring the 'general conditions of capital accumulation', to be sure, but in ways that must be studied closely rather than presumed from overly abstract conceptions of 'the capitalist state'" (p.101). I pursue this goal here by focusing on the politics shaping communications policymaking.

Although my focus falls on debates occurring in the United States, this research has broader implications. Policymakers across the globe are wrestling with the consequences of platformization and datafication, as growing number of policy reports on digital platform markets indicates (Puppis & Winseck, 2020). The biggest companies driving these processes are American and the way the US decides to govern these markets is likely to reverberate internationally, particularly since US regulatory and legal systems have exported elsewhere (Braman, 2006, p. 5). In fact, as Feintuck and Varney (2006) argue, not too long ago the European Commission was harmonizing its competition law approach with the Chicago School framework. While the EU increasingly diverges from the US model, largely in its approach to digital giants, how the US governs these markets domestically will impact their operations abroad.

This dissertation follows critical scholarship that investigates how communications policy grapples with challenges arising from digitization and the emergence of new media (e.g., Ali, 2017; Curran et al., 2016; Evens & Donders, 2018; Lunt & Livingstone, 2011; Pickard, 2020). As these media and communications infrastructures become increasingly important "instrument[s] in contemporary global justice struggles [and] themselves an object of struggle" (Calabrese, 2017, p. 101), the way policy debates focused on developing governance frameworks unravel carries significant political implications. Pointing to tech giants' increasing concentration in various sectors of the digital economy, Freedman (2014b) argues,

> Ongoing consolidation of the digital domain has highlighted the flaws of contemporary ownership arrangements and competition regimes and contributed to an atmosphere in which demands for reform of media ownership structures are part and parcel of calls for wider democratic change. (p. 182)

By intersecting with foundational questions about how to best preserve the democratic and public function of communications, the debates I study here join a long line of political struggles over the governance of these systems. In fact, their immediate antecedents lie in waves of media activism and policy conversations about media and communications markets in the 21st century, from the public mobilization during FCC's 2002 biennial ownership rule review to the contested Comcast-NBCU merger to the recent net neutrality debates (Crawford, 2013; Gangadharan, 2013; Pickard & Popiel, 2018).

This research contributes to a theoretical account of the complex politics underlying competition policy and efforts to develop a governance framework for digital markets amid significant technological, economic, and political change. In the process, it aims to make a normative intervention. Streeter (1996) conceptualizes policy elites as an interpretive community and argues that a "measure of ideological strength of an interpretive community is the extent to which it can ignore its critics" (p. 117). By tracing how the existing competition policy paradigm is both defended and unsettled, and by scrutinizing the alternatives proposed in its place, this dissertation pinpoints and denaturalizes the discourses keeping the existing regime in place, while locating new policy gaps that will require democratic reform.

Research Design and Methodology

This dissertation critically investigates the discursive politics underlying competition policy debates vis-à-vis digital markets using qualitative methods. Investigating the political processes and power dynamics underlying policymaking has often led critical policy scholars to qualitative methodology (Herzog & Ali, 2015; Just & Puppis, 2012), which privileges the contextualization of the phenomena under study—here the politics of competition policy—and is attentive to complexity and issues of power (Ravitch & Carl, 2016).

To trace the evolution of this politics I utilize a case study approach (Creswell, 2013), following other critical analyses of communications policy issues, including historical debates over the role of journalism in society (Pickard, 2015a), the nature of contemporary media policymaking (Freedman, 2008), and the policy construction of media localism (Ali, 2017). Specifically, I focus on three distinct moments in overlapping time periods between 2016-2020: the AT&T-Time Warner merger case, debates about antitrust reform in the broader policy arena, and a congressional inquiry into digital platform markets. Aside from revealing key features of the shifting thinking about the governance of digital markets, the cases also unravel in three distinct policy spaces—the judicial, the broader policy space, and the legislative—each of which plays an important role in fashioning policy. This design choice reflects the fact that, absent a clearly delineated regulatory body to oversee these markets like the FCC for traditional communications, the policymaking authority is much more dispersed. I describe these cases in more detail below, but collectively they reveal why and to what extent these policy discourses evolved, what agreements emerged, what tensions persisted, and what are the characteristics of the emergent governance paradigm for digital markets.

Methods and data

Critical policy scholarship often draws on document analysis of policy proceedings and documents (e.g., Ali, 2017; Van den Bulck, 2008)—typically via critical discourse analysis (CDA) (Lentz, 2011, 2013; Streeter, 1987, 2005)—and stakeholder interviews (Ali, 2017; Brown & Blevins, 2008; Freedman, 2008; Lentz & Kirkpatrick, 2014). All three of my case studies involve extensive document analysis: from official competition regulator speeches, regulatory reports, court case decisions, and legal documents pertaining to mergers to scholarly and think tank reports on digital platform markets, policy expert blog posts and op-eds, and trade and news coverage of antitrust debates related to digital markets. I also viewed video recordings of the 2018 and 2019 Stigler Conferences on "Digital Platforms and Competition," and read select transcripts from fourteen hearings held by the FTC between August 18, 2018 and June 12, 2019 on "Competition and Consumer Protection in the 21st Century." I supplement the thousands of pages of documents and dozens of hours of video recordings with fieldwork, during which I attended a dozen panels on antitrust in digital markets between December 2018 and August 2020. The events were held in Washington, D.C. and Philadelphia and, when the COVID pandemic erupted in March 2020, many scheduled events on these topics moved online, and I attended several of these webinars.

Additionally, between November 2019 and May 2020, I conducted twelve semi-structured interviews with key policy stakeholders, including former policymakers (e.g., regulators, staffers), members of advocacy groups (Free Press, Open Markets Institute), and members of think tanks active in these debates (Public Knowledge, R Street). I recruited the interviewees via email through purposive sampling because of their participation in and contribution to these discussions and obtained verbal consent to record the interviews. The recordings were professionally transcribed and stored on an encrypted drive for security. I pair the analysis of these interviews with document analysis for triangulation to cross-validate the findings (Bowen, 2009; De Bruycker, 2017; Herzog & Ali, 2015; Just & Puppis, 2012; van Dijk, 1993). The interviewees and the events I attended are listed in the Appendix.

I analyze both sources of data (interviews and documents) using two approaches. First, I engage in critical policy analysis (Fischer, 2003; Hendrik, 2015b), which is interpretative and draws from the CDA tradition (Fairclough, 2013; Howarth, 2000; van Dijk, 1993). In critical policy studies, the guiding analytical questions are "how is the policy issue being conceptualized or 'framed' by the parties to the debate? How is the issue selected, organized, and interpreted to make sense of a complex reality?" (Fischer, 2003, p. 143). CDA engages relations between discourse, primarily of elites, and other social elements like power, ideology, and state institutions (Fairclough, 2013). The approach complements critical policy studies by focusing on how policy problems are constructed, even though they are produced through material processes: in defining "a cause of difficulties as a problem and explaining these difficulties as effects of this problem, one is identifying … what needs to be changed, what needs a solution" (Fairclough, 2013, p. 186). By engaging the processes of problem construction, CDA is ideally suited to illuminating what Andrews (2020) calls policy "sense-making" (p. 11), in which policy communities attempt to work out complex, unclear, and often uncertain policy problems—like the ones examined here.

I code the data inductively, but informed by my theoretical framework and research questions, broadly examining how stakeholders define the problem they aim to address, namely platform power, since problem definitions delineate the field of acceptable policy solutions (Schmidt, 2008, p. 306). I search for larger patterns constituted by these codes, including assumptions and value judgments about digital communications, the role of the state in digital markets, and specific governance paradigms and philosophies. This use of CDA illuminates the ideological contours of the policy debates I analyze, including discursive tactics to promote and oppose policy reform. I also critically assess the blind spots and contradictions emerging in these discourses, including policy alternatives that are discarded or marginalized.

Since I investigate policy debates during a period of conflict and contestation, CDA alone does not shed light on the politics underlying them. Thus, second, I also draw on stakeholder analysis, which helps illuminate the complex dynamics in policymaking (Van den Bulck, 2012; Van der Burg & Van den Bulck, 2015). Although I use this approach formally in the last case study, all my case studies track the key policy stakeholders involved in these debates—policymakers, industry actors, and civil society actors—along with their policy interests, stances, and goals. I conceptually link this analysis to the discourses I identify through CDA, examining how groups of stakeholders imagine governance over digital media markets and whose approach carries the most political weight with what policy consequences.

Case studies

In the next three chapters, I present findings from my case studies, which focus on instances when competition policy vis-à-vis digital media and platform markets was contested across three policy arenas: the judicial arena, the broader policy arena, and the legislative arena. Aside from revealing how norms underpinning each of these arenas structures a particular politics of competition policy, each case also represents a conceptually distinct (but temporally overlapping) instance in the larger US competition policy debate about digital markets. I summarize these here.

AT&T-Time Warner and the Politics of Vertical Integration

In 2016, wireless giant AT&T announced its intent to acquire Time Warner Inc., a media company with valuable properties like CNN and HBO, to enter the digital platform TV market—a process of platformization. The merger was the first major media transaction following the controversial 2016 US presidential election. Moreover, since Time Warner sold off its only broadcast license, the merger evaded a public interest review conducted by the FCC—a relic of a media policy regime that no longer fit the industry it was meant to oversee (Napoli & Dwyer, 2018). Despite all signs of an aggressively pro-business climate in Washington, D.C., the Department of Justice challenged the merger in court, resulting in the first vertical merger trial since the breakup of AT&T in the 1980s. The proceedings and their outcome became a legal referendum on vertical media mergers and the ability of existing competition policy to address sweeping changes within digital video and advertising markets. For instance, the merger raised significant regulatory questions about how to address competitive concerns associated with data, which plays an increasingly important role in communications markets.

A key discourse underpinning US antitrust—often taken for granted in American legal rhetoric—is that antitrust protects competition, not competitors. However, what protecting competition over competitors means in practice, like the notion of "competitive" markets itself, both has changed over time and betrays the politics underlying antitrust enforcement. I interrogate the discourse of protecting competition over competitors, as well as its contradictions, through the lens of the AT&T-Time Warner merger case.

Drawing on critical discourse and legal analysis (Milosavljević & Poler, 2019; Streeter, 2013; van Dijk, 1993), I trace how the discourse of protecting competition over competitors operates through merger review by analyzing testimony and public statements given during a congressional hearing on the merger and legal documents from the subsequent antitrust case and its appeal. The analysis reveals how this discourse obscures the strategic choices made by courts to protect incumbents—shedding light on the politics of competition policy in digital media markets. Through (non)intervention, namely allowing the merger to proceed while legally sanctioning it and enshrining the ruling as legal precedent, the court case represents a struggle over incentivizing competition in digital advertising markets at the expense of competition, particularly smaller competitors, in video markets. Though the case represents an instance of weakened antitrust, it can also be interpreted as a deliberate decision to encourage market-based regulation. In this case, the court circumscribed a market, namely video programming and distribution, for unrestrained consolidation and attendant potential anticompetitive harms by justifying growing, equally *potential* competition in the digital advertising market dominated by Google and Facebook. Extending insights from legal scholarship about the limitations of competition policy in addressing public interest concerns associated with media mergers (Baker, 2001, 2007; Just, 2009) to the digital realm, I consider what the case implies about the existing approach to competition policy to regulate rapidly transforming digital media markets.

The Politics of Antitrust Reform

As attorneys fought over the AT&T-Time Warner case in federal court, in 2017 an increasingly vibrant conversation was taking place in D.C. policy circles about the ability of antitrust to address competitive concerns arising in digital markets. By late 2018, driven by a growing anti-monopoly movement, this conversation exploded into an international policy debate that drew in antitrust scholars, policy experts, think tanks, top regulators at the FTC and DOJ, and prominent politicians. By the time the widely criticized AT&T-Time Warner court ruling was announced, the foundations of existing US antitrust law and competition policy were being contested in the broader policy arena—to which the ruling only added fuel.

These debates galvanized not only a powerful intellectual critique of competition policy, but also generated policy action. In this chapter, I trace them across several prominent policy venues, including Stigler Conferences on digital platforms and the eponymous report; the 2018-2019 FTC hearings on competition; and a series of antitrust events, panels, and symposia organized by many stakeholders active in the competition policy space, supplemented by interviews with some of the active participants. After a brief account of competitive concerns arising in digital platform markets, my analysis sheds light on the competition for competition policy, namely the efforts of one set of stakeholders to police the boundaries of antitrust and the efforts of others to drastically reform it. I map the interests invested in the outcomes of the debates—noting how antitrust itself has become politicized particularly as a right-wing tool to controls information flows in the private sphere—before delving into an analysis into their discursive features.

The intense policy conflict reveals tensions over what constitutes market competition in digital platform markets, what the role of law and policy is in overseeing it and, perhaps most importantly, what competition policy does and does not offer as an emergent governance paradigm for these markets. I locate both the areas where the defense of existing antitrust began to fracture under the weight of its own contradictions, as well as the persistent blind spots of the proposed solutions. I theorize these blind spots as partly attributable to the dominance and insularity of the competition policy framework as a foundation for governing digital markets—a feature of the broader policy efforts to address platformization, which remain siloed and, at least discursively, atemporal. Invoking the term "policy sequences," I argue that approaching policy design on a temporal scale may resolve some of the apparent trade-offs between policy options.

Addressing Digital Platform Power

As the direct byproduct of the debates in the broader policy arena, which continued to intensify, in 2019 US Congress launched a series of hearings on "Online Platforms and Market Power"— the first congressional antitrust investigation in nearly 50 years. The hearings involved testimony and submissions from regulators, antitrust experts, industry competitors, including those who hosted their businesses on platforms, and top executives as well as even the CEOs of the most prominent digital platform firms.

The investigation produced a sweeping report on competitive concerns in digital markets and recommended relatively radical policy solutions, including structural separation along business lines for the biggest of these companies and legislative changes to antitrust law. In this chapter, I conduct a stakeholder analysis of the hearings. Drawing on critical policy studies, which emphasizes the power of discursive policy problem definition, I map how participating stakeholders define the problem they try to address, namely how they conceptualize platform power, what solutions they present, and what these solutions imply about governance frameworks for digital markets.

The contradictions that appear in the debates in the broader policy arena resurface here. However, policy silences also emerge as the more aggressive proposals articulated in the policy arena do not get mention in the congressional hearings. Thus, reform-oriented discourses imply commercial notions of digital media, expanding market logics to factors like data, without adequately staking out policy protections for the social and public activity across these platforms. Concurrently, the case study sheds light on how industry actors approach the issue. Competitors and businesses that rely on platforms' services are somewhat hampered in articulating strong policy interventions because of their dependence on platform markets. Meanwhile, platforms actively resist antitrust intervention, promoting a co-regulatory settlement instead—one that has crucial implications for contesting platform power via policy.

Chapter 2 – AT&T-Time Warner and the Politics of Vertical Integration

"Free market ideology comes to merger regulation from two sides. On the one hand, proponents of free markets desire as much competition as possible and expect the government to ensure that no player dominates the field. On the other hand, neo-liberals are wary of any government intervention in the market; if the market demands that two companies merge, who is the government to object? Market rhetoric therefore cuts both ways. This basic ambiguity in the free market faith enables competition authorities to invoke the spirit of the market no matter what they do." (Bagchi, 2005, p. 1)

In 2016, wireless giant AT&T announced its intent to acquire Time Warner Inc., a media company with valuable properties like CNN and HBO. The merger was the first major media transaction following the controversial 2016 US presidential election ending in Donald Trump's presidency. Despite all signs of an aggressively pro-business climate in Washington, D.C., the Department of Justice (DOJ) challenged the merger in court after the Federal Communications Commission (FCC) declined to review it—a consequence of both the FCC's self-avowed skepticism towards public interest merger review and active strategizing by the merging parties. The ensuing court case was the first vertical merger trial since the breakup of AT&T in the 1980s. The proceedings and their outcome became a legal referendum on vertical media mergers and the ability of existing competition policy to address sweeping changes associated with platformization within digital video and advertising markets.

The twin forces of digitization and convergence have reshaped media markets dramatically and challenged existing regulatory frameworks overseeing communications (Flew, 2016; Hesmondhalgh, 2015; Holt, 2011; Krämer & Wohlfarth, 2018; Lotz, 2014; Van den Bulck, 2008). In this chapter, I examine how antitrust fills this growing regulatory gap and addresses these forces through the lens of the AT&T-Time Warner merger. Although mergers and acquisitions undergo economic and legal analysis to identify potential anticompetitive harms, communications merger review is also a political process especially in high profile cases (e.g., Aufderheide, 2002; Birkinbine, 2017; Crawford, 2013; Yoo, 2014). The politics emerges not just in disagreements over whether a particular transaction poses competitive harm to a relevant market and the definition of that market, but also in debates over the non-economic impacts of such mergers on information flows (Harcourt & Picard, 2009). This politics, shaped by courts' narrow antitrust approach and a deep-seated preference for market-based regulation, has significant implications for the emergence of real oversight over digital media markets.

Drawing on critical discourse and legal analysis (Milosavljević & Poler, 2019; Streeter, 2013), I trace how the politics underlying competition policy in digital markets operates in merger review by analyzing testimony and public statements given during a congressional hearing on the merger and legal documents from the subsequent antitrust case and its appeal. The analysis reveals how the discourse of protecting competition over competitors—a central tenet of US antitrust enforcement—obscures the strategic choices made by courts to protect incumbent companies. Through (non)intervention, namely allowing the merger to proceed while legally sanctioning it and enshrining the ruling as legal precedent, the court case represents a struggle over incentivizing competition in digital advertising markets at the expense of competition, particularly smaller competitors, in video markets. Though the case certainly represents an instance of narrowed antitrust enforcement, it can also be interpreted as a deliberate judicial decision to encourage market-based regulation in video programming and distribution markets. Extending insights from legal scholarship about the limitations of competition policy in addressing public interest concerns associated with media mergers (Baker, 2001, 2007; Just, 2009) to the digital realm, I consider what the case implies about the existing approach to competition policy to regulate rapidly transforming digital media markets.

The chapter begins by considering the challenges policymakers face in correctly evaluating potential harms of consolidation in communications markets. As robust public interest review of media mergers recedes amidst convergence, digitization, and neoliberal politics, antitrust increasingly plays a central role in overseeing these markets. Thus, next, I briefly examine the historical, legal, and political forces underlying the discourse of protecting competition over competitors, which guides antitrust enforcement and has implications for adjudicating communications mergers. I situate the case study within an overview of the business dynamics in converging video markets and review the key concerns the merger raised when it was announced. Then, I examine three key debates over the merger: first in a Senate judiciary committee hearing, then throughout the federal court case, and finally during its appeal. The chapter concludes by evaluating the merger's impacts on the market and consumers to date and by considering the role of existing antitrust in managing competition in digital media markets.

Evaluating Communications Mergers

In media economic theory, companies pursue mergers to serve larger markets, invest in economies of scale, and diversify holdings to reduce risk in a volatile media economy. Mergers can yield stability that stimulates growth within the industry, along with increased capital to innovate. However, consolidation also creates incentives for abuse of one's dominant market position to safeguard that position. It does so by facilitating the accumulation of market power to ward off competitors by improving firms' ability to control access to resources and distribution mechanisms (Harcourt & Picard, 2009). For instance, owners of communications systems can bias against media content of outside competitors (Baker, 2001). Moreover, large media companies may exercise their market power to exert political power to influence the policymaking process and undermine its public interest goals (Baker, 2007). Finally, consolidation may negatively impact consumers through worse, yet more expensive service, as well as society at large by placing a commercial imprint on the media, reducing its diversity, and restricting the flow of information (Harcourt & Picard, 2009).

Consequently, media and telecommunications mergers undergo regulatory review. In the US, the DOJ, the FTC, and the FCC oversee this process. However, while the former two agencies focus on antitrust considerations, the FCC has a broader "public interest" mandate embedded in the Communications Act of 1934 (Ruane, 2008). Since "[v]alues and value conflicts play a central role in communications policy making" (Just, 2009, p. 112), including in the arena of media ownership, there exists a tension between advancing difficult-to-quantify normative regulatory goals like diversity and the growing prevalence of cost-benefit analysis, particularly in antitrust (see also Baker, 2007).

As Just (2009) points out, mergers and acquisitions in the communications sector raise unique concerns for regulators. For instance, traditional market concentration measures like HHI (Herfindahl-Hirschman Index) may not only poorly assess sectoral concentration but also its impact on regulatory goals like media diversity (see also Napoli, 2001; Noam, 2009). Additionally, while not unique to communications mergers, defining relevant markets is often difficult, particularly amid increasing convergence and digitization. Regulators face two challenges with respect to this problem. First, prices for media products are not typically set competitively, complicating traditional relevant market calculation used in merger review, such as the SSNIP[3] test. Second, convergence in media and communications markets increasingly

[3] Small but significant and non-transitory increase in price.

complicates clear distinctions between substitutable products—the foundation of market definition crucial to antitrust review.

Additional concerns arise in the public interest review of mergers, like the impact of specific market structures on content production and opinion formation. As Baker (2007) argues, antitrust is ultimately "'commodity' oriented [and] considers only how concentration can negatively affect the consumer's interest in the product choice" (p.73). Since antitrust focuses on market power over commodities and not within the public sphere, "antitrust laws provide virtually no limits on national concentration among sellers of media products that are not themselves primarily national" (Baker, 2007, p. 172). Moreover, the laws' concern about commodities relates to power within advertising instead of content production markets, which can result in significant media concentration (Baker, 2007, p. 172). Thus, as Shelanski (2006) notes, antitrust review is limited in safeguarding democratic objectives underpinning media policy, including diverse ownership and programming. These overlooked consequences can only be addressed through a public interest assessment of the merger, typically conducted by the FCC (Ruane, 2008), in combination with other policy prescriptions (Picard & Pickard, 2017). However, the FCC's public interest merger review largely has been defanged (Crawford, 2013; Napoli & Dwyer, 2018). Instead, as former FCC Commissioner Michael Copps put it, the FCC fueled consolidation with "constant green lighting of mergers in telecom and … in the media industries" (personal communication, December 4, 2019).

Net neutrality regulation introduced in 2015 and repealed just three years later provided limited additional protections against market power abuses in this market, motivated by changes in the marketplace. Former FCC Chair Tom Wheeler, who oversaw the passage of net neutrality rules, argued that ISPs

> envied the guys at the edge of the network [like Netflix] who made such huge margins off of their services. They wanted to either extort the use of their delivery network to make more, or they wanted to get into that business themselves (personal communication, November 20, 2019).

As ISPs vertically integrated with content companies, as in the Comcast-NBCU merger, they acquired incentives to exercise their market power to thwart over-the-top (OTT) competitors like Hulu and Netflix. Documented anticompetitive strategies by ISPs have involved charging access fees to reach their subscribers, bundling internet and cable to draw subscribers away from rivals' content products, and imposing data caps (Crawford, 2013). As the market became concentrated, gatekeeping power among incumbent ISPs increased. Net neutrality, as Tom Wheeler argues, sought to "make it difficult for network extortion to take place, which is why you see companies like AT&T now going up the stack and into edge-like activities with the promise of higher margins" (personal communication, November 20, 2019). In the absence of net neutrality, which prevented ISPs from thwarting traffic of OTT content providers, ISP concentration and consolidation increases their market power over the flows of content across on the internet (van Schewick, 2010).

However, net neutrality could not prevent vertical integration between ISPs and content companies. Yet, when ISPs like AT&T buy content companies like Time Warner, they acquire both consumer data and user eyeballs, extending their advertising reach. As Wheeler argues, "we're living under a Communications Act written in 1934, last updated in 1996. In 1996, the internet was AOL, and we had no jurisdiction over the edge providers" (personal communication, November 20, 2019). Moreover, the FCC's authority to review mergers is limited to cases when a license transfer is involved (Ruane, 2008). With the rise of media mergers without any transfer of licenses the prospect of a public interest review dwindles. Absent the regulatory rationale for a public interest review of the merger, a question arises to what extent traditional antitrust analysis can evaluate potential harms in media and telecommunications transactions in the digital economy.

Protecting Competition, Not Competitors

The goal of US competition law is "maintaining competition in private markets" (Hovenkamp, 2005, p. 13). Antitrust enforcement, as commentators often remark and as the Supreme Court opined in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977), involves "the protection of *competition*, not *competitors*" [4] [emphasis in original]. The distinction is essential to antitrust enforcement, as the DOJ itself wrote in a 2008 report on the subject:

> The focus on protecting the competitive process has special significance in distinguishing between lawful and unlawful unilateral conduct. Competition produces injuries; an enterprising firm may negatively affect rivals' profits or drive them out of business. But competition also benefits consumers by spurring price reductions, better quality, and innovation. Accordingly, mere harm to competitors is not a basis for antitrust liability" (Department of Justice, 2008, p. 11).

The phrase represents a guiding enforcement principle, is frequently cited in antitrust court rulings, and is often invoked to argue the US approach is superior to others (Fox, 2003; Swaine, 2002).

However, what protecting competition over competitors means in practice, like the notion of "competitive" markets itself, both has changed over time and betrays the politics underlying antitrust enforcement. Indeed, as Paul (2020a) argues, "Antitrust law decides where competition will be required and where coordination will be permitted"

[4] Quoting the following: "When concern as to the [Clayton] Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market" ("Brown Shoe Co. v. United States," 1962).

(p. 382). For instance, the famously liberal and judiciously active Warren Court of the 1950s and 1960s defined competitive markets as ones with many competitors and with small businesses having a "right" to compete with the bigger firms (Hovenkamp, 2005). The roots of the judicial notion of protecting competition, not competitors lie in the Supreme Court case *Brown Shoe Co. v. United States* (1962):

> It is competition, not competitors, which the [Clayton] Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. (p. 345)

Thus, the credo implied a robust notion of competition with room, if not direct need, for smaller competitors.

Yet, in the 1970s, as part of a broader neoliberal shift, competition became detached from its liberal origins as a counterpoint to monopoly and attendant concentration of economic power. Instead, lawyers and economists at the Chicago School reconceptualized competition as "competitiveness" or the potential for competition (Davies, 2014), and redefined competitive markets "in the economic coin of low prices, high output, and maximum room for innovation" (Hovenkamp, 2005, p. 2), namely the consumer welfare standard. Since the emphasis fell on potential for competition and very specific market outcomes over actual competition, the scope of what constitutes noncompetitive markets narrowed, with price effects as the metric (Britton-Purdy et al., 2020; Khan, 2017a; Steinbaum & Hwang, 2017). As Khan (2017b) argues, shifting "antitrust analysis around welfare has largely severed the definition of 'competition' from an analysis of [market] structure and process" (p. 972).

This shift had an impact on enforcement. Chicago School theorists largely saw antitrust intervention as governmental overreach into generally self-correcting markets (Hovenkamp, 2005; Khan, 2020; Khan & Vaheesan, 2017; Wu, 2018). The discourse of protecting competition, not competitors came to signify antitrust restraint both in courts and among enforcers, and a justification of consolidation. William Kolasky, the Deputy Assistant Attorney General of the DOJ's Antitrust Division, offered a distillation of this discourse in a 2002 speech to European competition regulators entitled "What is Competition?"[5]:

> An economist sees competition not in terms of rivalry per se, but in terms of market performance. … [A] market is perfectly competitive when firms price their output at marginal cost and costs are minimized by internal efficiency. This does not necessarily require a large number of rivals. Where entry and exit are costless, markets can be perfectly competitive even with only one firm serving the entire market. Similarly, some models of oligopoly show that in some markets prices may be driven to marginal cost, even where there are entry barriers, with as few as two competitors. … In these markets, antitrust intervention to preserve or create a larger number of rivals would harm consumer welfare and worsen economic performance. (Kolasky, 2002, para. 6-7)

In a stark contrast to the notion of competition expressed in *Brown Shoe Co.*, Kolasky justifies barriers to entry and market concentration by reorienting competition as a process for securing pricing efficiency—while narrowing the role of antitrust. The emphasis on competitive outcomes focuses on the maximization of a value, while deprioritizing actual competitive processes in markets (Wu, 2018, p. 95). This notion of competition as efficiency harkens to Robert Bork and serves to "cloak the preference for economic coordination in the form of hierarchical control over others … as paradigmatically embodied in the traditional, top-down business firm" (Paul, 2020a, p. 415) rather than a dispersed market of smaller competitors, for example. Consequently, the discourse of protecting competition, not competitors strategically operates to legitimate market consolidation and concentration.

[5] The arrogant title raises key questions for future research about the entanglement between US foreign policy, nationalism, and neoliberal capitalism in communications by US antitrust enforcers to regulators in other countries.

Importantly, markets like media, telecom, and big tech naturally pose competitive challenges, tending toward oligopoly or monopoly due to economic characteristics like network effects and economies of scope and scale. Nevertheless, a question remains as to when antitrust intervention is justified. To ensure its coherence, the discourse must provide an account of circumstances that warrant enforcement. As Kolasky goes on to argue, such circumstances are exceptionally limited:

> *competition is the process by which market forces operate freely to assure that society's scarce resources are employed as efficiently as possible to maximize total economic welfare*. This formulation allows us to solve the paradox of how we can protect competition without protecting competitors. Competition is fiercest when competitors have no protection from their government … The purpose of the antitrust laws is to assure that the war is fought and the outcome determined on the basis of efficiency. The antitrust laws should intervene only when one combatant employs methods that would deny victory to the most efficient firm or create barricades to entry by equally or more efficient new entrants. (Kolasky, 2002, para. 9-11) [emphasis in original]

By default, the discourse implies antitrust restraint in deference to market mechanisms. The rationale for antitrust intervention is narrowed to situations in which a competitor threatens processes that drive prices to their efficient levels. As a corollary, this antitrust approach is especially permissive toward vertical integration, which is typically seen as creating efficiency and accepted as unproblematic (Waterman & Choi, 2011; Yoo, 2002). This rhetoric and attendant antitrust practices have implications for overseeing digital media markets, which I explore in this chapter through the AT&T-Time Warner merger.

Merging and Converging

Against the backdrop of deregulatory policies coupled with narrowed antitrust enforcement, one of the major challenges for policymakers is to create or maintain a level playing field in communications and media markets "increasingly marked by network convergence and populated by telecom, cable and technology platforms that have entered the television value chain" (Evens & Donders, 2018, p. 220). Vertical and horizontal integration, frequent in media industries since the 1990s (Hesmondhalgh, 2015; Holt, 2011; Lotz, 2014), is spurred on by platformization, namely "rise of the platform as the dominant infrastructural and/or economic model in media, electronic communications and information, communication and technology (ICT) sectors" (Evens & Donders, 2018, p. 1). Such integration creates immense global conglomerates, which acquire significant market power over various parts of the production and supply chains. One of the challenges for antitrust authorities overseeing such markets is ensuring these vertical combinations do not engage in anticompetitive behavior that harms other competitors or consumers or thwarts innovation (Evens & Donders, 2018).

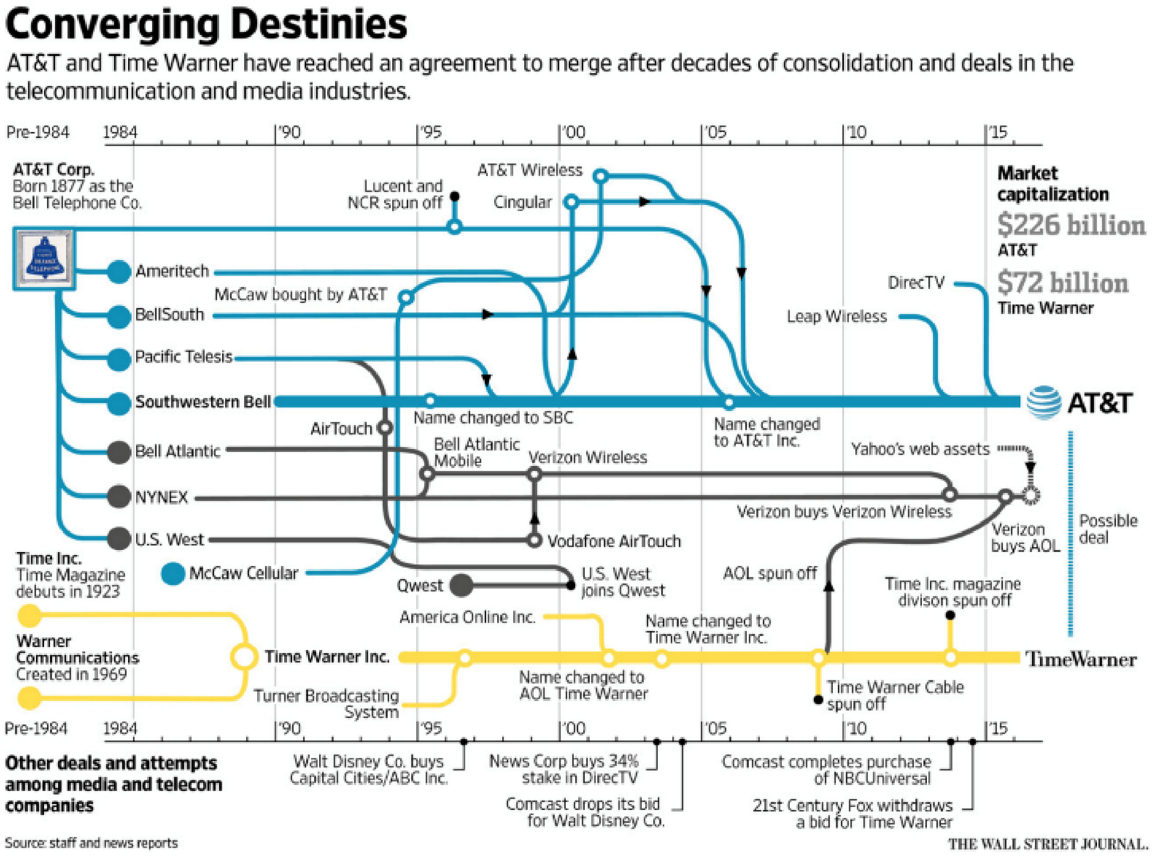
At a meso-level, the growing popularity of OTT platform services like Amazon, Hulu, and Netflix has accelerated cable cord-cutting among consumers, namely canceling pay-TV in favor of OTT subscription services. Incumbent ISPs like Comcast and AT&T have pursued vertical integration with media companies to counter this threat by offering a "'triple play' bundle of broadband, voice, and subscription television" (Meese, 2019, pp. 3-4) to consumers. The 2011 vertical merger between Comcast-NBCU represented a strategic response to these changes in the media markets (Crawford, 2013). As Evens and Donders (2018) argue, since the "programming market has become a seller's market, resulting in inflating costs for attractive content" (p. 77), telecom incumbents pursue control over production and distribution to realize significant efficiencies and to compete with OTT platforms. Thus, vertical integration represents a response to challenging market conditions, growing convergence between fixed and mobile content distribution, the advantages of scale, and greater programming negotiation leverage. Moreover, OTT platforms amass growing viewer data reservoirs that steer their production and marketing decisions—Netflix's decision to fund *House of*

Cards is a byproduct of such strategizing. Although cable distributors used to not feel the pressure to wade into big data collection and algorithmic audience measurement given the industry's traditional separation of content creation and distribution (Lotz, 2014, p. 228), this is changing.

AT&T & Time Warner

In response to these developments, AT&T announced its plans to acquire Time Warner in October 2016. Although many commentators expected the merger to sail through antitrust review given regulators' tolerance of vertical integration, it resulted instead in the first vertical merger lawsuit since the famed 1980s case that broke up AT&T. The merger faced significant criticism from advocacy groups, policy elites, and smaller competitors, who were concerned about the potential accumulation of market power.

Since its breakup, AT&T has re-acquired the bulk of the companies it was forced to divest, known as Baby Bells (see Figure 1), to become the largest US wireless telecommunications and satellite pay-TV company, surpassing its own size at the time of its breakup (Smith, 2017). The markets in which it operates are also significantly concentrated: along with Sprint, Verizon, and T-Mobile, it captures 98 percent of US mobile service revenue and, as of 2011, along with Verizon it acquired 53.9 percent of the broadband industry's revenue (Steinbaum & Hwang, 2017). By acquiring Time Warner, whose popular content properties like HBO, CNN and DC Comics make it the fourth-largest media company, behind Comcast, Disney, and Fox (Forbes, 2016), AT&T planned to significantly grow its content ownership, currently limited to DirecTV.


Converging Destinies
AT&T and Time Warner have reached an agreement to merge after decades of consolidation and deals in the telecommunication and media industries.
Pre-1984
1984
'90
'95
'00
'05
'10
'15
AT&T Corp.
Born 1877 as the Bell Telephone Co.
Lucent and NCR spun off
AT&T Wireless
Cingular
Market capitalization
$226 billion
AT&T
$72 billion
Time Warner
Ameritech
McCaw bought by AT&T
BellSouth
DirecTV
Leap Wireless
Pacific Telesis
Southwestern Bell
AirTouch
Name changed to SBC
Name changed to AT&T Inc.
AT&T
Bell Atlantic
Bell Atlantic Mobile
Verizon Wireless
Yahoo's web assets
NYNEX
Verizon buys Verizon Wireless
U.S. West
Vodafone AirTouch
Verizon buys AOL
Possible deal
Time Inc.
Time Magazine debuts in 1923
McCaw Cellular
Qwest
U.S. West joins Qwest
AOL spun off
Time Inc. magazine divison spun off
America Online Inc.
Name changed to Time Warner Inc.
Warner Communications
Created in 1969
Time Warner Inc.
Turner Broadcasting System
Name changed to AOL Time Warner
Time Warner Cable spun off
TimeWarner
Other deals and attempts among media and telecom companies
Walt Disney Co. buys Capital Cities/ABC Inc.
News Corp buys 34% stake in DirecTV
Comcast drops its bid for Walt Disney Co.
Comcast completes purchase of NBCUniversal
21st Century Fox withdraws a bid for Time Warner

Source: staff and news reports

THE WALL STREET JOURNAL.

Figure 1 – AT&T and Time Warner merger history

Critics were concerned that the merger would create incentives to exercise market power to thwart competition in content production and distribution markets and hurt emerging OTT competitors. In particular, they worried post-merger AT&T would charge above-market rates to competing distributors for the distribution of its own content, which would include Time Warner's highly-sought programming, harming smaller competitors who could not afford these fees (Public Knowledge, 2016; Steinbaum & Hwang, 2017). Absent net neutrality regulations, the merged entity could prioritize its own content by throttling competitors' content flowing through both its wired and wireless networks. Indeed, the company would have an extensive stamp on the content available to large segments of the US population, including prominent news sources like CNN, with a sizeable impact on civic knowledge and discourse (Steinbaum & Hwang, 2017).

Moreover, with significant debt leftover from its DirecTV merger, AT&T was going to incur a $40 billion debt, resulting in a combined debt of more than $175 billion, which signaled consumer price hikes (Buckley, 2016; Picker, 2016). The inclusion of premium Time Warner content in cable subscriptions would only compound the rising costs (Birkinbine, 2017). Since Americans pay 50% more for fixed and wireless broadband access than consumers in other developed countries and have fewer ISP choices (The Economist, 2016), critics were concerned the merger would only entrench the digital divide, particularly in harder-to-reach and low-income areas (Callahan, 2017).

The merger would also yield the third largest domestic company in the US, acquiring even more power and lobbying reach (The Economist, 2016). This would ensure the combined entity's interests are better represented in the political realm, and its activities more resilient to regulatory oversight and checks otherwise provided by market competition. AT&T flexed this power, deploying an army of one hundred lobbyists to gain political approval for its merger with Time Warner (Kang & Lipton, 2016). In 2016, its lobbyists successfully defeated municipal broadband expansion efforts in Tennessee (Brodkin, 2016) and promoted other corporate interests, including opposing net neutrality (Lipton et al., 2016).

These issues took center stage as the merger was evaluated, first by policymakers in a Senate Judiciary Committee hearing and then by the courts during the antitrust case and its appeal. Importantly, the scope of the discussion over the merger's competitive impacts significantly narrowed as the debate became a lawsuit, revealing the limitations of antitrust in addressing non-economic concerns associated with media and communications mergers. However, equally importantly, the discussions in both arenas, political and legal, reveal how competition itself becomes a value-laden term in competition policy discourse that both exposes and legitimates media and market power.

Mapping Competitive Impact

On December 7, 2016, the Senate Judiciary Committee held a hearing on "Examining the Competitive Impact of the AT&T-Time Warner Transaction" in Washington, D.C. The hearing came a month after the 2016 federal election, as the media grappled with its own widely perceived failure in covering the election race, and as accusations mounted of foreign propaganda efforts via prominent digital platforms, particularly Facebook, to manipulate the election outcome. As a candidate and later president, Donald Trump lashed out against the merger, animated by his antipathy toward mainstream media coverage of his campaign, including by CNN. Consequently, Time Warner's ownership of CNN and the danger of increased concentration in media markets triggered additional political scrutiny.

The bipartisan hearing was convened by Senators Charles Grassley (R-IA), chair of the Judiciary Committee, Mike Lee (R-UT), the chair of the Antitrust Subcommittee, Patrick Leahy (D-VT), and Amy Klobuchar (D-MN). Grassley framed the purpose of the hearing as investigating "possible impacts of the merger on the market and consumers" (Grassley, 2016, p. 1). Leahy argued that the hearing continued a key conversation about "looming concentration in industries that create and distribute the media that millions of Americans consume every day" (Leahy, 2016, p. 1). Fragmented media consumption paired with growing concentration in the production and dissemination of information required the preservation of "affordable access to a diversity of views and ideas" (Leahy, 2016, p. 1). The stakes extended beyond economic effects of the transaction to the merger's potential public interest implications.

The merger review hearing turned on three political questions. The first one asked whether the state should—or legitimately could—intervene in a rapidly changing industry. The second concerned the efficacy of the tools at its disposal to promote competition in converging digital platform markets. The third concerned the robustness of those tools to advance non-economic goals, like diversity of views. Five witnesses testified: Randall Stephenson, CEO of AT&T; Jeffrey Bewkes, CEO of Time Warner; Mark Cuban, sports mogul and chair of media company AXS TV; Daphna Ziman, president of Cinémoi, an independent TV network; and Gene Kimmelman of Public Knowledge, an advocacy think tank focused on intellectual property, speech, and antitrust in digital markets. These stakeholders not only offered diverging accounts of competitive dynamics in the relevant markets, but also drew attention to different consequences of these dynamics for competition, data, and information access. I examine these themes in turn below.

The rhetoric of dynamic markets

Stephenson, Bewkes, and Cuban pitched the merger as a response to a rapidly changing media industry. The twin developments of shifting media consumption patterns and the rise to prominence of digital platforms threatened existing TV markets: "[t]he idea that TV is the dominant content delivery mechanism no longer is valid. Instead, we fill our time by consuming content from Facebook, Instagram, Snapchat … Facebook is without question in … the dominant position for content delivery" (Cuban, 2016b, pp. 1-2). The market had changed—nascent businesses like Netflix, Hulu, and Amazon had become established players (Bewkes, 2016a, p. 6). Netflix's popularity has grown, with its subscribers matching those of AT&T and Comcast combined, while social media companies like Facebook and Twitter hosted live events like presidential debates and expanded into original content production. The witnesses stressed that Amazon, Apple, Facebook, Google, and Microsoft forged dominance in the sector through strategic acquisitions of apps and content. Moreover, by leveraging their reserves of big data and optimizing their personalization algorithms, these companies exercised more control over how to reach users and present content to them. Any antitrust scrutiny would have to account for the evolving marketplace "in which traditional pay television services are competing for viewers, subscribers, and advertisers with other forms of video content" (Bewkes, 2016a, p. 2), including subscription-based OTT platforms like Netflix and ad-supported platforms like YouTube and Facebook. The message was: within the relevant market innovation is rapid and competition cutthroat.

The witnesses stressed that AT&T's merger with Time Warner would yield a smaller company than its tech competitors (Stephenson, 2016b) and bring much needed competition to the sector. Bewkes emphasized that the merger would "accelerate the development and delivery of the next generation of video services" (Bewkes, 2016b, p. 1), while Cuban argued that owning more content would enable AT&T to experiment with interactive content delivery (Cuban, 2016a). Consumers would see more control and choice, while platforms would face more competition. However, actual examples of content experiments were meager and nothing new for content consumers: more mobile video options for subscribers via AT&T's mobile network and interactive video with the ability to share clips with others. The witnesses argued these experiments would facilitate AT&T's expansion in digital advertising markets, shifting the costs of this mobile content to advertisers and lowering prices for consumers (Stephenson, 2016a, pp. 3-4).

This evolving video market also included traditional cable and satellite TV providers—Multichannel Video Programming Distributors (MVPDs)—which included

AT&T's struggling DirecTV. Here, too, the merger would introduce competition and "threaten cable's entrenched and still dominant market position" (Stephenson, 2016a, p. 3). However, AT&T's primary obstacle to achieving this goal was costly negotiation with third-party content owners, particularly in a rapidly transforming online video delivery marketplace. Innovative market players offered content across multiple devices that was always accessible, personalized, and interactive. In this climate, as AT&T representatives argued, acquiring content to experiment with delivery formats was fraught. As consumers spent more time consuming content from platforms, the changing demand for content intensified "bargaining friction between content providers and distributors [as] AT&T and Time Warner … have sought to bring innovations to market" (McKone & Vest, 2017, p. 3). This friction undermined AT&T's ability to experiment in the digital video marketplace, for instance by creating "a greater market for video and online content focused on rural interests" and competition in rural content production and delivery (Stephenson, 2016b, p. 2). Moreover, by acquiring Time Warner and optimizing its content for mobile video, AT&T promised to singlehandedly drive "demand for, and enhancing the revenue to support, deeper and faster 5G deployment" (Stephenson, 2016b, p. 10) to close the digital divide.

Thus, the rationale for the merger was to gain a foothold in a competitive and evolving marketplace, where content creators enter distribution (e.g. CBS All Access), while distributors create content (e.g. Netflix) (Stephenson, 2016b). Eliding the distinction between content distributors like Netflix and content *and* infrastructure providers like Comcast and AT&T, the merging parties pitched market uncertainty against experimentation with content, contesting cable dominance in broadband and MVPD markets, faster 5G rollout, and consumer benefits—all to legitimate vertical integration between programming and distribution. Competition was impossible to meet without market consolidation. As Mark Cuban put it, one thing was clear: "when an industry is continuously innovating and has a history of punishing incumbents … as the technology industry has, [it] is best served with minimal government intrusion" (Cuban, 2016a, p. 2).

The witnesses' rhetoric of market dynamism, rehearsing the Silicon Valley ethos of inevitable technological disruption (Levina & Hasinoff, 2017), naturalized vertical integration between ISPs and content creators. Concurrently, the discourse of rapid market change strategically played into lawmakers' concerns about potentially erroneous antitrust intervention. Senator Grassley openly wondered "whether current merger analysis methods are 'well suited to tackle' this transaction [given] the competitive effects of mergers between different complex, interconnected platforms" (Grassley, 2016, p. 1). The discourse of technological innovation through into question traditional tools for governing markets: "[w]ith tech giants … changing the way consumers access content, it's legitimate to ask whether 'what looks straightforwardly anti-competitive in the old industrial-merger models might not be so simple in the merger of modern media platforms'" (Grassley, 2016, pp. 1-2). The statement reveals how narratives about market dynamism and innovation, against a backdrop of regulatory restraint, delimit the state's role in adjudicating markets, particularly ones prone to failure.

Competitors and competition

Promises of innumerable if insubstantial benefits notwithstanding, the proposal to combine a wireless provider with a national footprint and a media giant met with both skepticism and pushback. These criticisms reveal the complexity underlying antitrust's "protect competition, not competitors" maxim. As the merging parties emphasized the merger's efficiencies and the unpredictability of competition within the digital video market to justify vertical integration, opponents warned that allowing the merger to go through would protect a privileged and powerful incumbent from competition.

Contrary to existing antitrust's generally lenient attitude toward vertical mergers and consequent lack of regulatory interference (Crawford, 2013; Khan, 2017a), witnesses argued that the transaction would fundamentally affect competitive dynamics within the online video marketplace. As the president of the independent TV network Cinémoi Daphna Ziman testified, post-merger AT&T would acquire incentives to discriminate against independent networks, which compete with Time Warner's Turner Classic Movies for carriage by MVPDs and for advertising. Pre-merger, Time Warner networks had incentives to keep improving their programming to avoid losing viewers to independents. Post-merger, "AT&T's best recourse is not more investment in Time Warner channels [but] to eliminate the competitive threat by restricting an independent network's access to viewers" (Ziman, 2016a, p. 2). The merger would give AT&T leverage in program carriage negotiations since it would own Time Warner's prestige content and no longer would be as reliant on other content producers. Thus, the telecom giant would acquire incentives to charge these content producers above-market license fees to carry their content. The problem would also extend to the distribution market, where AT&T would gain from increasing prices on Time Warner's "must have" content in negotiating with MVPDs to capture these competitors' subscribers. Since AT&T has a national footprint in the wireless and distribution markets (via DirecTV), these incentives would scale higher than previous vertical content-conduit mergers like Comcast-NBCU. Any losses in subscribers incurred by Time Warner through such tactics would be offset by subscription price hikes or the elimination of independent channels from the programming budget. This argument about the merged entity's accrued bargaining leverage would form the centerpiece of the government's lawsuit against the merger.

Moreover, as Gene Kimmelman of Public Knowledge testified, despite larger players like Netflix the online video marketplace was still nascent. Competition within it drove down prices, ensured growing choice in content offerings, and helped liberate consumers from traditional and increasingly expensive cable bundles. The merger would not only have an immediate impact on this marketplace, but also would create pressure for giants like CBS, Verizon, and 21st Century Fox to vertically integrate, strengthening MVPDs dominant position vis-à-vis emergent digital content platforms. Thus, the merger presented a stark choice between allowing consolidation for bigger players to compete among one other—protecting incumbent competitors—and ensuring smaller players can enter the market: "at some point the government must take steps to promote competition and put a stop to a consolidation arms race, which can lead only to a marketplace with fewer choices and higher prices for consumers" (Kimmelman, 2016b, p. 11). Preserving the competitive process, the hallmark of antitrust, required a longer-run perspective attuned to the impact of non-intervention, namely allowing the merger to go through, on the future behavior of incumbent market players. Despite the merging parties' strategic rhetoric of market dynamism, narrow review of this merger could destroy nascent competition in these markets by normalizing consolidation as a competitive strategy among larger players.

"Traditional Merger Analysis"?

Either in an apparent recognition of the scope of the issues the merger presented or in deference to the merging parties, the Judiciary Committee engaged in a foundational debate about antitrust review. Senators asked the witnesses how the DOJ should evaluate the evolving media market and whether "traditional merger analysis methods” (Ziman, 2016b, p. 4) can determine whether the merger was responding to and creating new competition or destroying it.

The merging parties tellingly argued that regulators should apply traditional antitrust principles, which viewed vertical mergers as “producing pro-competitive efficiencies” (Bewkes, 2016a, p. 1), while not posing anticompetitive threats. Since AT&T was not acquiring a competitor, but a programming supplier from a competitive market, the merged entity would not harm competition in production (i.e. studio or network) or distribution (i.e. wireless, broadband, or MVPD) markets. Instead, the merger would introduce competition to cable, content production, and pay TV markets. Contrary to the merger’s opponents, the witnesses argued AT&T had no incentives to anticompetitively withhold Time Warner’s content, but to maximize its distribution (Stephenson, 2016a).

Although the merger was positioned as a response to competition from OTT platforms, it would also consolidate two business models that could harm that competition. Consequently, a question loomed over the hearing about the legitimacy of antitrust intervention to prevent such consolidation. Proponents of the merger, like Senator John Cornyn (TX-R), reframed this question by asking whether merger opponents’ rhetoric of “bigness as badness” represented a misguided departure from traditional competition law, which prioritized effects on price and consumers over market structure. Bewkes picked up the cue and stressed that “[p]unishing companies just because they are big would cripple innovation, create enormous uncertainty, and ultimately threaten to punish successful American companies who are competing on a global stage” (Bewkes, 2016a, pp. 7-8). Traditional antitrust guaranteed consistency and predictability in constantly evolving media markets (Stephenson, 2016b). Thus, the merging parties endorsed a narrow antitrust review under the banner of adaptation and innovation in a competitive, evolving market. Invoking economies of scale and global competition as hallmarks of media markets, Stephenson and Bewkes naturalized growing firm size, while assuring that "[m]arket realities refute any concerns about anticompetitive effects" (McKone & Vest, 2017, p. 7).

Opponents of the merger argued for a careful, thorough antitrust review, claiming the merging parties attempted to "disguise the competitive harms of this transaction" (Ziman, 2016b, p. 4). They warned that AT&T could zero-rate Time Warner content, namely exempt it from its data caps and effectively impede competing content producers' access to its streaming platform subscribers (Ziman, 2016b). Similarly, the merger would also create incentives for AT&T to throttle competitors' content—a practice banned under the FCC's 2015 Open Internet Order (Kimmelman, 2016b). However, if these regulations were repealed, as the Republican FCC majority planned to do (Barwick, 2017), the merger's harms would be exacerbated. Traditional antitrust methods could detect these anticompetitive harms, but enforcers had to be willing to use them and consider the merger's impact on emergent business models. They also needed to assess whether the merger would increase the likelihood of sectoral consolidation and "further normalize and entrench vertical integration between the most powerful content distributors and programmers" (Kimmelman, 2016a, p. 9).

Ultimately, the witnesses offered strikingly different expectations of how traditional antitrust methods should be applied. The merging parties stressed that modern antitrust viewed vertical integration as pro-competitive, with decades of precedent on their side. Opponents disagreed; the merger would establish vertical integration between content and conduit as the market norm and the competitive harms would be immediate and compounded over time.

Beyond economics: a regulatory gap

Competition law, particularly in media markets, intersects with democratic politics by allocating the distribution of economic and communicative power (Baker, 2007). Opponents' concerns about the merger extended to harms in the realm of the public sphere, which elude "the economic-focused lens of modern antitrust" (Kimmelman, 2016b, p. 2). For instance, by increasing AT&T's ability to refuse to distribute competitors' content via leverage in carriage negotiations, the merger "threatens the viability of independent voices" (Ziman, 2016a, p. 2). A subsequent letter to then-presidential candidates Clinton and Trump from a coalition of advocacy organizations opposing the merger cautioned that the merger would further diminish the growing lack of news diversity and quality in civic discourse, enclosing the open internet, hurting the economy, and raising prices. By increasing their market size, the two firms would concentrate lobbying and therefore political power. The vertical integration of content distribution and production, including notable news outlets like CNN, created perverse incentives to manipulate information flows to supplement the merged entity's bottom line (Greenlining et al., 2016).

The policy mechanism to address mergers' non-economic harms was the FCC's public interest review process, which the merging parties sought to evade. FCC's jurisdiction over the merger review hinged on the transfer of Time Warner's broadcast station in Atlanta, which the company planned to sell prior to completing the transaction (Harwell et al., 2016). Ziman stressed that, absent FCC oversight, the DOJ "has an obligation to pay special attention to how this merger will impact the ability of independent programmers to compete and for diverse voices to survive" (Ziman, 2016b, p. 1).

FCC oversight related to another dimension of the merger, namely regulatorily murky issues of data and privacy. AT&T and Time Warner pitched combining AT&T's consumer data with Time Warner's data and advertising inventory as facilitating the merged company's entry into digital advertising, not only benefiting consumers, but also contesting Facebook and Google's dominance in the digital advertising market. On the one hand, data-related merger concerns were economic. Opponents argued that AT&T's access to Time Warner's consumer data would provide the merged entity with significant competitive advantages over non-vertically integrated competitors (Kimmelman, 2016a). Although such competitive effects of data ownership are increasingly well established (Katz, 2019; Stucke & Grunes, 2016; Tucker, 2019), regulators have been slower to address them with competition law (Just, 2018).

On the other hand, this data would facilitate more effective targeted advertising and user tracking across different devices and networks. AT&T acquiring Time Warner's data would provide a comprehensive window onto users' internet use and viewing habits, while reducing their control over how their personal information is used by the merged entity. Indeed, AT&T's privacy record offered a bleak forecast. For instance, the Snowden disclosures revealed that the company collaborated closely with the NSA, surveilling domestic and international communications (Angwin et al., 2015; Birkinbine, 2017). In an initiative known as Project Hemisphere, in a clear violation of public trust AT&T privately reached agreements with various local and federal law enforcement agencies to share its subscribers' metadata, charging them between $100,000 to $1 million a year for access (Lipp, 2016). In 2015, FCC imposed a $25mil fine on AT&T—the largest in the agency's history—for consumer privacy violations (Kimmelman, 2016a, p. 10).

The FCC's privacy rules, under the 2015 Open Internet Order, provided limited protection. However, the new FCC majority planned to repeal these rules, of which AT&T

was one of the most vocal opponents. With AT&T owning over 75% of US landline services and having the second largest share of the country's wireless infrastructure, its potential surveillance reach was extensive (Birkinbine, 2017; Steinbaum & Hwang, 2017). The merger with Time Warner would increase its share of wireline and wireless internet subscribers only extending that reach. As Kimmelman emphasized, access to and the ability to monetize consumer data by selling advertising against Time Warner's content provided a key rationale for the merger. Absent FCC oversight, it was incumbent upon antitrust regulators to examine the merger's privacy and data dimensions, particularly their effects on consumers and in advertising markets (Kimmelman, 2016b).

United States of America v. Vertical Integration

In 2017, after the hearings, Time Warner sold off its only broadcasting station and the FCC stated it would not conduct a public interest review of the merger. Later that year, the FCC began its proceedings to repeal the 2015 Open Internet Order. These developments ensured that an antitrust intervention became the only policy tool to address the public interest concerns around the proposed merger, while revealing "a troubling disconnect between the scope of contemporary regulatory authority and the structure and dynamics of the contemporary media ecosystem" (Napoli & Dwyer, 2018, p. 10).

On November 20, 2017, and not without controversy given Trump's public criticism of the merger, the DOJ filed a lawsuit against the merger, citing likely price increases in cable and satellite subscriptions and anticompetitive effects on OTT platforms. These harms, the government argued, were compounded by AT&T's reach, which exceeded those posed by the Comcast-NBCU merger the DOJ approved a decade earlier (United States v. AT&T, 2018d). David McAtee, AT&T's General Counsel, stated that the lawsuit represented “a radical and inexplicable departure from decades of antitrust precedent” (Kang & de la Merced, 2017).

An examination of the amicus briefs as well as the trial documents submitted by the plaintiff and the defendants reveals both the malleability of market competition in legal contexts and the radically narrow application of antitrust law. Within the confines of the antitrust arena, the stakeholders’ arguments about the merger necessarily excluded public interest concerns, exposing the political role of competition law in merger review. Concurrently, the litigants’ vastly divergent testimonies, including economic analyses, undermine neoliberal accounts of technocratic and rationalized antitrust (Davies, 2014). As Judge Leon who presided over the case phrased it in his opinion, “If there ever were an antitrust case where the parties had a dramatically different assessment of the current state of the relevant market and a fundamentally different vision of its future development, this is the one” ("United States v. AT&T," 2018, p. 1).

Ultimately, these documents reveal that the rhetoric of protecting competition and not competitors masks how American antitrust law shapes market competition in the media sector, particularly absent regulatory oversight. I focus on them here because these documents play an important role in antitrust cases, which increasingly rely on technical evidence and complex economic analysis. Since judges may lack expertise in evaluating such arguments, courts often rely “on amicus briefs and third-party experts for the economic reasoning justifying antitrust rules” (Khan, 2020, p. 1679).

Harming competition

With the Republican FCC officially dismantling net neutrality regulations in the background, the conservative DOJ skirted the argument about how the vertical integration of the world's largest telecom and media giant creates incentives to anticompetitively throttle competing content—something net neutrality was designed to prevent. Even though these arguments played a pivotal role in securing conditions imposed on Comcast-NBCU, the last such vertical media merger case (Crawford, 2013), the government focused on the merger's effects on the dynamics of programming negotiations.

The DOJ made the case that, within the entire video distribution market, the AT&T-Time Warner merger would harm competition by increasing competitors' costs, foreclosing on their access to Time Warner's "must have" programming content, and hurting innovation. The government argued, like the merger's opponents did during the judiciary hearing, that the merger would change incentives around licensing Time Warner content. Pre-merger, if Time Warner tried to charge MVPDs and OTT distributors above market rates for its content, it would lose distribution. However, post-merger, the incentive to maximize the whole company's profits would override Time Warner's need to maximize distribution: by raising prices on and withholding this content from competing distributors, AT&T would gain a significant number of their subscribers—switching to AT&T would be the only way they could now access this content (United States v. AT&T, 2018f). This foreclosure, in turn, would effectively stifle competition from emerging OTTs, which needed to expand their subscriber base to maintain a foothold in the market (United States v. AT&T, 2018d). Amicus briefs submitted by Cinémoi and by the American Cable Association (ACA), which represents smaller ISPs, seconded the government's account. The merger would hurt smaller networks that could not afford the post-merger carriage fees and smaller MVPDs, which would lose subscribers if they lost attractive content (United States v. AT&T, 2018b, 2018c).

While the merger would hurt smaller competitors, it would do so at the expense of competition in the video market, which kept prices in check and innovation going. Consequently, the government argued the merger violated Section 7 of the Clayton Act by substantially harming competition. Invoking the landmark Warren Era antitrust case, *United States v. Philadelphia Nat'l Bank* (1963), which codified a strong interpretation of antitrust law, the DOJ argued that the Clayton Act meant to protect small businesses, thwart concentration, and "arrest anticompetitive tendencies in their 'incipiency'" (United States v. AT&T, 2018f; "United States v. Philadelphia Nat'l Bank," 1963, p. 362).

Part of the challenge in the government's case rested in persuading a conservative court that vertical mergers would fall within the bounds of Section 7 and thus pose antitrust concerns. Amici like antitrust attorney Joseph M. Alioto argued for a robust antitrust approach, reminding the court that competition law meant to protect the freedom of every business to engage in competition from foreclosure in "one sector of the economy because certain … groups believe that such foreclosure might promote greater competition in a more important sector of the economy" (United States v. AT&T, 2018a, p. 17). In short, by allowing the merger, the court would privilege a large competitor over smaller ones, and thus protect a competitor over competition. The stakes were significant since the court's verdict would "not only impact the media industry, but [also] have a lasting impact on future vertical acquisitions. … the legitimacy of challenges to vertical mergers is also on trial" (United States v. AT&T, 2018a, p. 1).

The DOJ's case against the merger contested the accepted wisdom that vertical integration poses no competitive harms (e.g. Yoo, 2002), highlighting how a vertically integrated business model would drastically alter the competitive processes within the video market, particularly for emergent competitors. Since these competitors, namely OTT platforms, were introducing competition to the video market and threatening incumbents like AT&T's DirecTV, the line between protecting the competitive process and competitors became murky.

Protecting competition and capitalizing on data

While the government argued the merger would thwart competition from OTTs, the defendants positioned it as a legitimate response to competition from OTTs and digital platforms, which "irreversibly reshaped the landscape for the creation and delivery of television content" (United States v. AT&T, 2018e, p. 5). Since Time Warner lacked basic consumer data—including "demographic characteristics, interests, and viewing preferences ... even the names, e-mails, or IP (Internet protocol) addresses of its viewers" (United States v. AT&T, 2018e, p. 20)—it could not compete with platforms like Google and Facebook to attract advertising to subsidize its subscription fees and content production costs, aggravated by cord-cutting. AT&T's rich troves of user data, collected through "its DIRECTV set-top box, its broadband infrastructure, and its nationwide cellular network" (United States v. AT&T, 2018e, p. 8), would enable Time Warner to do so. Additionally, AT&T's distribution channels would provide Time Warner with direct consumer access. Like digital platforms, the media giant would be able to deliver content to users without an intermediary and costly negotiations for distribution deals. Meanwhile, for AT&T, acquiring content and experimenting with mobile video delivery would drive adoption of its wireless services: "the future of video lies in its wireless network, and the future of its wireless network lies in video" (United States v. AT&T, 2018e, p. 21). By combining distribution infrastructure, video, and data, the defendants argued, the merger represented the "industry's only foreseeable opportunity to create a video advertising platform with scale adequate to give advertisers a viable alternative to the duopoly of Google and Facebook" (United States v. AT&T, 2018e, p. 24).

The merging parties' defense stressed future competition in the changing video marketplace instead of the normalization of vertical integration in programming and distribution that opponents feared. They defended competition through consolidation, while the government and amici argued that such consolidation thwarts emerging OTTs, independent networks, and smaller MVPDs. The defendants' arguments ignored the fact that digital platforms' access to consumers was not entirely direct—they owned no distribution infrastructure, like AT&T with its national wireless network. By claiming Time Warner lacked such access, they downplayed Time Warner's successful experiment with HBO Go, an OTT platform service that offers consumers a subscription to HBO's premium content without a cable subscription. By positioning vertical integration between programming and distribution as the only alternative to a duopoly in digital advertising, they implicitly wrote off antitrust intervention in and regulation of the sector.

In making their case, the defendants emphasized that the purpose of antitrust was to "protect *competition*, not competitors" (United States v. AT&T, 2018e, p. 6, emphasis in original), thereby strategically diverting focus from potential harms to competitors. They argued that vertical integration, as recognized by the existing neoliberal antitrust, creates efficiencies which force competitors "to respond with competitive initiatives of their own, all to the benefit of consumers" (United States v. AT&T, 2018e, p. 6). Thus, blocking the merger would rob digital platforms and other MVPDs of competition. Moreover, they stressed that such mergers only pose competitive concerns when they impact competitors' ability to constrain their pricing power. Instead, by collecting even more user data—a concern outside the scope of antitrust—the merged entity promised to make advertising scarcer, more relevant, and more efficient to reduce consumer prices—something modern antitrust valued (Davies, 2014; Hovenkamp, 2005; Khan & Vaheesan, 2017).

Protecting competitors

On June 12, 2018, the D.C. District Court ruled in favor of the defendants, acknowledging the complexity in evaluating vertical mergers due to "the lack of modern judicial precedent involving vertical merger challenges - a dearth of authority that is unsurprising, considering that the Antitrust Division apparently has not tried a vertical merger case to decision in four decades!" ("United States v. AT&T," 2018, p. 58). Thus, implicitly, the court realized the impact the verdict would have on shaping future antitrust enforcement of vertical mergers. Judge Richard Leon laid out the rationale behind the decision in a 172-page court opinion, which betrays the politics underlying the rhetoric of protecting competition over competitors in the context of media merger review.

The court acknowledged that OTT platforms like Netflix introduced competition into the digital video marketplace, resulting in cord-cutting, which challenged traditional MVPDs and programmers like the defendants. The judge agreed with the defendants that the merger represented a legitimate response to growing competition, particularly since OTTs and digital platforms' rich user data enabled efficient and effective content targeting that Time Warner could not match. He took a permissive stance toward the merger's inevitable impact on data collection, pointing out that Time Warner's user data needed to be "sufficiently granular" ("United States v. AT&T," 2018, p. 33) to compete for digital advertising. By combining the companies' resources, particularly data, the merger would allow Time Warner to better target its viewers and attract more advertising dollars.

The combined entity would introduce “a marketplace of data-informed advertising inventory” ("United States v. AT&T," 2018, p. 39), which would enable experiments with personalized mobile content delivery. Drawing from defendant testimony, examples of these experiments included gathering and editing “individual news clips from CNN throughout the day - all tailored to a given user's interests - and deliver[ing] that news to the wireless customer for viewing on his or her fifteen-minute break” ("United States v. AT&T," 2018, p. 38). The court accepted that such clips on users’ mobile phones represented a competitive substitute for long-form, curated OTT programming and that such experiments enable the merged entity to compete with data-driven companies, increase ad revenue, subsidize programming, and reduce prices for consumers. Ultimately, the court embraced a Chicago School approach to vertical integration, invoking “the recognition among academics, courts, and antitrust enforcement authorities alike that ‘many vertical mergers create vertical integration efficiencies between purchasers and sellers’” ("United States v. AT&T," 2018, p. 57).

Under the banner of protecting competition, the judge rejected the competitors’ testimony which contested the defendants’ account of the merger’s impact on the video industry, stating “there is a threat that such testimony reflects self-interest rather than genuine concerns about harm to competition” ("United States v. AT&T," 2018, p. 92). Dismissing these witnesses’ concerns as “speculative, based on unproven assumptions, or unsupported” ("United States v. AT&T," 2018, p. 99), the judge accepted defense witnesses’ statements that the industry is the most competitive it has been in the last 30 years, without factual proof. The court opinion deferred to the defendants, erring on the side of incumbents over smaller competitors in the video market.

To meet the legal threshold set by Section 7 of the Clayton Act, the government needed to demonstrate the merger’s probable effects on competition. Quoting Randall

Stephenson, the court argued that the merger was “a vision deal” ("United States v. AT&T," 2018, p. 155), pairing data with advertising to create value, and rejected the government’s arguments that it would create anticompetitive harms in programming and distribution markets, particularly for emerging OTTs. The judge justified the decision on the basis of industry testimony about “dramatic changes that are transforming how consumers view video content” ("United States v. AT&T," 2018, p. 65) accepted at face value. Although AT&T acknowledged the merger would enable it to withhold Time Warner content, the court argued that “evidence indicating defendants’ recognition that it could be possible to act in accordance with the Government’s theories of harm is a far cry from evidence that the merged company is likely to do so” ("United States v. AT&T," 2018, p. 90). The judge also discarded the centerpiece of the government’s case, namely that withholding Time Warner content from rival distributors would benefit the merged entity’s bottom line overall due to gains in competitors’ subscribers. He misapprehended that a company (e.g. AT&T-Time Warner) aims to maximize its total revenue over that of a particular division (e.g. HBO)—the principle known as corporate maximization—which creates incentives to withhold that content.

The court placed the interests of incumbents over competition in the video marketplace not just in the rationale for its decision, but also in setting an accelerated timeline for the case to conclude prior to the merger deal expiring to save AT&T a $500 million breakup fee ("United States v. AT&T," 2018, pp. 3-4). In his ruling, Judge Leon demanded that the government not stay the merger to appeal his decision; such a stay “would undermine the faith in our system of justice of not only the defendants, but their millions of shareholders and the business community at large” ("United States v. AT&T," 2018, p. 172). Perhaps more tellingly, the court approved the merger without any behavioral conditions.

"Errors of economics, law, and logic"

The court decision, perceived as a blow to Trump's DOJ, and its future impact on media markets were hotly debated in policy circles. In October 2018, the DOJ appealed the ruling, citing the court's rejection of the economics of bargaining in programming negotiations, including Time Warner foregoing profits in those negotiations to benefit the merged entity's bottom line: "Corporate-wide profit maximization is an established principle of corporate and antitrust law, but the court rejected it on the basis of self-serving testimony from defendants' executives" (United States v. AT&T, 2019d, p. 31). The government argued that, through errors, inconsistencies, and undue deference to defendant testimony, the court essentially protected competitors and not competition. Competition from OTTs challenged traditional pay-TV business models and cable bundles—by ruling in AT&T-Time Warner's favor, the court intervened in that competitive process on behalf of two incumbents threatened by that competition.

Thirty-seven prominent economists, legal scholars, and former regulators filed an amicus brief in support of the court's decision. All neoliberal communications policy stalwarts, they included Gerald R. Faulhaber, the Bush-era FCC's chief economist who oversaw the passage of the AOL-Time Warner merger; Harold Furchtgott-Roth, who helped enact the 1996 Telecom Act and later presided over a wave of a deregulation as FCC commissioner; and Christopher Yoo, a legal scholar fiercely opposed to net neutrality regulation and a proponent of vertical integration in media markets (Yoo, 2002). For them, Judge Leon's decision vindicated the Chicago School leniency toward vertical mergers. As legal commentator James B. Stewart put it, the opinion "essentially embraces the [Robert] Bork approach" to vertical integration (Stewart, 2018, para. 17). The amici agreed the merger offered multiple, credible efficiencies and the government failed to persuasively demonstrate any anticompetitive effects (United States v. AT&T, 2019a).

However, the remainder of the amicus briefs[6] drew attention to the politics pervading the court's decision and inconsistencies within it as basis for overturning the ruling. In a pointed amicus brief, the prominent advocacy organizations American Antitrust Institute, the Consumers Union, and Public Knowledge decried "the court's rejection of basic economic and legal principles, skewed treatment of industry evidence, and undue demands on the government's economic expert … [T]he court seems to have readily accepted the defendants' version of the evidence and rejected the government's" (United States v. AT&T, 2019c, pp. 6-7). For instance, the amici criticized the court's blanket acceptance of defendants' testimony that the merged entity would not raise prices in the future as proof that prices will not rise. They also questioned the court's rejection of the government's argument that the merged entity would acquire incentives to withhold Time Warner content to benefit its overall bottom line: "[t]he reason that antitrust operates under an irrebuttable presumption that entities under the same corporate umbrella will maximize corporatewide profits is not simply that such an assumption is realistic" (United States v. AT&T, 2019c, p. 9), but because it is inevitable.

The amici criticized the court for not taking seriously the anticompetitive dangers of vertical integration: "Antitrust enforcement and understanding have progressed considerably since the days of Robert Bork's Antitrust Paradox" (United States v. AT&T, 2019c, p. 11). Their objections were reiterated in another brief authored by 27 prominent post-Chicago antitrust scholars skeptical of the Chicago School approach, including Herbert Hovenkamp, one of the most influential antitrust law scholars; Jonathan B. Baker, law professor at American University and former chief economist at the Obama-

[6] Excluding those that took no stance, e.g., FCC's amicus clarifying its approach to merger review.

era FCC; and Fiona Scott-Morton, Yale economics professor who served at the DOJ in 2011-2012. They argued the court's decision sets a dangerous precedent for the entire antitrust enterprise: "the district court made significant errors of economics, law, and logic [and] neither these errors nor certain extreme positions advocated by the defendants … should be enshrined into law" (United States v. AT&T, 2019b, p. 1). Although the DOJ adopted a restrained stance on antitrust, arguing that most mergers either had no impact on competition or actually increased it, it also stressed that

> [t]he outcome of this appeal will shape the future of the media and telecommunications industries for years to come by setting the standard for determining whether industry participants will be permitted to merge into vertically integrated firms that control valuable programming content as well as the means of distributing that content to consumers. (United States v. AT&T, 2019d, p. 1)

The appeal represented not only an opportunity to correct a flawed decision, but also to forestall future vertical consolidation in the media sector, particularly absent net neutrality regulations that restricted anticompetitive conduct among distributors that owned content.

On February 26, 2019, the District Court of Appeals upheld Judge Leon's original decision. Its opinion conceded that "the district court made some problematic statements, which the government identifies, and this court cannot ignore. And in the probabilistic Section 7 world, uncertainty exists about the future real-world impact of the proposed merger on Turner Broadcasting's post-merger leverage" ("United States v. AT&T," 2019, p. 17). While the merger's competitive impact remained unclear, the court argued the government failed to provide sufficient evidence to support its objections to the merger and to contest the defendants' testimony. The court also addressed the issue of the lack of a proper legal standard for reviewing vertical mergers. The judges acknowledged that there "is a dearth of modern judicial precedent on vertical mergers and a multiplicity of contemporary viewpoints about how they might optimally be adjudicated and enforced" ("United States v. AT&T," 2019, p. 15). They agreed that vertical mergers could create harms beyond higher prices, including negatively impacting innovation. However, since the government's case rested on price-related harms, non-price effects were not evaluated. Likewise, while non-horizontal merger guidelines have not been updated in over 35 years, the court declined to review the legal standards of vertical merger review because neither party challenged their application in the court decision. Contesting the merger on narrow antitrust terms ultimately foreclosed on expanding vertical merger review in court.

Real-World Impact

Many advocates, policymakers, and industry members saw the deal as a blow to media competition, particularly absent net neutrality regulations, which the FCC repealed earlier that year. As INCOMPAS, the internet and competitive networks association, stated: "Without question, a bigger, more powerful AT&T in a world absent net neutrality is a very, very dangerous proposition for consumers and content creators who have thrived during the streaming revolution" (INCOMPAS, 2018). The day after the initial court ruling was announced, Comcast announced a $65 billion offer to buy 21st Century Fox, entering a bidding war with Disney—another acquisition that would be exempted from a public interest review by the FCC since no licenses would be transferred (Lee & Barnes, 2018). As a former DOJ antitrust attorney put it, "The AT&T ruling pretty much eliminated the vertical issue from at least where the world stands now … It's not hard to make the comparison from AT&T buying Time Warner to Comcast buying Fox" (Lee & Barnes, 2018, para. 25).

After the merger was consummated, contrary to the defendants' testimony and the court's unwavering confidence in it, AT&T-Time Warner raised prices and began withholding content from competitors. Already in November 2018, as the appeal was underway, AT&T withheld Time Warner's HBO in its carriage negotiations with rival Dish, resulting in the network's first blackout in its history. Since the DOJ excluded HBO foreclosure from its appeal arguments, the court never addressed the blackout (Eggerton, 2018).

Moreover, in a demonstration of the corporate maximization principle at work, AT&T prevented Time Warner-owned shows from streaming on rival services, including Netflix, to make its content more exclusive. John Stephens, AT&T's CFO, justified the $1.2 billion loss in quarterly revenue by stating that "We made the strategic decision to give HBO Max exclusive streaming rights for top programs ... In the past, we would have sold these externally" (Brodkin, 2020). Meanwhile, AT&T raised the prices for its DirecTV satellite and streaming services for its subscribers (Hiltzik, 2019; Lazarus, 2019).

While the merged entity began to engage in anticompetitive behavior and raise prices almost immediately in the video market—all to the detriment of consumers—it took steps to strengthen its position in another market. Just two weeks after the initial ruling, AT&T acquired AppNexus, one of the largest ad exchange companies in the world, to further position itself as a competitor in the digital advertising market dominated by Google and Facebook (Sutton, 2018). As Hernan Cristerna, the co-head of mergers and acquisitions at JP Morgan, which advised AT&T on the merger, argued, allowing consolidation served as a market-based alternative to other regulatory measures to dealing with tech giants:

> One way to improve competition would be to break up those heavyweights … But until regulators conclude that such action is necessary, the United States needs an approach to merger regulation that protects consumers by supporting transactions that create enterprises capable of standing head-to-head with the tech giants. The decision to allow AT&T to acquire Time Warner is a step in this direction. (Cristerna, 2018).

Thus, the effect of antitrust non-intervention in this merger was not to protect competition over competitors, but to fuel consolidation to offset an oligopoly in one market at the expense of competition in another.

However, such court and industry-dictated market-based regulation raised concerns about growing concentration and social harms that extended beyond the narrow price-related concerns raised during the antitrust case. Gigi Sohn, a prominent media advocate, argued that the ruling enabled greater data collection, targeted advertising, and threats to privacy: "the collection of massive amounts of consumer data for use in targeted advertising … has now been recognized as a kind of public good, enabling, in the judge's view, a more competitive marketplace" (Sohn, 2018, para. 4). Thus, antitrust worked to enable greater data collection amidst increasingly frequent data hacking scandals involving digital platforms.

Conclusion

Media policy scholarship has traditionally focused on ownership policies and efforts made by regulatory agencies like the FCC to address market failure (Crawford, 2013; Freedman, 2008; McChesney, 2013; Napoli, 2001; Streeter, 1996). However, as processes of digitization and convergence make it easier for mergers like AT&T-Time Warner to escape regulatory jurisdiction and public interest oversight, already emaciated by neoliberal politics, competition policy and antitrust enforcement take a more central stage. These are increasingly prominent arenas of struggle for arresting consolidation and corporate power, with stakeholders actively opposing their narrow and permissive scope.

As Holt (2011) observes in her account of consolidation in the US media industry in the 1980s and 90s, competition policy invites foundational questions about structuring the media:

> What constitutes enough concentration or too much market control? How are markets defined and regulated when their boundaries, products, dimensions, and delivery systems are always evolving? … at what point should media consolidation and the concentration of ownership be controlled by the government as opposed to market forces or corporate strategy? … the language of policy resists any clear or consistent answers. More to the point, the answers have been in constant flux, shifting alongside political winds and adjusting to the prevailing interpretations of industrial concentration and market competition. (Holt, 2011, p. 6)

As the AT&T-Time Warner merger case demonstrates, the discourse of antitrust protecting competition over competitors masks the politics underlying competition policy. In particular, this discourse obscures how the confluence of corporate interests and Chicago School influence over competition law protects incumbents and facilitates consolidation in media markets. The lack of judicial precedent on vertical merger enforcement coupled with significant deference to defendants' claims about the purpose of the merger, its impact on the market, and promises of efficiencies, all under the rhetoric of innovation in dynamic markets, reveals how narrow and defanged antitrust law facilitates consolidation in the digital economy.

However, arguing that the merger case constitutes antitrust law applied poorly, as many of the merger's opponents did, tells only half the story. Perhaps more importantly, the case represents antitrust law applied deliberately—to contest a digital advertising oligopoly through non-intervention and therefore by facilitating consolidation to contest that market at the expense of OTT entrants, smaller video competitors, and consumers. Indeed, the defendants posited vertical integration between content and conduit as the solution to dwindling competition in digital platform markets, while implicitly writing off antitrust and regulatory intervention in them. Thus, the AT&T-Time Warner case sheds light on how state (non)intervention—stepping aside to allow the merger, yet actively enshrining the rationale for it as legal precedent—delineates the boundaries of market activity. The process reflects accounts of neoliberal policymaking as *interventionist* to advance the interests of dominant industry players (Davies, 2014). In this case, the court circumscribed a market, namely video programming and distribution, for unrestrained consolidation and attendant potential anticompetitive harms by justifying growing, equally *potential* competition (as the appeals court itself admitted) in the digital advertising market dominated by Google and Facebook. The case, then, serves as a potent reminder that the state is involved in specifying the boundaries of market activity even through non-involvement—a form of market-based regulation.

The case study also extends insights from legal scholarship about the limits of antitrust in advancing public interest goals in traditional media markets (Baker, 2001, 2007; Shelanski, 2006) to digital ones. Here, however, the stakes are arguably higher since digitization and convergence have eroded traditional regulatory oversight, while introducing new concerns like privacy threats posed by growing data collection and the expansion of digital advertising. Competition law has been critiqued for its inability to address ongoing datafication and the march of surveillance capitalism (van Dijck et al., 2018; Zuboff, 2019). However, this case study suggests that, by viewing expanding data collection through the lens of competitive strategy, existing antitrust law may actually legitimate and enable these processes in digital media and advertising markets. Its emphasis on considering merger-specific harms all but ensures that supplemental regulation is required to address these pressing policy concerns.

Although the government took the unprecedented action of contesting the merger in court—a vertical one at that—it did so under narrow antitrust arguments that focused on price effects and did not invite a broader review of vertical merger guidelines. Consequently, despite pleas from advocates active in antitrust circles, the appeals court declined to comment on proper legal standards for evaluating such mergers. Instead, the case and Judge Leon's ruling would propel the DOJ and the FTC to pass the first-ever vertical merger guidelines (Department of Justice & Federal Trade Commission, 2020; Simons, 2019). Indeed, by the time the appeals court delivered its opinion, in early 2019, an antitrust reform movement had already been brewing for several years, drawing fuel from the political ire at tech giants, whose power was increasingly embedded in politics and the economy. The policy conversations to define the scope of this reform, in the face of a significant and contested problem are the subject of the next chapter.

Chapter 3 – The Politics of Antitrust Reform

In 2019, the University of Chicago's Stigler Center held a conference entitled "Digital Platforms, Markets and Democracy: A Path Forward." The annual conference, the third in a series on competition policy, brought together antitrust experts to discuss the findings and recommendations of the Stigler Committee's report on digital platforms—a year-long endeavor by a community of prominent economists, policy experts, industry representatives, and academics. At one panel, on the "Economy and Market Structure," several economists engaged in a highly technocratic, mild-mannered debate about whether platforms should have specific obligations to competitors in the marketplaces they host. When the moderator turned to panelist Alanna Rutherford, Vice President of Legal, Global Products & Technology at VISA, she said:

> I think we're overcomplicating things. We say 'digital' and all of a sudden everyone loses their minds. ... We talk about the FANGs. Netflix is not the same as Amazon. And we have to stop, you know, putting everything together and thinking it's the same problem. ... [T]here's an answer to all these questions and we've answered them in the past and we can answer them in the future. ... The lifecycle of where we are in the platform development and creation is still very new. ... Usually, it's around ... the ten- to fifteen-year mark that you see substantial changes even without regulatory policy. So I would just caution about, you know, using large cuts versus small incremental changes to foster the kind of competitive markets that you want." (Stigler Center, 2019c, 01:00:48)

The statement reflected tensions that persisted in debates about whether competition policy could, or should, address platform power. As she made the case for regulatory restraint, Rutherford questioned the uniqueness of digital platform markets and the newness of the problems they purportedly posed. She stressed the importance of narrow problem definition against broader, systemic claims. She pitted the unpredictability and dynamism of tech markets against potential intervention, wondering aloud whether the problems experts identified would simply fix themselves. Above all, she urged caution in applying big, bold policy interventions over narrow ones. The problems in digital markets were familiar, overblown, and self-resolving—they required minimal oversight. And yet, in making this argument, the statement inherently framed the question of governing these markets as a policy choice.

Debates about this choice, namely the application of competition policy in digital markets, erupted in the broader policy arena between 2017-2020, largely driven by a burgeoning antimonopoly movement. This chapter surveys these emerging debates across several prominent venues, including: the Stigler conferences on digital platforms and attendant eponymous report; the 2018-2019 FTC hearings on Competition and Consumer Protection in the 21st Century; and multiple antitrust panels and symposia organized by prominent think tanks, law schools, and advocacy organizations—supplemented with interviews of policy stakeholders involved in shaping these debates, regulatory documents, hearing transcripts, and public-facing communications like newspaper op-eds.

As policy experts, antimonopoly advocates, former antitrust regulators, and other stakeholders argued over defining the problems arising in digital markets, efforts to reform antitrust to address these problems clashed with efforts to preserve it. Underlying this intense political contest were fundamental disagreements over what constitutes market competition in digital markets, what the role of law and policy is in overseeing it and, most importantly, what such competition offers—and what it does not—as a governance mechanism over these markets. Yet over the course of these policy discussions the contours of an emergent governance paradigm to oversee digital platform markets began to appear. The conflicts and disagreements that shaped this paradigm illuminate the contingencies, assumptions, and gaps underpinning existing law and policy governance over digital markets. By examining them during a period of immense policy unsettlement, we can glimpse how key discourses functioned strategically to shape the boundaries of what we refer to as digital platform markets.

This chapter proceeds in three steps. First, I outline the key features of dynamics in digital platform markets, particularly the competitive concerns dominant platforms pose, to provide a context for the policy debates examined here and in the remainder of the dissertation. Second, I map the policy arena in which the competition for competition policy unfolds, identifying the most prominent groups of stakeholders engaged in these debates and the range of interests they represent. I shed light on the political economy underlying the competition policy debates and the ways in which antitrust itself has become politicized, particularly to advance information controls in the private sphere by right-wing populists. This analysis also serves as context for the rest of the chapter, in which I trace the conflicts in and evolution of antitrust reform debates in the policy arena between 2017-2020. I identify key stakeholders' positions and I trace the discourses that pervade these debates, stressing the tensions, contradictions, and blind spots emerging in them. Specifically, as they shape the emergent governance paradigm, I critically assess how these discourses define the relationship between competition, policy, and digital markets, and what these definitions imply for tackling platform power. In the chapter's conclusion, I reflect on the blind spots this account reveals about digital communications policymaking and invoke two policy concepts to make sense of them.

Dynamics in Digital Platform Markets

Against the broader context of platformization (Nieborg & Poell, 2018; Poell et al., 2019; Van Dijck, 2020), dominant digital platforms exhibit market behaviors that pose challenges for existing policy, raising concerns among policymakers (Mansell &

Steinmueller, 2020; Moore & Tambini, 2018). In this section, I provide an overview of dominant platforms' business models, their strategies to corner markets, and the ways in which both factors combine to challenge existing US competition policy, shaping digital markets. I focus on the largest companies since they were the subject of the debates I examine below.

In terms of business model, Facebook and Google make profit from advertising, capturing more than half of the total 2020 US digital ad revenue. Amazon operates as a retailer, an online marketplace, and a prominent logistics and cloud services company through its AWS (Amazon Web Services). In fact, many sellers in its marketplace pay Amazon fulfillment and advertising fees to reach customers and survive on its platform (Nicas et al., 2020). Apple produces hardware devices, including personal computers, smartphones, and smart technology, and operates a mobile app store, in which it also competes. The app store makes money by charging developers a commission on user app purchases and for subscription-based apps,[7] and the revenue it generates—$13 billion in 2020—exceeds the revenue from Apple's hardware (Barwise & Watkins, 2018; Mosco, 2017; Rosenberg, 2020).

These companies have acquired dominance in these markets. Currently, Amazon takes in half of all online purchases, dominating electronics and toys sales, and owns 90 percent of the book market. Facebook captures 77 percent of mobile social traffic and, with 3 billion monthly users using its apps, maintains dominance in social media markets globally, wherever it operates.[8] Although Tik Tok is often invoked as proof of Facebook's competition, the app has 800 million users worldwide (Hendrickson & Galston, 2017; Nicas et al., 2020). Google owns 81 percent of the search engine market

[7] The initial fee is 30 percent, which drops to 15 percent after the app's first year in the App Store. Google's Play Store fee structure is similar.

[8] Thus, it does not compete with Chinese social media giants like Tencent.

and a staggering 97 percent of mobile search (Net Marketshare, 2017). Facebook and Google form a duopoly in digital advertising, with 61 percent of the market (Perrin, 2019) and Apple and Google form a duopoly in the smartphone operating system market (Nicas et al., 2020). Additionally, these companies compete in over-the-top media markets, offering streaming services (Evens & Donders, 2018).

Their enduring dominance in these markets, driven in part by economic characteristics like economies of scope and network effects, raises concerns about being exploited to thwart competition. Growing evidence shows these companies gain competitive advantages in markets in which they act as intermediary and competitor, even if the question of what constitutes anticompetitive behavior in platform markets is the subject of intense, ongoing policy discussion (Coyle, 2018). For instance, Google has been investigated for using its search dominance to promote its own products over competitors' in search results by both European competition authorities, who found evidence of harm, and US authorities, who found a well-functioning market. Apple hosts an app store and sells apps through it, but unlike competitors, its app developers do not pay a commission, their apps do not get user ratings, are ranked above other apps in the store, and presumably escape Apple's notorious app store enforcement scrutiny (Kang et al., 2020; Nicas et al., 2020). Amazon has access to data about third-party sellers on its online marketplace platform, which it has exploited to make, market, and sell its own products over those of competitors, even though Amazon claims such practice is against its internal policy.[9] The data informed market entry strategies, pricing decisions, and product design, including which product features to copy (Mattioli, 2020). Likewise, Apple has also used app competitors' data to develop competing apps, with the added

[9] Other retailers, like Walmart, also develop substitutes for products they sell, but Amazon's data is arguably richer, allowing the company to strategize about which products to develop with less risk.

competitive advantage of interoperability with Apple's hardware devices (e.g. Apple Watch) because of proprietary access third-party developers lack (Albergotti, 2019).

Moreover, digital platforms actively expand their dominant position through mergers, acquiring dozens of companies in the last two decades (Stoller et al., 2020), with regulatory approval. Although these include major transactions like DoubleClick and Instagram, most are strategic purchases of small startups largely under the public radar, such as facial recognition and AI companies increasingly central to big tech platforms' business models. Facebook has made some of the most expensive purchases, like its $22 billion WhatsApp acquisition, while Google has engaged most aggressively in the practice of acquiring companies, on average purchasing one a week since 2012. The search giant created its Alphabet Holding Company in 2015 precisely to expand into other sectors while retaining its core Google brand (Srnicek, 2017). First, these transactions develop existing lines of business. Google's 2007 acquisition of the internet ad company DoubleClick cemented the search giant's foothold in the digital ad market. Second, they allow entry into new sectors, facilitated by these companies' dominant position in other markets. For instance, through its acquisition of Whole Foods and by leveraging its mass reserves of user data and loyalty base of Amazon Prime members, Amazon firmly established itself in the grocery market. Third, they serve as a tactic to defeat potential competitors: such acquisitions are often about expansion, duplication, and the purchase of intellectual property rather than innovation. Facebook purchased Instagram in 2012 and WhatsApp in 2014, essentially eliminating nascent competitors in social networking markets (Kosman, 2019; Newton, 2020), while facilitating its entry into the VoIP (Voice over Internet Protocol) market. Indeed, in an email to an employee who congratulated him on the Instagram acquisition, Mark Zuckerberg acknowledged the strategy: "One reason people underestimate the importance of watching Google is that we can likely just always buy any competitive startups. … But it'll be a while before we can buy Google" (Newton, 2020, para. 26). Likewise, Amazon has bought stake in startups only to launch competing products modeled after the startups' innovations. As an inventor who claimed Amazon implemented a microphone array he created in its Amazon Echo put it, "They find technology they think is extremely valuable and seduce people to engage with them, and then cut off all communication … Years later, lo and behold, the technology is in an Amazon device" (Mattioli & Lombardo, 2020, para. 25). These acquisitions continue unabated amid the COVID-19 pandemic (Isaac, 2020).

Concurrently, platform markets pose challenges for existing US antitrust. I mention just two here. First, policymakers consider whether the multi-sided nature of many platform markets poses competitive challenges, especially combined with big data and platforms' intermediary position in them (Coyle, 2018; Just, 2018). While multi-sided markets are not new—media markets have multiple sides (e.g. audiences and advertisers)—platforms' impact on competitive dynamics in multi-sided platform markets remains contested (Just, 2015). In the most prominent antitrust case dealing with multi-sided platform competition to date, *Ohio v. Amex* (2018), the Supreme Court substantially raised the bar for enforcers to prove competitive harm. The court ruled that the plaintiff must define and prove a relevant market instead of simply relying on direct proof of harm to competition and that such harm must be demonstrated in both market sides to constitute an antitrust violation (Hovenkamp, 2019)—a decision influenced by the presumption that vertical restraints, namely at different production or distribution levels, rarely harm competition. In this interpretation, many of the gatekeeping behaviors outlined above constitute legal market conduct.

Second, under Chicago School economic theory market power is intimately tied to price, measured as the ability to raise prices above cost, which occurs when there are no competitive substitutes to constrain this behavior. Assessing this power requires defining the relevant market typically using the Hypothetical Monopolist Test, which asks whether a company can profitably impose a small but significant and non-transitory increase in price (SSNIP) in the defined product market[10] (Harkrider, 2015; Krämer & Wohlfarth, 2018). A market definition assumes a boundary of competition, but such boundaries may shift and are based on models fed on specific assumptions and datasets (Ezrachi, 2017). This is particularly true for digital platform markets, since platforms no longer compete exclusively on price (Srnicek, 2017), complicating traditional assessments of market power (Coyle, 2018).

Consequently, competition policy debates about how to govern digital platform markets increasingly involve a shift to non-price elements of competition, like quality, innovation, privacy, and user attention, and to the role of big data as a potential competitive asset (Esayas, 2019; Just, 2018). Market power may involve ownership of "data about specific users [from] several heterogeneous data sources across different markets" (Krämer & Wohlfarth, 2018, p. 160), which facilitates personalization and targeting of ads, products, or services, resulting in greater user interaction with the platform, further improving its data. Indeed, platform sites that leverage this data to acquire the bulk of user traffic are stickier than those of smaller competitors (Hindman, 2018). Thus, the combination of network effects and scale along with experience effects (e.g. personalization) associated with user data may create potential entry barriers (Katz, 2019). Consequently, policymakers must decide what competition, as a policy goal, means in digital platform markets and how to pursue it. Likewise, they must define what constitutes market power in platform markets. Moreover, since economic activity across

[10] If consumers can switch to another product, namely if the elasticity of demand is high, then the market is not relevant because the company could not profit off the price increase. Such analyses are more complicated in complex and dynamic digital markets, and often impossible without adequate data (Krämer & Wohlfarth, 2018).

platform markets intersects with socio-political activity, policymakers must grapple with "what respective roles competition law and regulation should play, for example regarding privacy or data protection" (Just, 2018, p. 388). The policy debates occurring in the broader policy arena engaged such questions, seeking to define the contours and role of competition policy vis-à-vis these markets. These were not just analytical conversations. As I show in the next section, many interests are invested in shaping the course of this debate.

Competition for Competition Policy

The governance of information and communications technologies occupies a key position in struggles over political power and resources (Barney, 2006; Braman, 2006; Hardy, 2014). Consequently, various stakeholders expend significant resources to advance their communications policy interests (e.g., Crawford, 2013; Newman, 2019), which include competition policy. The competition over competition policy extends beyond formal spheres of political power, namely legislative, judicial, and regulatory institutions, though it is inextricably linked to them. The policy arena is subject to external political and industry influence, including through lobbying, PR campaigns, and think tank advocacy, aiming to shape both specific outcomes and the overall legal and economic frameworks that courts and enforcers apply (Ezrachi, 2017). For example, the largely harmonized EU and US competition policy approaches diverged in 2012 when the FTC refused to prosecute Google for promoting its own shopping results in Search, while the EU did. The FTC's decision is partly attributable to Google's lobbying campaign (Popiel, 2018).

The debates examined here constitute an intense contest over the precise contours of competition policy itself, where proponents of existing antitrust can be seen "policing entry" (Streeter, 1996, p. 143) around the competition policy arena. This gatekeeping represents a form of boundary work, a concept rooted in science and technology studies (STS) research showing that the boundaries of fields of knowledge can be interpreted in different ways and therefore policed and contested by different stakeholders (Gieryn, 1983; Star & Griesemer, 1989). Here I identify the most prominent actors engaged in this work, both to preserve the boundaries of existing antitrust and to contest them, before turning to the policy conflicts in the remainder of the chapter. This survey is not intended as a comprehensive review, but an illustration of the more dominant ideological fault lines among actors engaged in the public debate.

Given their stake in the policy outcome, digital platforms support the existing, narrow approach to antitrust (Popiel & Sang, in press), and actively defend their business models against antitrust intervention. For instance, Apple has promoted a study by consulting firm Analysis Group showing that its 30 percent commission fee mirrors other platforms' fees, even if it did not mention that Apple set the industry norm (Borck et al., 2020). Amazon has paid consultants to stress that the company's e-commerce business model differs from ad-based Google and Facebook, and thus is less likely to pose antitrust concerns. Likewise, to counter arguments that it skews competition against third-party sellers on its platform, the tech giant released a report highlighting that these sellers outperformed Amazon's own direct-to-customer sales, growing 26 percent in 2019 (Amazon, 2020; Kang et al., 2020). Google has funded research (Gouri & Salinger, 2017) that contests EU competition authorities' findings of anticompetitive conduct in the 2012 Google Search case. Moreover, its lobbyists have emphasized that most product searches originate on Amazon, while Facebook's lobbyists point to competition from Chinese social media giants and TikTok (Kang et al., 2020). These efforts constitute PR and lobbying to argue that platform activities pose no threat to existing antitrust laws. However, these companies also actively invest in keeping those laws in place.

Over the last decade, tech giants have fundamentally established themselves as powerful political actors by lobbying the government on a host of policy issues and building relationships with policymakers (Popiel, 2018). They leverage both in the competition policy arena, investing in organizations and individuals that support their policy goals. Among these, is the Global Antitrust Institute established in 2014 at George Mason University's Law and Economics Center—a university with famously strong conservative backing, including from the libertarian Koch family—and funded by companies like Amazon, Google, and Qualcomm. The libertarian think tank sponsors antitrust conferences for competition policy officials around the globe, paying for travel, expensive meals, and lodgings (Wakabayashi, 2020). Headed by Joshua Wright, a former FTC commissioner with ties to Google (Dayen, 2016) and a public defender of Chicago School antitrust (e.g. Wright & Ginsburg, 2012; Wright & Portuese, 2019), the institute has been proselytizing a hands-off approach to competition policy.

Such boundary work gains legitimacy from ties to former and current policymakers. Indeed, a network of conservative FTC commissioners, including Joshua Wright, former FTC acting chair Maureen Ohlhausen, and former Republican FTC chair Tim Muris, who have all worked for big tech, publishes articles in defense of existing competition policy (Harding McGill, 2020) and often appears at antitrust panels and conferences on the subject. Similarly, staunchly libertarian Senator Mike Lee (R-AZ), who chairs the Senate Antitrust Subcommittee and has received donations from Google, has been a stalwart defender of existing antitrust (McCabe, 2019b). He has used this platform to hold hearings questioning calls to reform antitrust and critiqued the congressional investigation into digital platforms' market power conducted by House Judiciary Committee examined in the following chapter.

Conservative academics, particularly economic and legal scholars (often consultants on antitrust cases), also actively shape the intellectual boundaries of antitrust debate. For instance, neoliberal law professors like Daniel Crane of the University of Michigan Law School and Thibault Schrepel of the Utrecht University School of Law have dismissed the antitrust reform movement for its purported lack of clear proscriptions, arguing that antitrust "should be enhanced by applying reason to antitrust law; not fears, not feelings, not sentiments, not intuitions" (McCabe, 2019b, para. 17), as Schrepel put it. Schrepel is affiliated with the big tech-backed, libertarian International Center for Law & Economics (ICLE), which has received funding from Amazon, Facebook, and Google (McCabe, 2019b).

However, such funding amplifies rather than determines these scholars' views, whose embrace of the Chicago School approach precedes and aligns with platforms' policy preferences.[11] Instead, there are natural points of intersection between platforms' libertarian preference for minimal regulation and the conservative policy agenda (Broockman et al., 2018; Turner, 2006). For instance, the advocacy organization Americans for Prosperity, funded by the Koch family, has launched a PR campaign targeting attorneys general and senators to preserve existing antitrust (McCabe, 2019b). However, even such alignments have their limits, particularly as certain conservatives worry about platforms' disputed anti-conservative speech bias, which makes antitrust intervention palatable to them—a troubling development for conservatives opposing antitrust reform. I examine this tension in more detail in the next section.

[11] Crane himself is a member of the Federalist Society, a conservative, libertarian-leaning organization with roots in the Reagan era.

As Newman (2019) argues, a "powerful engine of the growth of neoliberalism is the explosion of think tanks driving policy discourse" (p. 39). A myriad outfits polices the boundaries of antitrust. The aforementioned ICLE and the affiliated conservative blog *Truth on the Market*, co-founded by ICLE's president Geoff Manne, actively defend neoclassical economic thinking against its challengers (ICLE, 2020). Notably, Manne co-authored an article with Joshua Wright for the conservative *Harvard Journal of Law & Policy* defending Google during the EU and US antitrust investigations into the company's search practices. They argue that the antitrust "focus on high-tech industries is dangerous, and the concerns regarding erroneous interventions should not be dismissed too lightly" (Manne & Wright, 2010, p. 171). Such think tanks and blogs serve as nodes linking a constellation of conservative idea marketers—many former (and future)[12] regulators—and include organizations like R Street, Tech Freedom, and the American Enterprise Institute (AEI). For example, AEI's Mark Jamison, an economist who frequently writes about tech-related antitrust (Jamison, 2020), has served on Trump's FCC transition team, advised Florida's governor on internet policy, and worked as policy advisor for Sprint (AEI, 2020).

Stakeholders contesting the boundaries of existing antitrust are similarly imbricated in a complex tangle of regulatory experience, industry influence, and politics. These include liberal think tanks Brookings Institute, New America, and Public Knowledge—all three of which receive funding from tech giants—former regulators like former FCC Chair Tom Wheeler, and academics with ties to both the industry and regulatory institutions. For instance, Fiona Scott Morton, an Obama-era DOJ antitrust enforcer and economist at Yale, is a prominent antitrust critic of big tech and one of the authors of the Stigler Committee on Digital Platforms report—the most prominent US

[12] At least one of my interviewees left the think tank that employed him to work at the FCC.

report on digital platform power. A frequent guest on antitrust panels and witness at government hearings, she has written extensively about the challenges digital platforms pose for competition policy. Her 2017 paper on Amazon's use of private contracts known as most favored nation (MFN) provisions, which prevent sellers on its platform from charging lower prices to competing platforms, resulted in Amazon ending the practice (Dayen, 2020). However, in July 2020 she revealed that she had advised Amazon and Apple on antitrust-related matters, which she did not disclose in her publications. Scott Morton argued that there was no conflict of interest because her publications since then concerned Facebook and Google (Dayen, 2020; McLaughlin, 2020), but the Stigler report and her public appearances cover other platforms.

The Scott Morton case serves as a highly prominent example of a phenomenon that extends beyond the individual to a practice naturalized within antitrust circles. At one point, during a prominent D.C. event on antitrust I attended that featured at least two former regulators, all panelists amiably admitted to the packed room that they were advising big tech clients and continued their debate as if nothing significant had transpired. This partly reflects the professionalized culture of antitrust where, for instance, economists on opposing sides of a merger case meet for a collegial dinner afterwards and may work for the same consulting firm and share staff (Eisinger & Elliott, 2016). It is also partly attributable to the revolving door culture in US communications and tech policy (Popiel, 2018, 2020), which extends to DOJ and FTC antitrust economists who advise the very corporations they either investigated or came to investigate (Eisinger & Elliott, 2016; Tepper, 2019). By one estimate, Google hired 54 former DOJ employees, Facebook hired 48, and Amazon hired 41 (Singer, 2020), which includes prominent lawyers and economists like Howard Shelanski, Carl Shapiro, Catherine Tucker, and Joseph Farrell (Stoller & Frerick, 2018; Tepper, 2019)—all academics training future lawyers and economists, and influencing antitrust debates. Such hiring is less about big tech seeking advice than about tactically creating a conflict of interest for critics—Scott Morton cannot write about Amazon and Apple. Moreover, as Gene Kimmelman of Public Knowledge put it, "Part of the game is to hire [economists] to prevent your opponents from being able to hire them … It's a large investment that can pay off enormously" (McLaughlin, 2020, para. 16).

The bounds of the arguments made by these reform-minded liberals, many of them Obama-era regulators, as well as the potential influence of antitrust regulatory culture and industry tactics become clearer when contrasted with the antimonopoly or Neo-Brandeisian movement, named after progressive Supreme Court Justice Louis Brandeis who championed small business. Although there are significant areas of overlap between these groups and plenty of interaction between their members, the former calls for reforms, keeping the core of antitrust largely intact, while anti-monopolists push for rethinking competition policy altogether. Put differently, in multiple instances at events I attended those pushing for antitrust reform decried more radical ideas, like structural separation, policing the bounds of what constitutes acceptable antitrust policy—a subject I explore in more depth below.

The antimonopoly movement has its more immediate roots in the work of Barry Lynn, who ran the Open Markets Division at the New America Foundation that conducted research on market power. The story of how the division became its own entity serves as a good illustration of the line between anti-monopolists and reform-oriented liberals. In 2017, Lynn posted praise on New America's website for the European Commission's (EC) imposition of a €2.42 billion fine on Google—one of New America's donors—in the Google Search case. Google's Eric Schmidt complained about the post to New America's CEO Anne Marie Slaughter and shortly thereafter Slaughter emailed Lynn that “the time has come for Open Markets and New America to part ways” (Dayen, 2017; Vogel, 2017). When Lynn’s firing became a public scandal and much-publicized example of big tech’s power over public discourse, New America vehemently denied acting on pressure from Google, stating its decision was long-time coming. Whether New America feared damaging its relationship with Google or whether Lynn’s firing simply constituted disastrous timing (Dayen, 2017; Tiku, 2017), there was a clear clash between the liberal establishment organization with ties to big tech— also typical in the Obama Administration (Popiel, 2018)—and Lynn’s progressive anti-monopolist division, which saw big tech as a symptom of concentrated economic power. Upon leaving New America, Lynn founded Open Markets Institute (OMI) as a standalone advocacy organization and recruited its most prominent members like Lina Khan.

Today, both New America and OMI get funding from the Soros Foundation, among others (McCabe, 2019a). Indeed, the antimonopoly movement also has its own burgeoning network of support seeking to counterbalance the influence of more established stakeholders on the debate: well-funded nonprofit organizations like the Ford and Hewlett Foundations, billionaire philanthropist George Soros, and eBay founder Pierre Omidyar all have donated millions to civil society organizations tackling digital platforms. The projects funded by these organizations include studies on the impact of concentration in digital platform markets on the media and on labor (McCabe, 2019a). Chris Hughes, who co-founded Facebook and then famously argued for its break-up in a *New York Times* editorial (Hughes, 2019), co-runs the Economic Security Project (ESP), which distributes money to organizations focusing on competition policy reform—a total of $10 million given over a year and a half beginning 2019 (McCabe, 2019a; Nix, 2020). OMI is one of the recipients (McCabe, 2019a). Other recipients of ESP grants include established advocacy organizations like Color of Change, the Institute for Local Self-Reliance (ISLR), Public Knowledge, and newer initiatives like the Law and Political Economy Project based at Yale. The funded projects reflect the multidimensionality of competition policy issues, from research on platform markets to Color of Change's work to "infuse a racial justice lens into anti-monopoly organizing and implement an emerging anti-monopoly program … to advance Black economic empowerment" (Economic Security Project, 2019a). Thus, although intimately linked to reform efforts aimed at digital platform markets, ESP extends to "emerging leaders in the economic justice field [to] ensure they have the networks, know-how, and money to succeed" (Economic Security Project, 2019b). More broadly, the antimonopoly coalition has ties to prominent academic institutions, including Yale's business program, and public intellectuals, like Lina Khan, Sanjukta Paul, and Tim Wu.

Therefore, the competition over competition policy in digital platform markets unfolds at the nexus of traditional political divisions and ideological frameworks, the professionalized regulatory culture and attendant revolving door practices, strategic industry interests, and broader progressive reform and social justice traditions. This brief sketch brings into focus the general boundaries of the politics of competition policy and provides the context for the competition discourses underlying the debates examined here.

Digital platforms, antitrust, and anti-conservative bias

Competition policy is always political, but its use to govern digital platform markets is also increasingly *politicized* under US right-wing populist leadership. This leadership targets and exploits existing democratic institutions to exert controls over information flows, including via public communication infrastructures like the postal service and, increasingly, private platforms. While antitrust is intended to disperse private power to safeguard democracy (Pitofsky, 1979), the Trump administration has threatened to use it against digital platforms and media outlets to censure them for excessively channeling speech perceived as critical of the regime. For instance, as detailed in the preceding chapter, Trump threatened the AT&T-Time Warner merger in response to critical coverage on Time Warner-owned CNN. Similarly, the right has invoked incidents like Facebook and Twitter's deplatforming of right-wing conspiracy theorist Alex Jones for spreading hate speech and Twitter flagging several of the US president's tweets that contained lies about the coronavirus pandemic as evidence of anti-conservative bias on digital platforms. Such accusations have a long history. As longtime media advocate and current senior VP of Public Knowledge Harold Feld put it: "conservatives decided that Silicon Valley was liberal and therefore they were going to make them the new enemy [like] they did in the 1990s and the 2000s with the media" (personal communication, March 6, 2020).

Platform-based content moderation raises complex legal, political, and technical concerns (e.g., Gillespie, 2018; Klonick, 2020; Napoli, 2019b). I focus specifically on the political intersection of antitrust and the false accusations of platforms' anti-conservative bias (Whitehouse, 2019), and its contradictory consequences for the competition policy arena. On the one hand, Trump-appointed Attorney General William Barr—former Verizon lawyer and Time Warner board member—has shown a willingness to pursue big tech unheard of under the Obama administration. At his own confirmation hearing he said that "a lot of people wonder how such huge behemoths that now exist in Silicon Valley have taken shape under the nose of the antitrust enforcers" (McCabe & Kang, 2020, para. 20). In 2019, under his direction, the DOJ started an antitrust investigation into whether Google has abused its market power in ad and search markets (McCabe & Kang, 2020). The DOJ's investigation coincides with a bipartisan investigation by 50 state attorneys general into Google's ad dominance, led by Texas attorney general Republican Ken Paxton. The state attorneys have conferred with the DOJ on the issue (Romm, 2019). Thus, long-demanded antitrust intervention in digital platform markets appears to be materializing under a profoundly deregulatory administration. The stakes are high following the DOJ's significant loss in the AT&T-Time Warner case examined in the last chapter.

However, prominent Republicans have called for including political bias as part of antitrust scrutiny of these markets. A key figure in the states' investigation, Texas assistant attorney general Jeff Mateer accused platforms of censoring conservative speech (Texas Attorney General, 2019). Barr himself has stated that tech companies "are only presenting one viewpoint and they can push the public in a particular direction very quickly. … One way this can be addressed is through the antitrust laws and challenging companies that engage in monopolistic practices" (McCabe & Kang, 2020, para. 26). Such attempts to regulate speech on digital platforms via antitrust, like Trump's intervention in the AT&T-Time Warner merger, have alarmed the antitrust establishment. Whistleblowers from inside the DOJ have accused Barr of directing staff activity based on personal antipathies toward specific industries and Trump's whims, with external political influence weighing heavily in big cases (Ewing, 2020; McCabe & Kang, 2020).

Thus, a tension has emerged between pro- and anti-interventionist conservatives, who object not to the accusations of political bias, but to addressing the issue through antitrust. As conservative antitrust experts view it, "A critical part of maintaining independence and neutrality in the administration of antitrust is ensuring that it is insulated from politics. Unfortunately, this view is under attack from all sides" (Bowman, 2020, para. 2). They argue this attack comes not only from reformist politicians, like

Senator Amy Klobuchar (D-MN), but also from Trump. Former FTC commissioner Joshua Wright, a traditional conservative, calls the right-wing politicization of antitrust "Trump Antitrust [which involves] micro-managing antitrust matters with public calls to either block merger deals or by blame [sic] firms for anticompetitive conduct, all without proper antitrust analysis by his Office or by any agency" (Wright & Portuese, 2019, p. 26). He argues that Trump's antitrust populism poses as much a threat to the institution as the antimonopoly reform proposals. Neil Chilson and Casey Mattox of the Charles Koch Institute put the issue succinctly: "If private platform power over the speech environment is a problem, antitrust is the wrong solution" (McKinnon & Kendall, 2020, para. 20).

The solutions vary. For example, Ben Sperry (2020) of ICLE and the conservative Competition Enterprise Institute argues that market mechanisms can address political bias, namely the emergence of alternatives like Parler, the far-right, pro-Trump social media platform awash in conspiracy theories. Others, like Trump-appointed FCC commissioner Brendan Carr reject this approach, revealing cracks in the pro-market ideology that characterizes conservative neoliberal policymaking: "[T]here are some on the Right who see no problems worth addressing or believe that any form of government-imposed accountability would do more harm than good. We must accept the status quo, they say, or reject the limited government, free market principles that conservatives stand for. This is a false choice" (Carr, 2020, para. 5-6). He views platforms as a perversion of market capitalism facilitated by government regulation. To correct their political bias, in a remarkable twist, he calls for a host of regulations, including FCC oversight of speech liability protections for platforms under Section 230, which would reduce platform moderation of content like hate speech, while centralizing the adjudication of user complaints about biased content with the FCC—a “light touch” (Carr, 2020, para. 11) alternative to antitrust intervention.

As a phenomenon attributed to platforms’ content moderation and to the use of antitrust to control speech across platforms, political bias reveals the conflict among conservatives in resolving contradictions in the clash of pro-market philosophy with oligopolistic private speech platforms. Accusations of anti-conservative bias animating support for antitrust intervention by the right-wing government constitute one prominent instance in which the state, admittedly selectively, works to oppose the concentration of private power. The politically motivated conservative support for antitrust intervention challenges “overly abstract conceptions of ‘the capitalist state’” (Winseck, 2017, p. 101) in which the state simply advances industry interests. The strategic interventions of right-wing populist politics to exert such social controls complicate accounts of neoliberalism as a wholly laissez-faire process, highlighting its interventionist tendencies (Fischer, 2020; see also Davies, 2014). The question of governance of digital platform markets, notably via competition policy, brings these political complexities to the foreground.

Defining the Boundaries of Competition Policy

Thus far the discussion has focused on competitive concerns arising in digital platform markets and the political and economic interests at stake in the competition policy arena where conflicts over how to address these concerns are settled. In the remainder of this chapter, I examine the discursive contours of these conflicts, including over defining the problems arising in digital platform markets, the competitive dynamics in them, and the role of law and policy in overseeing these markets.

These debates comprise efforts to provide an account of platform power through the prism of competition policy. Concurrently, they also involve efforts to preserve, expand, and adapt existing competition policy as a mode of governance over platform markets. Thus, first, these discussions constitute what Andrews (2020) calls "sense-making" (p. 11), in which policy communities attempt to work out complex, unclear, and often uncertain policy problems. He draws on Weick (1995), who argues that policymakers engaged in sensemaking "draw lines, establish categories, and coin labels that create new features of the environment that did not exist before" (p. 31)—a precursor to problem definition (Schmidt, 2008). However, sensemaking, with its careful analysis and problem-solving, is only a component of what is ultimately often policy conflict and tension. In communications, policymakers often adjudicate between advancing public values, like fairness and equity, and private interests, like wealth creation (Lunt & Livingstone, 2011; Mansell & Steinmueller, 2020; van Dijck et al., 2018), which requires understanding complex policy issues, but also inherently political decisions. Thus, second, the debates examined here represent a form of boundary work (Gieryn, 1983; Star & Griesemer, 1989) over competition policy by discursively channeling the politics outlined above into a contest over platform governance.

I begin by introducing the antimonopoly critique of existing antitrust as the main inciting incident behind these debates. Then, I trace how these policy discussions developed, highlighting notable points of disagreement and evolution. This narrative is not strictly linear. I privilege the circulation and development of policy ideas and arguments, though I reference key events that crystallized these discussions. Moreover, this is not an exhaustive account. The economic and legal literature examining the intricacies of applying competition policy to digital platform markets alone could fill volumes. Instead, I opt for a critical account of the notable features of these debates to illuminate underlying contradictions and paradoxes in efforts to preserve and reform antitrust vis-à-vis digital platform markets.

Antimonopoly: rethinking competition policy in the age of digital platforms

In addition to Barry Lynn's work at Open Markets, the entry of antimonopoly critiques into the policy arena began with the publication of Lina Khan's (2017a) *Yale Law Journal* article, "Amazon's Antitrust Paradox."[13] The extensive critique of how Amazon's business strategies and market power elude existing antitrust garnered significant attention from academic and policy elites, particularly in antitrust circles. The Amazon-Whole Foods merger announced just six months later—and its swift regulatory approval—added fuel to the debate. Open Markets' ouster from New America in August 2017 brought the antimonopoly group funders and publicity, as did OMI advising Senator Elizabeth Warren during her presidential campaign bid, among others (Mullins, 2019). These events intersected with the public backlash against big tech following the 2018 Cambridge Analytica scandal and accusations of mass voter deception on social media, priming policy elites for a critique of platforms, which received unwanted public scrutiny. Indeed, when I asked why the attention centered on digital platforms instead of equally massive telecom incumbents, my interviewees argued that platforms were ubiquitous and increasingly impossible to ignore.

The competition policy arena, typically quiet and mundane, exploded with debate. Numerous panels were organized by think tanks, advocacy organizations, and universities. Most prominently, in 2018 the University of Chicago's Stigler Center organized a conference dedicated entirely to concentration in digital platform markets.

[13] A pun on Robert Bork's 1978 *The Antitrust Paradox*, which revolutionized antitrust thinking, introduced the consumer welfare standard, and heralded the rein of the radically narrowed, neoliberal Chicago School antitrust paradigm.

The debates at the conference identified significant problems in these markets, leading the center to form the Digital Platforms Committee, which produced the "Stigler Committee on Digital Platforms" report (Stigler Center, 2019a), often cited by policymakers in the US and abroad. Regulatory bodies like the FTC and the DOJ, grappling with the failed AT&T-Time Warner case, appeared to listen and reflect about existing enforcement approaches. Between 2018-2019 the FTC held 14 hearings on *Competition and Consumer Protection in the 21st Century*, whose goal involved "examining whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy" (FTC, n.d.-a). The hearings represented the first such sweeping internal audit since 1995 and led to the publication of new vertical merger guidelines. Meanwhile, the DOJ began building a case against Google, while in 2019 Congress launched a series of hearings into digital platform markets, which are the subject of the next chapter. Public opinion also grew increasingly critical of online platforms, with 75 percent of Americans expressing concern about platform power (Consumer Reports, 2020).

The current antimonopoly critique has a historical parallel in the 19th century US antimonopoly movement, which contributed to the passage of America's early antitrust laws, but also extended beyond antitrust to advocate for a broader economic justice agenda (Paul, 2020a) and many tools to achieve it, including common carriage regulation. Likewise, as Lina Khan put it, "[t]he new Brandeis movement isn't just about antitrust" (Foroohar, 2019, para. 33), though it is associated almost exclusively with it partly through its own doing, namely by advocating for structural separation and breakups as legitimate policy tools to address corporate power. For instance, at a panel on "Populism and the Political Economy," when OMI alumni Matt Stoller was asked what he makes of the converging communications sector, particularly after the 1996 Telecom Act, he replied: “I don't 100 percent know how to deal with it. Generally, my one really good theory here is if it's too big, make it smaller” (The Capitol Forum, 2020a, p. 14). However, despite pervasively equating “smaller” with “more governable,” the antimonopoly critique should not be reduced to breakups or antitrust. Indeed, numerous prominent anti-monopolists entered the policy arena in the shadow of global economic meltdown and several OMI interviewees pointed to the 2008 Financial Crisis as an important catalyst for the antitrust reform debates—linking broader social inequality, failed or insufficient reforms, and platform power.

The initial antimonopoly critique argued that Chicago School antitrust’s definition of competition in terms of consumer welfare, namely price-based efficiencies, blinded it to anticompetitive harms stemming from concentrated market structures and anti-competitive processes. As Lina Khan says, the Chicago School approach “has embedded the same assumptions that were proper three, four decades ago [resulting in] a huge lag between the type of economics that still has currency in antitrust and what that [economics can say] usefully about these platform markets” (personal communication, May 13, 2020). However, the antimonopoly intervention is broader: to restore democratic governance of private markets. Anti-monopolists critique the Chicago School influence over antitrust and its deference to corporate power by denaturalizing the political decisions keeping existing competition policy in place. For instance, existing antitrust claims technocratic objectivity and anti-monopolists stress that competition law always makes normative judgments about what constitutes fair competition, influencing corporate behavior in particular ways—much like the court rulings in the AT&T-Time Warner merger case. As Sandeep Vaheesan (2020), Legal Director at OMI, argues such decisions are often disguised "under the language of 'competition'" (para. 10) but have concrete political and economic consequences. Thus, in competition policy,

> [t]he issue is not whether to promote competition but what business strategies to allow and what to proscribe. Under one possible set of market rules, businesses thrive by disseminating false information, buying out competitors and suppliers, and paying customers not to deal with rivals. Under a very different configuration of rules, businesses grow by putting out truthful advertisements, developing better products, and expanding their productive capacities. (para. 10)

But what is the alternative to existing competition policy? At a conference on "A New Future for Antitrust," University of Michigan law professor Daniel Crane and a staunch opponent of antitrust reform (McCabe, 2019b) challenged the antimonopoly movement to "specify what, exactly, they mean, in concrete, legal detail" (Wu, 2019, para. 6). During lunch, a group of legal and economic scholars took up the challenge and articulated specific reforms in a document known as "The Utah Statement" (Wu, 2019). The statement argues antitrust has both economic and political dimensions, protecting "fair competition [as] an instrument for both the creation of opportunity and the distribution of wealth and power" (Wu, 2019, para. 11). To achieve these goals, first, the reform proposals aim to shift the burden to more aggressive enforcement, like reinvigorating a structural approach to merger review (e.g., preventing two companies with dominant market shares from merging) over the consumer welfare standard, and erring on the side of false negatives (preventing pro-competitive mergers) over false positives (permitting anti-competitive mergers). The statement also rejects the established assumption, which shaped the AT&T-Time Warner case, that vertical mergers always produce efficiencies. In the legal realm, the statement calls for overturning *Trinko* and reviving the essential facilities doctrine—the basis for interconnection among competing services. Importantly, the statement also seeks to normalize structural remedies (see also Khan, 2019), namely divestures and breakups, over consent decrees and other behavioral rules that require extensive and expensive monitoring (Wu, 2019). These proposals advance two central critiques. First, existing assessment of market power and competitive harms is too narrow to capture the range of anticompetitive dynamics in digital markets. Second, relatedly, competition law is underenforced.

Yet, there exists a tension between the discourse of breaking up monopolies to level the playing field to harness the disciplining power of competition and democratizing governance of platform markets, which naturally tend toward concentration. To maneuver it, anti-monopolists remind that, aside from antitrust, competition policy involves regulatory tools of multiple agencies, including the FTC, the FCC, and the Securities and Exchange Commission as well as "public utility rules, consumer protection measures, [and] a different approach to intellectual property" (S. Vaheesan, personal communication, October 26, 2019), among others. Indeed, Khan (2018a) emphasizes that in markets that naturally tend to concentration, like platform markets, the goal is "not to break these firms up, but to design a system of public regulation that prevents the executives who manage this monopoly from exploiting their power" (p. 132). Ultimately, the critique is an invitation to reclaim governance over the platform sector. Vaheesan put it to me this way:

> [E]conomies of scale are real in many or most sectors of the economy. The question is, where do you draw the line? Do we really need a single dominant social media platform? … [Also] some people have presented this false dichotomy between structural breakups and public utility and other rules of the marketplace. We really need both. … Having smaller companies that grow and compete not on more comprehensive and intrusive surveillance, but through better products and better service. (personal communication, October 26, 2019)

This vision involves wresting the competition policy arena from an elite settlement that yields massive, unchecked firms in the tech sector and contesting the "economization"

(Davies, 2014, p. 101) of competition law, namely its capture by neoclassical economics. As Vaheesan argues, for the anti-monopolists “antitrust is a way of restoring democracy … in our economics and politics” (personal communication, October 26, 2019).

However, equating reformed competition policy with democracy implies pursuing predominantly economic goals in governing digital communications platforms. As Barry Lynn stated at one of the FTC hearings, “Corporations are tools of governance, so they must be regulated preferably through competition” (FTC, 2018b, p. 165). Indeed, early prominent anti-monopoly arguments emphasized unleashing market mechanisms via stronger antitrust to discipline private markets rather than debating which aspects of these markets should remain private. Likewise, the competition arguments initially received more attention in the policy arena than any regulatory proposals. As a result, radical reform of competition policy did not necessarily imply radical reform of digital communications markets, the neoliberal sway over them, or platform power that arose in them. However, despite the initially narrow approach, the power of the antimonopoly critique becomes clear in its impact on debates in the policy arena traced here. Since its critiques entail fundamental challenges to US competition law and policy, they unsurprisingly faced significant pushback from the antitrust community.

The critiques: mapping ideological fault lines and problem definitions

In 2020, a cohort of conservative antitrust experts and former regulators, including Geoffrey Manne, Maureen Ohlhausen, and Joshua Wright, wrote a letter to Congress to oppose reform proposals they viewed as politicizing antitrust, both by the right and the left. The authors staunchly opposed abandoning the consumer welfare standard, a structural approach to merger review, shifting the burden of proof to defendants, and breakups, (Barnett et al., 2020, pp. 1-2), among others. They claimed that such interventions produce multiple harms, including by allowing the state to unduly interfere in the market at the expense of the US standing in the global economy. The letter and its reasoning reflect the intellectual work of libertarians and conservatives staunchly opposed to antitrust reform. Although nominally opposing the politicization by the left and right, the substantive arguments target the left, which levied the robust challenge to existing antitrust.[14]

Anti-monopolists face critiques from across the political spectrum and ranging in depth. For example, as Khan put it, anti-interventionists argue that competition is abundant in digital platform markets: "'If you don't like Google, you can go to Bing, you can go to Yahoo, go to DuckDuckGo. These markets are dynamic, they're open, they're fast moving.' … I think it's belied by actual experience [and research] showing the stickiness of defaults and the way that markets tip and the advantages of network effects" (personal communication, May 13, 2020). Often, these arguments strategically expand market definitions to minimize platform dominance, for instance downplaying Amazon's power in retail by looking at the global retail market. Such efforts capitalize on the malleability and *contestability* of terms with an "apparent objective, quasi-academic quality" (Davies, 2014, p. 98) to influence public officials.

A perfect example is the Information & Technology Innovation Foundation (ITIF), an authoritative, firmly anti-interventionist centrist think tank. Under the direction of its president, Robert Atkinson, erstwhile advisor to the Clinton, Bush, Obama, and Trump administrations on technology and innovation, ITIF staunchly opposes antitrust reform. Its 2020 report entitled "Monopoly Myths: Do Internet Platforms Threaten Competition?" embodies many of the neoliberal arguments critiquing reform by way of defending markets. For instance, the report strategically

[14] The concerns regarding the right focus on selectively enforcing the law based on political grievances.

defines digital platforms as any other two-sided market platforms, “such as shopping malls, job placement services, and newspaper classifieds” (Kennedy, 2020). The comparison effectively divorces platform markets from any political and social implications, reducing them to marketplaces that lower transaction costs between sellers and buyers and facilitate the more efficient use of resources, like managing labor via ride-sharing apps. To foreclose on antitrust intervention, the report selectively obscures competitive threats arising in these markets. For instance, the report shifts the relevant market definition from a given platform and its function (e.g., social media, search) to both the entire advertising market (where platforms compete for advertising on one side) and all of user attention (for which platforms compete against essentially everything that can capture user attention). Expanding the scope of the market definition allows the report to claim that platform markets are competitive. Likewise, the report claims that platforms have incentives to attract third-party sellers rather than eliminate them because they reap benefits from their services; a claim which deftly sidesteps platforms’ competition with many of these sellers in marketplaces they also run.

A related tactic, as Sally Hubbard, Director of Enforcement Strategy at OMI, told me, is to simply claim that “‘these companies are great’” (personal communication, February 28, 2020). For instance, ITIF’s Atkinson has obscured problems in these markets by enumerating at length the contributions dominant platforms make to social welfare (ITIF, 2018), including better working conditions, despite widely documented reports to the contrary at companies like Amazon and Uber (Rao, 2019; Sainato, 2020), and supporting issues like diversity and environmental protections, despite Silicon Valley facing enormous diversity problems (Harrison, 2019) and actively collaborating with big oil (Cole, 2020). Indeed, such arguments quickly break down under scrutiny. Nevertheless, the discourse of “big is good” is often invoked to remind regulators and reformists that competitive markets function well without significant competition, particularly in digital platform markets, which are prone to tipping to oligopoly. As Joshua Wright writes in a highly-cited defense of Chicago School antitrust, the economies of scale and scope derived from platform network effects "enable platform owners to charge either no price from the outset or to charge a reducing price up to zero price for others" (Wright & Portuese, 2019, p. 6). Using the lens of price effects, he argues that the result is a natural market outcome rather than anticompetitive predatory pricing (Wright & Portuese, 2019, p. 6), simultaneously ignoring the costs to privacy users incur as a result of these transactions.

This paradox of championing the benefits of non-competitive markets illustrates the Chicago School's shift from the "definition of competition as a formal property of markets towards an empiricist definition as the maximization of utility" (Davies, 2014, p. 89), namely price, which is at the core of the anti-monopolist critique. Stretching the market definition creates competition where it is absent, while proclaiming efficiencies accrued by firm size demonstrates no harm to consumer welfare. These arguments culminate in a diagnosis of an absence of competitive concerns in digital platform markets and thus no need for antitrust reform. Likewise, ITIF invokes the discourse of protecting competitors over competition to argue that reforms will simply shield smaller competitors from "legitimate" competition. At the same time, addressing other concerns related to cybersecurity, political power, and privacy requires different policy approaches (Kennedy, 2020).

Indeed, neoliberal stakeholders like ITIF and many prominent antitrust regulators and experts invest more into defending existing policy than offering meaningful proposals for governing digital platform markets. This is partly ideological, as Atkinson (2018) himself confesses in outlining his objections to any regulation of big tech. Articulating the root of ITIF's fundamental problem with reform proposals, he argues that anti-monopolists "fundamentally reject the very idea of private, capitalist companies providing [platform] services" (para. 15). Rather than offer "reasonable protections," he decries the anti-monopolists' goal as "either public regulation for search engines and other tech platforms, or better yet a user-owned search or social network co-op that would never dare to run ads or collect personal information" (para. 15).

Framing reform proposals as an attack on capitalism itself leaves ITIF only one option: continued self-regulation. However, when platforms' "utility" and "efficiencies" become elusive as they collect even more user data to recover the true cost of their services, facilitate the promulgation of hate speech and misinformation, and exploit gig workers, this justification requires further elaboration. When the contradictions of the utility frame become impossible to ignore, its ideological foundations become clearer. For instance, Gus Hurwitz (2020), law professor and affiliate with the AEI and George Mason University, reviewing a book calling for antitrust reform, argues that the purpose of competition in a capitalist economy is not to satisfy society's needs, but to allocate resources amid persistent scarcity. This allocation is economic efficiency, whose goal is "making society as a whole as wealthy as possible but not about making sure that that wealth is fairly distributed" (para. 9). In this society, which creates prosperous markets, there are tradeoffs between "low cost, processed foods [and] greater poverty for those who already can least afford food" (para. 4) or between "a startup being beholden to … platforms' infrastructures [and a] startup [needing] to entirely engineer its own infrastructure" (para. 4). This radical neoliberal logic justifies inequality as the tradeoff for *potential* innovation and lower prices as a collective social benefit. This logic underpins existing antitrust frameworks and fuels platformization: the embrace of scarcity without acknowledging its asymmetrical distribution; the emphasis on choice between bad and worse alternatives without analysis of the market and political forces structuring those alternatives; and the valorization of the existing under the banner of market optimization against any potential reform as threatening that optimization.

Such thinking is the target of antimonopoly interventions. However, anti-monopolists also faced a persistent critique, which some have sought to accommodate, from stakeholders who favor a “regulated monopoly or regulated oligopoly public interest model” (H. Feld, personal communication, March 6, 2020). For instance, co-director of the Harvard’s Platform Accountability Project Dipayan Ghosh argues that Facebook constitutes a natural monopoly and treating it like a utility provides a more robust set of tools to address its multitude externalities (Ghosh, 2019). In fact, as Matt Stoller observed, antimonopoly’s “most ardent critics … have actually come from the left” (The Capitol Forum, 2020a, p. 11). For instance, Alex Jacquez from the Bernie Sanders Campaign agreed that antitrust has been neglected, but argued that splitting Amazon into three companies would not improve conditions for its workers, unless regulatory and structural conditions were created that encourage bottom-up building up of labor power (The Capitol Forum, 2020b). Such arguments would animate a growing debate about regulating platforms. Although more radical critiques of antitrust reform as simply optimizing capitalist markets (e.g., Morozov, 2019) entered the broader policy arena via the popular press, they have not pierced the louder US establishment debate over breakups and other reform proposals. However, antimonopoly academics, ideologically closer to New Deal progressives, have increasingly and seriously grappled with the tensions between socialist proposals and the left antimonopoly project, identifying areas where they diverge (e.g. centralization in the state) and areas where they align (e.g. structural transformation) to articulate visions of reform (e.g. Paul, 2020b).

The center, like neoliberal conservative and leftist critics, targets the proposed remedies. These antitrust experts see breakups as an “extreme remedy [with] government involvement into decisions about how a corporation is structured” (L. Khan, personal communication, May 13, 2020). Established antitrust scholars like Herbert Hovenkamp, one of the foremost legal authorities on antitrust frequently cited by the Supreme Court, caution that “you've got to tread a little lightly when you go through this stuff because the courts have vast power to break things” (personal communication, February 27, 2020). They agree that antitrust needs reform since it fails to capture certain competitive dynamics, but they associate Neo-Brandeisian proposals with using “antitrust to ward off technological … progress” (H. Hovenkamp, personal communication, February 27, 2020). Like Justice Brandeis’s protection of small grocers amid emerging big chain grocery stores, Hovenkamp argues anti-monopolists target companies like Amazon which outcompete smaller retailers through lower prices and distribution costs, thus opposing natural technological progress: “this is a major revolution in distribution and retailing. … We're not going to reverse it” (personal communication, February 27, 2020). Like neoliberal conservatives, these experts note efficiencies accruing from firm size, like Amazon offering logistical support like advertising and billing to smaller retailers. However, they also argue for limited policy reforms.

The critiques range in defining problem from intruding on well-functioning markets to unregulated market power to structural inequality to competitive distortions. However, all three groups oppose achieving more competitive markets through breakups either by defining competition in terms of efficiencies, which accommodates big firms, or by pointing out that more competition does not necessarily translate into meaningful, equitable change. Anti-monopolists, many of them trained lawyers and economists, approach these critiques by being very specific analytically and empirically about their interventions. The endeavor requires the difficult, mundane work of in-depth policy analysis into platform markets. As Lina Khan put it, "a central task is really identifying what the core problems are and understanding how those problems link to either problems of market structure or problems with the business model" (personal communication, May 13, 2020). Despite critics' assertions, this work is extensively empirical: "you actually have to disentangle the different monopolies, understand what are the different … properties that [help decide] whether a particular function needs to be governed by competition or whether there are certain … benefits to scale that we want to preserve" (L. Khan, personal communication, May 13, 2020) via utility-based regulation.

Such careful analysis is essential to antitrust enforcement because it characterizes the market in question and aids in the assessment and location of potential market power. For instance, in the 2012 Google Search case the EC found no alternatives to Google Search and therefore evidence of market power, while the FTC used a broader market definition of search to include commerce platforms like Amazon and eBay. US conservative antitrust stalwarts argue the EC politically narrowed the market definition to find anticompetitive harms (Wright & Portuese, 2019, p. 38), instead of faulting US authorities for defining the search platform market too expansively. By delineating where competitive concerns lie, such definitions have profound consequences for both structuring markets and policy interventions into them.

As critical policy studies literature emphasizes, different governance philosophies can result in the construction of very different policy problems (Black, 2002; Dery, 2000; Fischer, 2003). Because platformization introduces interdependence and complexity into markets (Nieborg & Poell, 2018; Van Dijck, 2020; van Dijck et al., 2018), these approaches can have downstream effects. Consequently, precise problem definition and analysis is essential. As Harold Feld argues: “there's competition on the various platforms and competition with the various platforms” (personal communication, March 6, 2020). Maximizing competition between retailers competing on Amazon, without Amazon’s interference, is different from incentivizing competition to Amazon. The competition from specialized retailers, like Etsy, is different from that of Walmart’s online store. Moreover, these dynamics differ across platform markets: “The question of ‘how would you open the online retail space to competition’ is different from ‘how would I open the online advertising space to competition,’ which is different from search” (personal communication, March 6, 2020). The debate requires precision about which market is being discussed, how substitutable the products are, how individual markets should be regulated, and how competition within and across these markets should be organized.

The ideological critiques outlined here differ not only in defining the existence and scope of the problem in digital markets, but also in the mode of policy analysis. These divergences crystallize in debates over existing antitrust’s primary analytical tool: the consumer welfare standard.

Problem analysis: consumer welfare and price effects

A key component of expanding the debate about the political role of antitrust involves challenging its lodestar, namely the consumer welfare standard. Khan’s (2017a) “Amazon’s Antitrust Paradox” charged that “the current framework in antitrust—specifically its equating competition with ‘consumer welfare,’ typically measured through short-term effects on price and output—fails to capture the architecture of market power in the twenty-first century marketplace” (p. 716). For platforms, this market power involves erecting barriers to entry, gatekeeping, leveraging data, bargaining power, and leveraging dominance in one market to expand into an adjacent one. Since the exercise of this power does not result in price increases, antitrust frameworks focused on price effects fail to detect it. Consequently, reformists argue for expanding the scope of potential interventions and a structural antitrust approach, which considers market dynamics, concentration, and firm behavior (e.g., Khan, 2017a; Khan, 2019; Rahman, 2018). They also call for abandoning the consumer welfare standard.

The evolution of the debate over the consumer welfare standard reveals both the boundary work of antitrust experts and institutional path dependence. Antitrust elites, particularly conservatives, rallied not just behind the consumer welfare standard, but also the focus on price effects even as the antimonopoly critique began to gather support in policy circles. Defining anticompetitive activity in terms of price increases or output reduction provided antitrust with coherence and gave enforcers clear goals. Perhaps more importantly, as Tom Struble, the former Manager of Technology and Innovation Policy at the libertarian think tank R Street,[15] told me, abandoning the simple cost-benefit analysis of consumer welfare "would throw a lot of uncertainty back into the economy and companies would suddenly not know how to plan their business" (personal communication, February 26, 2020) or whether potential mergers might get blocked. In such accounts, the consumer welfare standard provides an agreed-upon, narrow metric that facilitates mergers and acquisitions with minimal state restraint. The discourses of uncertainty and unclarity constitute part of what Davies (2014) calls the "performance of neoliberal authority [involving] appeals to ... economic evaluation as the test of legitimate competitive activity" (p. 56), which the consumer welfare standard provides.

[15] Struble became the Attorney Advisor at the Office of Engineering and Technology at the FCC in mid-2020, soon after my interview with him.

However, the consumer welfare standard includes non-price criteria, like quality, innovation, and consumer choice. Yet, antitrust cases focus on consumer price, as antitrust expert at Public Knowledge Charlotte Slaiman points out, because of antitrust's reliance on economics: "it's much easier to do an economic model of prices than innovation. … even if [economists] do it, I think the judge will be more taken in by the price modeling, because it's more reliable" (personal communication, February 28, 2020). This institutional path dependence serves as an obstacle to expanding the consumer welfare standard.

The debate over the consumer welfare standard as a tool for analyzing competitive problems represents a conflict over the role of antitrust enforcement in platform markets. While reformists view the analytical approach as a roadblock to addressing anticompetitive harms by thwarting robust problem detection, opponents view the predictability it offers as essential to the maximally frictionless operation of platform capitalism. Though these stances are diametrically opposed, the debate over the consumer welfare standard evolved over the course of my research. As economists identified new features of competitive dynamics in digital platform markets, the efforts to accommodate them under the standard continued amid antimonopoly objections. Next, I focus on the most prominent of these, namely data.

Data, privacy, and competition

What role, if any, do data and privacy play in competition and competition in data extraction and analytics? Such questions have generated immense intellectual output (e.g., Graef, 2018; Srnicek, 2017; Stucke & Grunes, 2016; Zuboff, 2019). In the context of antitrust reform, the policy debate concerned whether competition law could and should deal with data collection and user privacy—key processes underpinning the expansion of surveillance capitalism.

Proponents of narrow antitrust, especially libertarians and conservatives, argued that data is an important, but not a critical resource: without good technology and business models it is useless (e.g., Kennedy, 2020). Charles Duan, a Senior Fellow at R Street, told me that although reformists argue "that Google happens to hold on to particularly valuable search data or Amazon happens to hold on to particularly valuable shopping data. … [T]hat's not necessarily the case. … It is as valuable as you're able to make it" (personal communication, February 20, 2020). Such arguments posit data—the key feature of the digital economy—as a non-asset and therefore outside antitrust's jurisdiction. The libertarian ICLE emphasizes that data is not a scarce resource: competitors can easily purchase third-party data and many startups compete without significant data (Bowman & Manne, 2020). Others, like Hovenkamp, acknowledge data's value to platform business models but frame its collection as advancing consumer welfare: "Amazon … keeps tabs on customers' buying habits and … gives them little nudges. … Turns out customers actually like that. … [These are] not antitrust concerns unless you can figure out a way that it results in higher prices for some product or service" (personal communication, February 27, 2020).

However, ICLE's arguments misrepresent both the granularity of data collected by big tech behemoths and their frequent acquisition of startups. Duan's point fails to account for the mutually constitutive relationship between algorithms and data. Recommender and personalization systems, which attract users to platforms, benefit from accuracy and effectiveness. At a certain point, these accrue with more data rather than the quality of the recommender algorithm (Hindman, 2018). Put differently, the scope and amount of data, among other features, make machine learning algorithms better able to interpret data and, consequently, extract value from it. This contributes to the stickiness of already popular platforms, like Amazon, entrenching their market dominance: "most heavily used sites have a significant advantage in building recommender systems over sites that are currently less popular. More signals, and a greater diversity of signals, significantly improve performance" (Hindman, 2018, p. 61). Thus, when Hovenkamp frames personalization as increasing consumer welfare, he demonstrates the shortcomings of antitrust's focus on price effects to capture market power accruing from massive data sets.

The competitive significance of data became the center of intense policy debates, which focused on the role of user privacy as a dimension of competition in digital platform markets and the role of data as a competitive tool. In 2018, the Assistant Attorney General of the DOJ's Antitrust Division Makan Delrahim, a former attorney and lobbyist for Google during its acquisition of DoubleClick (Overly & McGill, 2019), gave a keynote speech on antitrust enforcement in digital markets at the Stigler Conference. He conceded that "[f]rom an economic standpoint … [user] preference for data privacy could signal the emergence of a new market asset" (Delrahim, 2018, p. 7). The same year, during its hearings on competition in the 21st century, the FTC dedicated three days to the role of privacy and big data in competition. The discussants reflected on increasingly perceived enforcement failures in the Google-DoubleClick and the Facebook-WhatsApp acquisitions and considered the link between data and competition law. Law professor Ramsi Woodcock articulated this link in the context of online merchants offering users personalized pricing: "[data] allows firms to figure out how much they can raise prices [for products] without alienating their consumers. … [T]he more competitive a market is, the less the firm can raise prices and so the less value it can extract" (FTC, 2018c, p. 14). Robust competition policy that actively prevented concentration in digital markets would reduce incentives to extract user data by dispersing its value among a greater number of competitors. Calls like this one emphasized what defenders of existing antitrust denied, namely the value of data to digital platforms, which increased in concentrated markets. Moreover, implicitly, this meant that data had context-specific value—a company that collected customer data over a decade would be better able to extract value from it than a company that just started.

The antitrust community was divided on the policy implications. The response of conservative think tanks was that privacy protections, not data, create barriers to entry in digital platform markets (Bowman & Manne, 2020). As Charles Duan put it, "big tech companies use private data in ways that are problematic to consumers, but any [regulatory] approaches that would limit that sort of activity … generally end up favoring the large companies" (personal communication, February 20, 2020) by imposing compliance costs only big companies could afford. Although conservatives invoked these arguments to oppose strong privacy regulations, they made a subtler point: framing data collection through the lens of competition implied "that it's really just the big tech companies who are taking advantage of private data" (C. Duan, personal communication, February 20, 2020). The competition lens put the focus on the largest firms, divorcing concerns about data collection and the surveillance capitalism it feeds from digital markets themselves. There was some recognition of this blind spot: the Stigler Report proposed a more radical idea, namely to classify social media platforms as stewards rather than owners of user data, "entitled to use it to improve their own business models but not necessarily to prevent others from using the data for welfare-maximizing purposes" (Stigler Center, 2019c, p. 323). An addendum suggested platforms deposit a percentage of collected user data into the public domain for capitalization by start-ups. Yet the proposal ultimately sought to incentivize competition in digital markets. There was little effort to radically rethink the entire data collection apparatus. Instead, a smaller change was taking place.

In 2019, at a speech on the subject at Harvard Law School, Delrahim hinted at a shift in antitrust thinking at the regulatory level: “Today, the extraction of monopoly rents may look quite different than it did in the early 20th century. Therefore, it is not surprising that data and its market value as an asset class would raise competition concerns” (Delrahim, 2019b, p. 3). He also stressed the challenges mass data collection posed for competition enforcers, who must evaluate the competitive impact of the scale of data, its type, and how and which companies used it. Most importantly, “enforcers must confront the reality that data insights in the digital economy are combined across the ecosystem of the internet sometimes in ways that transcend product improvement and impact consumer choice altogether” (Delrahim, 2019b, p. 4), skewing competition by manipulating demand. He acknowledged that incumbents’ access to extensive datasets can create barriers to entry for firms that lack the same data volume, enhancing their market dominance. Concurrently, he cautioned against oversimplifying “how bargaining, transaction costs, and competition principles apply with respect to businesses that rely on data collection, aggregation, and analysis” (Delrahim, 2019b, p. 6).

Delrahim’s speech mounted a defense of existing antitrust law and a commitment to an overarching enforcement philosophy: “free markets, not governments, should decide winners and losers” (Delrahim, 2019b, p. 12). As he argued earlier that year in response to the burgeoning anti-monopoly critique, “the Antitrust Division does not take a myopic view of competition. Many recent calls for antitrust reform, or more radical change, are premised on the incorrect notion that antitrust policy is only concerned with keeping prices low” (Delrahim, 2019a, para. 40). The consumer welfare standard, which loomed over these debates, could accommodate privacy concerns under diminished quality, along with harms to innovation and the loss of potential competition.

Anti-monopolists staunchly opposed such efforts by the antitrust community to preserve the standard. At an FTC hearing on the subject, Barry Lynn adamantly told an audience of former and current antitrust economists and litigators that "[t]he consumer welfare test must go. … You have devoted entire careers to this philosophy. I greatly appreciate how much creativity … you are devoting to stretching the consumer welfare philosophy to fit … new purposes" (FTC, 2018b, p. 168). No matter how it was measured, the consumer welfare standard detracted from the political dimensions of antitrust, focusing exclusively on economic output. Such objections anticipated the question of whether antitrust could address noneconomic concerns arising in digital platform markets.

The limits of competition

In late September 2019, at an event organized by Georgetown University's McDonaugh Business School titled "How to Handle Big Tech"—part of a series of talks called *New Debates and Tensions in Antitrust*—Terrell McSweeney, a former Obama-era FTC Commissioner, made the quintessential argument about the limits of antitrust in digital platform markets:

> Content moderation comes to mind, bias, discrimination, privacy, dark patterns, manipulation of any kind, political speech, advertising, disinformation, national security, free expression, First Amendment, autonomous predictive systems. … Big data, access to data, data portability, interoperability. … Some of these are externalities [as] part of the whole transformation of our economy into a digital economy. … I get the idea that if we can just 'antitrust' a little bit more in some of these markets, we'll get more competition and whooo! It'll be magic, right? … I think [competition is] a very powerful force in markets, but … it's not necessarily awesome for addressing externalities. … If you introduce more competition [in digital platform markets], what is likely to be the outcome

> for people? ... Would we see less behavioral advertising in online digital advertising markets? I'm gonna go with 'no' on that. (Georgetown Center for Business and Public Policy, 2019, 00:59:50).

Indeed, there was a growing antitrust elite consensus that competition law could not tackle many concerns arising in these markets—nor should it. As Jan McDavid, a prominent US antitrust lawyer and antitrust transition guide to Clinton, Bush, and Obama administrations, argued at an FTC hearing, "[A]ntitrust analysis that includes amorphous concepts of bigness and fairness could lend itself to politically motivated enforcement, which we certainly should eschew, especially now in the current political environment" (FTC, 2018a, p. 63). The reservation was a reaction to the growing politicization of governmental institutions by the Trump administration and an expression of legitimate concern about potential capture of the legislative process by right-wing populists. At the same time, conservatives like Joshua Wright worried that expanding the focus of antitrust would likely result in "slowing economic growth and depriving consumers of goods and services" (Wright & Portuese, 2019, p. 48), inflating prices and killing innovation. Finally, some stakeholders stressed the narrow purpose of competition law namely, as VISA's Alanna Rutherford put it at the 2019 Stigler Conference, "to promote capitalism in a way that doesn't interfere with the social contract" (Stigler Center, 2019c, 00:32:25). Attempts to reform antitrust "to sort of rewrite social policy" (Stigler Center, 2019c, 00:32:25) reeked of central planning and undermined the natural relationship between capitalism and democracy.

The neoliberal critique aside, Rutherford's point intersected with mounting doubts that more competition could address the more expressly social problems arising in these markets. When I pressed Sally Hubbard about whether social media platforms' political dimensions, including transmitting speech and serving as sites of political engagement, could be overseen by antitrust, she stated that platforms "should be required to adhere to common carriage standards" (personal communication, February 28, 2020). However, she added, "ideally though, I would like them to be smaller. I don't think it's okay to have one company control the speech that 2.3 billion people see. I think that's dangerous" (personal communication, February 28, 2020). This very subject came up at the 2019 Stigler Conference. Economist Luigi Zingales asked Chris Hughes, co-founder and prominent critic of Facebook, how he would address the problem of bias and misinformation in Facebook's newsfeed:

> Hughes: I want a competitive market where I have multiple newsfeeds to choose from. … Multiple different ways of learning about the world.
> Zingales: So, you think that the solution is not in trying to in any way regulate that? The solution is to try to create more competition?
> Hughes: I don't have a sense of how regulation around newsfeed algorithms would work. So, no, I think more competition is better. And there are some folks who say that more competition … could be in some industries a race to the bottom.[16] … The fact is, we don't know. … I'd rather have a competitive market where we can understand what's really happening. And if it is actually a race to the bottom, think about digital literacy education, civics education, regulation—these things [rather] than to just have one person in control who we are just waiting and hoping to make the right decision. (Stigler Center, 2019b, 00:32:45)

Such arguments pointed to the ad-driven business model as the core problem with sites like YouTube and Facebook, which incentivizes fear, outrage, and misinformation. However, since market mechanisms rewarded Facebook's business model, competition simply could produce platforms with even more extreme content, like Parler, even if their reach would be smaller. The solution was to maximize consumer choice, educate consumers to maximize informed consumption, and see what would happen—a preferable alternative to having one content outlet.

As the debates evolved, and like Hughes himself implied, antitrust and regulation came to be seen increasingly as complements. Despite the frequent emphasis on competition and structural separation, antimonopoly accommodates regulatory options,

[16] He is likely referring to "Competition Overdose" by economists Stucke and Ezrachi (2020).

particularly in communications markets (Rahman, 2018), since the law can be configured to design different markets. As Lina Khan argues, “in addition to antitrust and … utility principles like nondiscrimination, we’ve also had a public option [namely] a publicly-owned service that is competing with privately-owned services. … [T]hese types of commons regimes [are] certainly within the broader anti-monopoly framework” (personal communication, May 13, 2020). Although such concepts are more familiar and actively fought in the telecom space, like municipal broadband, anti-monopolists invoked public utility, public options, and even co-ops as legitimate market arrangements in an effort to expand the policy discourse vis-à-vis digital markets.

However, the allure of applying competition law in these markets stems from the scope of the problems they pose. As Charlotte Slaiman put it, “the root of the problem … is power, which makes you turn towards competition remedies … [But] regulation is really what we’re going to need. Antitrust is like a one-time tool, and this is a place that really needs ongoing monitoring” (personal communication, February 28, 2020). Yet, despite winner-take-all characteristics and partly since regulating so many components posed significant challenges, many of my interviewees argued that pursuing competition in digital platform markets was an essential alternative to deciding, as Harold Feld put it, that “today’s top five are the top five and we will just run them as quasi-government corporations” (personal communication, March 6, 2020). Even though conservatives and libertarians invoked antitrust’s inability to address the host of problems identified in platform markets simply to foreclose on antitrust reform, many in the antitrust community began to consider what competition policy could realistically achieve and what regulation would have to.

To a large extent, these debates were crystallized in—and subsequently influenced by—the Stigler Committee on Digital Platform (2019) report, which articulated concerns in platform markets across four dimensions: 1) market problems, 2) news, 3) privacy and data, and 4) politics. Many of its findings were unsurprising. They reflected the growing consensus that platform markets are prone to tipping to monopoly; that zero price obscured privacy and behavioral control harms to consumers,[17] especially when combined with market power; and that platforms could leverage dominance in one market, such as advertising, to monopolize other markets. The report also charged that platforms monopolize news markets as editors and distributors, declaring that newspapers represent "collateral damage of the digital platform revolution" (Stigler Committee on Digital Platforms, 2019, p. 10). Crucially, it emphasized that social media platforms play a civic function as increasingly powerful political actors with significant economic resources, massive networks of users, and opacity in their business operations.

The report's many proposed solutions combined antitrust reform with familiar regulatory tools, like forced interoperability, namely designing open APIs (Application Program Interfaces) to facilitate interconnection between devices. Partly a testament to the legacy of mergers like AT&T-Time Warner and the anti-monopolists' interventions, the report also called for more aggressive antitrust enforcement, new merger guidelines for digital platforms, a more sensitive transaction size threshold to trigger regulatory merger review, and more stringent requirements for merging parties to prove efficiencies. It emphasized the importance to effective enforcement of structural dynamics, like exclusive dealing practices and evaluating harms on both sides of platform markets,[18] over price effects. Yet, the report retained the consumer welfare

[17] For instance, via nudges and default options.

[18] A recommendation directly contradicting the Supreme Court's findings in *Ohio v. Amex*—"users on different sides of a platform generally have divergent interests" (Stigler Committee on Digital Platforms, 2019, p. 96). The report also argued that when there is evidence of competitive harm, specifying in which defined relevant market it occurs should not matter.

standard, defining non-price concerns like user privacy violations as a dimension of product quality.

But the report's signature recommendation involved the creation of a new regulatory body, the Digital Authority (DA). The agency would establish and enforce rules that prevent anticompetitive harms and shape future conduct in digital markets, complementing antitrust, which relies on case-by-case analysis and focuses on past violations. The report invokes the DA—envisioned as a subdivision of the FTC—as an argument against breaking up platforms, which it considers too complicated, "very disruptive" (p. 100), and burdensome for antitrust enforcers. Instead, the DA's remedies could prevent the need for a breakup, as the agency somehow would take over the extensive and ongoing monitoring enforcers cannot conduct. Indeed, the report ascribes the agency a multitude of duties: ensuring barriers to entry in platform markets remain low (without clarifying whether this applies to platform-adjacent or platformized markets); supporting antitrust enforcers (without clarifying to what extent); enforcing data portability, mobility, open standards, nondiscrimination, and interoperability; playing an expert role in merger review; preventing foreclosure, bundling, and lock-in; ensuring general consumer protection in the privacy arena; investigating breaches; and managing access to data for external audits, among others.

Despite these extensive oversight responsibilities, the committee tellingly modeled the DA after the FCC[19]—an agency with a track record of industry capture (Popiel, 2020). Indeed, the report argued the DA needs to carefully balance preempting potential harms against minimizing its impact on the dynamism of digital markets, providing these markets with "clarity and legal certainty as to the boundaries of

[19] "The communications sector may offer the best guidance for how to approach public accountability for digital platforms" (Stigler Committee on Digital Platforms, 2019, p. 101).

acceptable competition" (Stigler Committee on Digital Platforms, 2019, p. 100). Fearful of unduly imposing on market mechanisms, the political subcommittee went further, arguing that the DA should balance its regulations against any "adverse effects on innovation and competition in the digital media sphere" (p. 311), which "should be promoted where possible" (p. 315). Indeed, the political subcommittee framed problems it investigated like political influence, hate speech, and misinformation as issues of economic concentration: "many of the negative political by-products identified by this report are associated with the lack of a competitive market for digital platforms" (Stigler Center, 2019c, p. 315). Its calls for antitrust reform and greater competition echoed the philosophy behind regulations like the FCC's media ownership caps, which sought to prevent the excessive concentration of communicative power, rather than social regulations like the long-repealed Fairness Doctrine.

Ultimately, then, the report struck a balance: market-based regulation, namely competition, was the optimal solution for many digital platform market concerns. However, for the market competition to work optimally, it would have to be regulated along with the privacy and data externalities it created. Likewise, antitrust and its enforcement would have to be reformed. Both its regulatory ideas and antitrust enforcement proposals stopped short of bolder options like public utility regulation or breakups, erring on the side of market mechanisms. However, the report also clearly bore the stamp of the broader competition policy debates out of which it emerged.

Evolution or status quo?

Such reports and discussions were not just conversations between antitrust experts, but clashes of interests and ideologies that expanded the scope of policy debate and led to top-level investigations into platform markets, like the congressional hearings examined in the next chapter. Throughout these debates, thinking about the relationship between antitrust, market competition, and digital platform markets evolved. Lina Khan notes a “tremendous shift” in thinking: “[The] establishment view on these issues has really moved dramatically towards the positions that just a few years ago were considered radical” (personal communication, May 13, 2020). As Harold Feld put it, the first major shift involved acknowledging “digital markets as having unique characteristics that require a different application of the antitrust laws” (personal communication, March 6, 2020). The work of OMI, and scholars like Lina Khan drew attention to the market power in digital platform markets that existing antitrust missed. They dissected the dangers of vertical integration and defining competition in terms of price effects. As Sally Hubbard recalled, the notion that the consumer welfare standard might consider anything beyond price “was like a crazy idea a few years ago” (personal communication, February 28, 2020). Likewise, the antitrust dimension of privacy is increasingly accepted, and vertical mergers have received more scrutiny. Moreover, the early work put more aggressive remedies, like structural separation, on the antitrust radar if not the table. Breakups have been somewhat normalized. At the 2019 antitrust conference “The Bipartisanship America Needs: Left-Right Convergence on Confronting Monopoly Power,” co-sponsored by The American Conservative and The American Prospect, FTC Commissioner Rohit Chopra acknowledged that “there are cases when divestures will not solve the problem because of strong network effects,” where tools like standardization and interoperability may be more effective. However, he argued that breakups should be on the table and no one in the audience batted an eye (“The Bipartisanship America Needs,” November 14, 2019).

The second shift concerned a more existential inquiry into the role of antitrust vis-à-vis digital platform markets. On one side, as Feld described it, were those who believe antitrust remains relevant in the digital age, but simply must be applied properly—for instance, by expanding the scope of the consumer welfare standard or engaging in stronger enforcement. On another side were those who argued that antitrust law needed revising to address challenges specific to digital platform markets (personal communication, March 6, 2020). Additionally, there was a third shift, namely that antitrust, whether more stringently applied or completely reworked, could not address all or only partly address the dimensions of platform power identified to date (e.g., Feld, 2019). As Feld argues, the Stigler Center and other countries' reports on digital platforms (Puppis & Winseck, 2020) have shed additional light on dynamics within these markets, contributing to a growing recognition within the antitrust community that they require a dedicated regulator because of strong network effects which make them prone to tipping to monopoly (personal communication, March 6, 2020).

However, despite expanding the boundaries of competition policy debate, the impact of this policy work on actual policy outcomes remains unclear. Lina Khan expresses skepticism about tangible change, since platform "companies continue to exist in our current form" (personal communication, May 13, 2020). One obstacle to aggressive reform, and for some a crucial check on reform proposals, is the resistance of the courts. As Hovenkamp argues, the courts "are substantially committed to the consumer welfare principle and, as a result, they have not been too favorable toward big dramatic relief against the big platforms" (H. Hovenkamp, personal communication, February 27, 2020). For others, courts delay the ability of the law to address dramatic developments in certain markets: "what we have seen in the last 40 years … is new economic learning saying that some … assumptions of antitrust law are wrong and we need more enforcement, and it's not being incorporated. … [T]hat is in part because of the judges" (C. Slaiman, personal communication, February 28, 2020).

Indeed, major court decisions dealing with antitrust concerns in digital platform markets offer little hope for meaningful reform. On the one hand, the 2019 Supreme Court case, *Apple v. Pepper*, gave app users standing to bring class action antitrust lawsuits against platforms like Apple as “direct purchasers” of third-party apps through the Apple App Store platform ("Apple Inc. v. Pepper," 2019). The ruling facilitated enforcement through private litigation against platforms. However, the *Ohio v. Amex* ruling significantly handicapped the ability of enforcers to bring monopolization cases in two-sided platform markets, raising the burden of proof. *U.S. v. Sabre* (2020), a contested merger between airline ticket software platforms Sabre and Farelogix, extended this logic to merger cases. Though the court ruled against the DOJ, the companies abandoned the merger after British regulators opposed it. Concerned the ruling “could have an outsized effect on cases involving competition in the digital economy” (U.S. v. Sabre Corp., 2020, p. 6) as judicial precedent, the DOJ requested the court vacates it and the court agreed.

The regulatory and enforcement landscape is also unclear. The FTC competition hearings contributed to the formation of a task force to monitor tech markets, with approximately 17 staff attorneys and a Technology Fellow who specializes in tech platforms (FTC, 2019). They also yielded new vertical merger guidelines. As FTC Chair Joe Simons stated, their drafting was partly motivated by AT&T-Time Warner which “exposed significant misconceptions about the government’s interest in and willingness to challenge vertical mergers” (Simons, 2019, p. 8). Yet, the guidelines met with criticism, not least from both Democratic FTC commissioners and legislators like Senator Amy Klobuchar, for continuing to largely assume vertical integration produces benefits and ignoring established theories of vertical harm (Georgetown Center for Business and Public Policy, 2020).

Finally, the broader policy arena also presents obstacles to addressing the problems arising from platformization. As scholars draw attention to lessons that could be learned from media regulation (Flew et al., 2019; Iosifidis & Andrews, 2019; Napoli, 2019b), the policy debates have remained remarkably siloed. The silos arise from the political economy of think tanks and advocacy organizations, the specializations of antitrust experts who shape these debates, and institutional path dependencies, including in courts and antitrust agencies. The boundary work around competition policy also often results in stakeholders dismissively relegating problems not directly under its purview to undefined regulation. As Feld puts it, "the competition folks are mostly interested in solving the competition problem" (personal communication, March 6, 2020), while those focusing on content moderation or privacy do not engage with these areas' competitive dimensions. Consequently, platform power remains largely defined at the policy level as a market problem, even as efforts like the Stigler Report attempt to bridge these silos.

Conclusion

This account of 2017-2020 developments around antitrust reform in the context of digital platform markets offers several lessons about an emergent governance paradigm of profoundly disruptive technological developments. First, whether antitrust reforms materialize, a more robust definition of competition that moved beyond price effects began to take hold in policy circles. The analytical labor invested by anti-monopolists like Khan and others carefully defined a competitive problem in digital markets and produced a critique of existing competition policy on economic and legal terms that resonated with progressive antitrust experts. In arguing that existing antitrust advanced incumbent interests, the antimonopoly movement also invoked the discourse of robust democratic governance of digital markets. These interventions persisted amid various criticism from neoliberal antitrust elites, including conservatives and centrists, as well as other stakeholders. Disagreement emerged over problem definitions and policy analysis approaches, including key concepts like the consumer welfare standard. However, the competition policy discussions about concerns arising in digital platform markets at venues like the Stigler Center and the FTC hearings ultimately legitimated many of the antimonopoly critiques. These policy debates about antitrust reform produced a set of policy ideas and values vis-à-vis platforms that coalesced around a governance paradigm constructed by an interpretive community (Hassan et al., 2020; Streeter, 1996) of antitrust experts. Rooted in competition policy, the framework ultimately compromised some of the bolder proposals in deference to market mechanisms.

Second, the idea of antitrust and regulation as complements to address platform power emerged as a product of two opposing forces reacting to the Neo-Brandeisian intervention. On the one hand, liberals were alarmed by market failure in these markets and the blind spots in enforcement that failed to detect it. Many of these conversations had been brewing for years in more progressive antitrust circles, but never reached critical mass. Likewise, leftists, largely marginalized in the policy arena, pointed to the limits of competition in addressing pressing policy issues like worker conditions in Amazon warehouses. Concurrently, conservatives, who rabidly opposed antitrust reform, aligning antitrust with a very narrow purpose, argued that non-competition policy problems should be addressed via separate policy mechanisms. Even though they often did not specify these mechanisms, using the argument strategically to turn attention away from antitrust, invoking thinking beyond antitrust aligned with the views of progressives, who linked market failure with regulation.

Third, the debates predominantly focused on the fate of the consumer welfare standard, the appropriateness of breakups as a remedy, the question of dealing with data, and a detailed analysis of competitive issues arising in digital platform markets. No prominent, concerted leftist alternative to the competition paradigm successfully emerged in the broader policy arena thus far, likely partly because law (and economics) is a conservative profession. At a legal antitrust symposium I attended, when one legal scholar mentioned "no-fault monopolization" as a remedy against platform power—the idea that a firm may be broken up once it reaches a certain size[20]—the entire room erupted with laughter. From this vantage point, anti-monopolists' broadening of the debate is a significant accomplishment.

And yet, fourth, competition policy inherently privileges solutions that focus on individual, usually big, companies. As a result, the policy debate remains tethered to the activities of platform giants, while platformization—a process that implicates an increasingly massive swath of social and economic life (Van Dijck, 2020)—remains outside its field of vision. This problem is defined in policy discourse as the problem of policy silos; a spatial metaphor that captures the disconnect between distinct policy arenas that are interconnected by a problem or series of related problems. The Stigler Report, by bringing together insights from economists, lawyers, political scientists, and privacy scholars, among others, sought to address the problem of policy silos, but it persists in the legislative arena as the next chapter illustrates.

However, policy silos can also manifest as a temporal phenomenon: the disconnect between policy interventions at a specific moment and a potential, successive intervention following it. Temporal policy silos can manifest as false tradeoffs between policy options that appear as substitutes but can be complementary on a temporal plane.

[20] An idea that Elizabeth Warren floated when she was running for president (Lao, 2020).

The notion of policy sequences can address these types of silos; a term which I borrow from traditional policy studies. Policy sequences are temporal (Daugbjerg, 2009; Howlett, 2009, 2019) and draw attention to the compatibilities, incongruities, and dependencies between successive policy interventions. Thinking of policy interventions on a temporal plane—much like a historical one—frees us from seeing all policy proposals as substitutes and expands the scope of potential options to contest platform power. Thus, even apparent opposites like structural separation and public utility regulation are suddenly recovered when framed as sequences in a longer policy process. Policy sequencing captures the spirit of certain antimonopoly proposals, with antitrust intervention often framed as a precondition of more aggressive interventions—not least, to loosen platforms' stronghold on political institutions to enact those interventions. While there is a danger with policy sequencing itself being captured or invoked to make empty promises about future reforms that never materialize, procedural safeguards can be built into them (Howlett, 2019). However, I also invoke the term as a conceptual tool for thinking through policy interventions over time, since addressing datafication and platformization requires both immediate and long-term policy effort.

Chapter 4 – Addressing Digital Platform Power

As the debates over antitrust reform intensified in the broader policy arena, Facebook appeared to be facing a crisis. In June 2020, with a global pandemic raging and amid mass US civil rights protests led by the Black Lives Matter movement in response to the killing of Black citizens by the police, Donald Trump posted on the social media platform: “When the looting starts, the shooting starts.” Facebook refused to take down the post, which indicated presidential approval of armed suppression of the protests and led to immense public outrage. On June 17, the coalition of advocacy groups *Stop Hate for Profit* called for a boycott of Facebook, which was joined by many prominent US companies, like Coca Cola. Mark Zuckerberg, CEO of Facebook, stated: “My guess is that all these advertisers will be back on the platform soon enough” (Clayton, 2020, para. 1). He added: “We're not going to change our policies or approach on anything because of a threat to a small percent of our revenue” (Clayton, 2020, para. 3).

Zuckerberg’s casual response captures the intersection between market dominance and broader social concerns that digital platforms, particularly social media platforms, exemplify. The statements also raise questions about whether addressing market power can address these broader issues associated with platform power. While the previous chapter charted the debates around reforming competition policy to address problems arising in digital platform markets, this chapter picks up this thread and focuses specifically on efforts to identify, define, and address digital platform power in the legislative arena.

Using stakeholder analysis, in this case study I examine how tech giants, their competitors, regulators, and advocacy groups deploy competition policy discourses in addressing the power of digital platforms in a series of 2019-2020 U.S. congressional hearings on “Online Platforms and Market Power”—the first congressional antitrust investigation in nearly 50 years.[21] The hearings constitute a congressional inquiry into these markets that emerged out of the momentum behind the debates examined in the previous chapter. Specifically, I trace how the politics underlying these discourses, which both contests and naturalizes platform power, emerges at multiple stages. In particular, following critical policy studies, which emphasizes the power of discursive policy problem definition (Black, 2002; Fischer, 2003; Schmidt, 2015), I map how stakeholders’ discourses articulate the problem they try to address, what solutions they present, and what these solutions imply about stakeholders’ visions of governance over digital platform markets. I show how competition policy discourses operate politically to challenge tech incumbents by contesting dominant regulatory and legal paradigms. However, I also note the limits of these policy paradigms in tackling the power of platforms.

The findings reveal that the reform-oriented competition policy discourses contest dominant accounts of competitive dynamics in digital markets that work to cement digital platform power, while foregrounding the state’s role in market governance by denaturalizing competition as an exclusively market mechanism. At the same time, these discourses imply commercial notions of digital communication, expanding market logics to factors like data, without adequately staking out policy protections for the social and public activity across these platforms. Although they parallel debates explored in the previous chapter, policy silences (Freedman, 2010) emerge with respect to bolder policy proposals. Following Cammaerts and Mansell (2020), the analysis foregrounds “discursive [policy] practices, both repressive and

[21] These led to the passage of the Hart-Scott-Rodino Act of 1976, which requires companies to notify the FTC and DOJ of mergers meeting a certain threshold.

emancipatory [that] have contradictory consequences for economic value generation and for upholding public values" (p. 147), while denaturalizing "the prevailing digital platform common sense" (p. 146). Cumulatively, the case study exposes the politics of competition policy vis-à-vis digital markets and describes the stakes in using this policy discourse to frame the response to digital platform power. I conclude by critically assessing the consequences of the emergent antitrust reform frame for a range of social activity under the banner of digital communication occurring across these platforms.

The Policy Response

Against the backdrop of broader debates about the role of competition policy vis-à-vis digital platform markets—a governance framework animated by the antimonopoly movement examined in the preceding chapter—U.S. Congress organized a series of hearings on "Online Platforms and Market Power" that are the focus here. The hearings were convened by congressmember David Cicilline, Chair of the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law, notably whose staff Lina Khan had joined. Announced on June 3, 2019, the subcommittee framed the investigation as precipitated by Facebook's data breach by Cambridge Analytica, widely and publicly connected with the right-wing populist victory of Donald Trump in the presidential election. Lawmakers argued that the Federal Trade Commission (FTC), which addresses data breaches under its consumer protection mandate, failed to hold Facebook to account for the breach, imposing only a nominal $5 billion fine on the social media giant. However, the scope of the investigation extended beyond Cambridge Analytica, as the subcommittee declared, to the international policy conversation about how to govern digital platform markets:

> A small number of dominant, unregulated platforms have extraordinary power over commerce, communication, and information online. Based on investigative reporting and oversight by international policymakers and enforcers, there are concerns that these platforms have the incentive and ability to harm the competitive process. The Antitrust Subcommittee will conduct a top-to-bottom review of the market power held by giant tech platforms. This is the first time Congress has undertaken an investigation into this behavior. The Committee's investigation will focus on three main areas:
>
> - Documenting competition problems in digital markets;
> - Examining whether dominant firms are engaging in anti-competitive conduct; and
> - Assessing whether existing antitrust laws, competition policies, and current enforcement levels are adequate to address these issues. (House Judiciary Committee Media Center, 2019)

Although competition concerns provided the central rationale, Jerrold Nadler, Chair of the Committee on the Judiciary which oversaw the subcommittee, framed the purpose of the hearings as more expansive: "Congress and the courts … recognized that certain businesses play such a critical role in shaping the economy that they warrant special scrutiny. … [C]ertain industries are 'affected with the public interest' in ways that demand special rules" (Nadler, 2019, p. 4). Invoking the public interest, Nadler argued that the purpose of the investigation was "to understand how intermediaries are affecting the shape of our economy and our democracy. How can and do these platforms use their market power? What are the effects of this conduct? And how should policymakers respond?" (Nadler, 2019, p. 5). Each hearing explored a different dimension of the issue: 1) impact on the press, 2) impact on innovation, 3) the competitive role of data and privacy, 4) the role of the antitrust agencies, 5) impact on competitors and the digital economy, and 6) the dominance of Amazon, Apple, Facebook, and Google.[22]

The congressional hearings serve as an ideal site of study for analyzing competition policy debates about digital platform markets for two reasons. First, they

[22] A final seventh hearing was held to review the findings of the congressional investigation as this dissertation was being finalized and is consequently excluded from analysis.

represent a microcosm of ongoing policy discussions, featuring policy actors who have debated these issues in the broader policy arena, crystallizing their positions. The hearings drew established stakeholders, experts, and representatives from the tech industry. Moreover, the sixth hearing, held in July 2020, included all four CEOs of Amazon, Apple, Facebook, and Google. Thus, while the previous chapter focused on policy elites, this case study sheds light on how the industry addresses these concerns. Second, the venue is both politically significant—the first investigation by the US Congress into digital platforms' business activities—and openly public. The discourses that circulated within it aimed to inform policy, culminating in a substantive more-than-400-page report that contained concrete policy and legislative proposals. However, these policy conversations also signaled to regulators in other countries grappling with these issues and to shape public opinion. They aimed to elucidate to the public the complex issues raised by digital platforms. Consequently, the hearings both sought to influence domestic politics and to contribute to ongoing international debates about how to govern digital markets.

Stakeholders

More than two dozen witnesses testified at the hearings and additional individuals and groups submitted letters to the Committee for inclusion in the record. Using the qualitative analysis software Atlas.ti to facilitate data management, I code the testimony and submissions for the record to identify these stakeholders (n=50), who fall into six groups (Table 1): 1) competitors and online services, 2) economists and legal scholars, 3) progressive advocacy groups and think tanks, 4) conservative think tanks, 5) digital platform representatives, including industry lobbyists, and 6) regulators from various governmental agencies. Such mapping facilitates the analytical linking of discourses to the policy interests of participating actors, like platform companies, their competitors, and advocacy organizations—these interests can serve as a powerful explanator for the shape of the policy discourses (Van den Bulck, 2012).

Competitors and online services include representatives from companies that use the platforms' services to reach users (e.g., CelebrityNetWorth.com, Spotify, news organizations) and/or directly compete with platforms in one or several markets, like mapping services, search, and smart speakers (e.g., Basecamp, DuckDuckGo, Sonos, respectively). Many of these stakeholders rely on platforms for user traffic to their content, which the platforms can thwart or redirect to their alternative. Together, they represent "complementors" operating in multi-sided platform markets, affected by processes of platformization (Nieborg & Poell, 2018). The second category, economists and legal scholars, are academics and public intellectuals. All have testified before regulators and lawmakers and some had served in government (e.g., Fiona Scott Morton). Ideologically, they all support reforming antitrust and have written extensively on this topic (e.g. Stucke & Grunes, 2016; Wu, 2018). In the analysis, I examine their positions alongside the third category, namely progressive advocacy groups and think tanks, which include the Open Markets Institute, the key force behind the antimonopoly movement. The fourth category, conservative and libertarian think tanks, includes established organizations like the American Enterprise Institute. Fifth, representatives from the major digital platforms, Amazon, Apple, Facebook, and Google all testified, and the Computer & Communications Industry Association (CCIA) which lobbies on behalf of the tech sector submitted written comments. Finally, the regulators represent not only different countries (e.g., Australia), different regulatory agencies (e.g., European Commission, Department of Justice), but also range from more progressive (e.g., Rohit Chopra) to more conservative (e.g., Maureen Ohlhausen). These stakeholders' positions largely aligned with either the progressive or conservative think tanks, thus I grouped them accordingly in the analysis. Even within their respective categories, these stakeholders reflect different perspectives, offer diverse insights into the debate, and draw attention to multiple dimensions of the issues. However, the testimony and the written submissions for the record converged on the key themes explored in the analysis below.

STAKEHOLDER CATEGORY	STAKEHOLDER
COMPETITORS & ONLINE SERVICES (17)	American Hotel & Lodging Association (AHLA)
	App Association
	Atlanta Journal-Constitution
	Basecamp
	CelebrityNetWorth.com
	DuckDuckGo
	Genius
	Journalists
	News Corp
	News Media Alliance
	Popsockets
	Retail Industry Leaders Association (RILA)
	Repair.org
	Sonos
	Spotify
	Six4Three
	Tiles
ECONOMISTS & LEGAL SCHOLARS (6)	Jason Furman
	Fiona Scott Morton
	Maurice Stucke & Ariel Ezrachi
	Dina Srinivasan
	Tommaso Valletti
	Tim Wu
PROGRESSIVE ADVOCACY GROUPS & THINK TANKS (8)	Coalition of Advocacy Organizations
	Consumer Reports
	Electronic Frontier Foundation (EFF)
	Electronic Privacy Information Center (EPIC)
	Institute for Local Self-Reliance (ISLR)
	Open Markets Institute

	Public Knowledge
	U.S. Public Interest Research Group (U.S. PIRG)
CONSERVATIVE THINK TANKS (4)	American Enterprise Institute (AEI)
	Mercatus Center
	NetChoice
	R Street Institute
DIGITAL PLATFORMS & LOBBYISTS (9)	Nate Sutton, Amazon
	Jeff Bezos, Amazon
	Kyle Andeer, Apple
	Tim Cook, Apple
	Matt, Scheuers, Computer & Communications Industry Association (CCIA)
	Matt Perault, Facebook
	Mark Zuckerberg, Facebook
	Adam Cohen, Google
	Sundar Pichai, Google
REGULATORS (6)	Rohit Chopra, Federal Trade Commission
	Makan Delrahim, Department of Justice
	Maureen Ohlhausen, Federal Trade Commission
	Joe Simons, Federal Trade Commission
	Rod Sims, Australian Consumer & Competition Commission
	Margrethe Vestager, European Commission

Table 1 – Stakeholders in the Judiciary Committee hearings on "Online Platforms and Market Power" (subtotals in parentheses)

Defining the Problem: Articulating Platform Power

Critical policy studies literature points out that in policymaking, aside from resource-based asymmetries among stakeholders, power also resides in defining policy problems—a key component of policy agenda-setting (Barbehön et al., 2015; Fischer, 2003; Hendrik, 2015a). Persuasively defining a problem for policy to address circumscribes "the scope of possible solutions" (Schmidt, 2008, p. 306). Thus, problem definition implies not just a particular policy objective, but also specific types of interventions. Since the process comprises "an effort to portray a social situation in a way that favours one's own argument and course of action as being in the public interest" (Fischer, 2003, p. 170), problem definition is ultimately political and discursive.

An essential feature of the debate about competition in digital markets during the congressional hearings is the concerted effort by a range of stakeholders, from advocacy groups to big tech's competitors, to define problems in digital markets—often by describing digital platforms' power or claiming its absence—to justify specific policy interventions, ranging from stricter oversight to market-based approaches. All stakeholders, including representatives from digital platform companies, shared their diagnoses with the committee, either explicitly or implicitly. These problem definitions contained broader ideological assumptions about the relationships between policy and digital markets, legitimating specific policy interventions while delegitimating others. Consequently, problem definitions shaped the boundaries of these policy debates.

Competitors & online services: an aberration in the digital marketplace

Digital platforms' competitors and companies that relied on their services to reach users defined platform power as gatekeeping power, accrued through platforms' privileged position in multi-sided markets and manifesting via algorithmic control, monopoly over data, and dominance in digital advertising, among others. For instance, Brian Warner (2019), CEO of a hosted web service CelebrityNetWorth.com, a database of celebrities and their net worth, argued that Google skewed what was initially a naturally innovative marketplace—"an open and free platform off which anyone could launch a new idea and reach consumers [because it] was not a walled garden, but a turnstile utility" (p.2-3). The search giant itself cultivated "these fertile conditions" (p. 3) in which immense innovation and new web businesses were born. In fact, this "symbiotic relationship … helped cement Google's search dominance" (p. 3). Consequently, this growth fueling the expansion of the digital market was mutually beneficial. This account recalled arguments made in the policy arena about the benefits platforms provided to third-party vendors.

However, this naturally innovative and competitive environment began to fray. Warner testified that, following an algorithmic tweak to Google Search, when users queried the net worth of a celebrity Search would display results from his site in a dedicated Search box without attribution—as if the results came from Google rather than Warner's site. User visits plummeted as Google siphoned Warner's users, damaging his business. Google no longer maintained a neutral intermediary position in the market it created; instead, the search giant increasingly acted as a gatekeeper. Emphasizing platforms' gatekeeping power was not an uncommon complaint. Genius.com, an online database of song lyrics, also detailed how Google appropriated content from its website in its search information box, depriving the company of potential user visits. As its owner put it, "the copying is both widespread and systematic" (Gross, 2019, p. 2).

Stakeholders construed such activities as an unnatural disruption of the once-competitive digital marketplace:

> Google has removed essentially all of the oxygen from the open internet ecosystem. There is no longer any incentive or even basic opportunity to innovate as I did back in 2008. If someone came to me with an idea for a website or a web service today, I would tell them to run. Run as far away from the web as possible. Launch a lawn care business or a dog grooming business - something Google can't take away as soon as he or she is thriving. … Google's dominance today is vast, extending beyond online search into mobile operating systems, advertising, browsers, mapping, email and video. These business lines work in tandem to establish unchecked power in virtually every facet of the consumer internet. (Warner, 2019, p. 6)

Natural market mechanisms were no longer functioning effectively. The narrative countered claims that platforms simply provided immense benefits to third-party businesses in the marketplaces they hosted: those benefits were increasingly offset by private governance regimes that stifled innovation through gatekeeping power.

Competitors argued that digital platforms exploited their size and scope in ways that were antithetical to the level playing field and efficiencies inherent to digital markets. As David Hansson of Basecamp argued, "[w]e cannot rely on the benevolence of big tech corporate leaders to do the right thing. They have repeatedly failed to self regulate [sic]" (Hansson, 2020, p. 11). Their competitors and third-party services defined the problem as an aberration in a naturally competitive and dynamic digital marketplace, skewed by a select few massive platform companies. The diagnosis was not structural, but individual: the biggest platforms required lawmakers' attention, if not intervention.

In defense of platforms: locating competition in digital markets

Defining platform power as an aberration of the digital marketplace, where greedy gatekeeping killed robust competition, shaped digital platforms' defense. Platforms defended themselves against the possibility of antitrust intervention by locating "intense competition" in various sectors, strategically capitalizing on the "malleability" (Holt, 2018, p. 179) of competition as a policy concept. For instance, Kyle Andeer, Vice President of Corporate Law at Apple, argued that "in every category where our software competes, we face strong competition" (Andeer, 2019). Adam Cohen (2019), Director of Economic Policy at Google, stressed that "[i]n the face of intense competition, we are proud of our record of continued innovation. We have helped reduce prices and expand choice for consumers and merchants … We have created new competition in many sectors" (p. 6-7). By positioning itself as the product of and contributor to competition in multiple markets, reducing prices and thus maximizing consumer welfare, Google signaled that the current policy regime was working. Under it, the company provided "significant value to a wide range of consumers and businesses across the country [creating] $335 billion in economic activity … across the U.S. in 2018"

(p. 2). The company's competition stretched beyond just search to other domains, including "operating systems, mobile devices and applications, voice assistants, artificial intelligence and machine learning, virtual reality, enterprise services, cloud computing, office applications, digital advertising, mobile, video sharing, and much more" (Cohen, 2019, p. 5). Likewise, Matt Perault, Head of Global Development at Facebook, located competition in all the markets in which Facebook operates, including "photo and video sharing, messaging, advertising [and] all around the world, notably in China" (Perault, 2019). These statements muddled complex market dynamics, bunched companies across markets together, and failed to demonstrate in which market big platforms did not enjoy dominance. More importantly, to illustrate they were competitive platforms enumerated their significant reach across multiple product and geographic markets, revealing the dissonance between existing competition law and economic power.

Beyond locating competition in other markets, platforms invoked existing antitrust frameworks to legitimate their arguments. For instance, Google stressed that the online search market was extremely competitive, even though by nearly all measures the company owned more than 95% of it. Adam Cohen argued that, in addition to general search engines like DuckDuckGo, the company competed with specialized ones, like Amazon, eBay, and Kayak. By implying substitutability between Google's search services and these search engines, even though they could only be used for products and services, Cohen strategically expanded the relevant market definition to create the semblance of competition. Invoking a similar argument, Nate Sutton, Associate General Counsel of Amazon, highlighted product substitutability as the measure of a relevant market to locate competition with offline retailers:

> the technology used to provide a service, or the business model a company deploys, is not the primary consideration in determining the scope of relevant markets in antitrust analysis or a jumping off point for sectoral

> regulation. In today's retail market, the notion that two products that are exactly the same do not compete with each other simply because one was ordered online makes little sense. … To avoid unintentionally tilting the competitive playing field, new [competition] rules should encompass all retailers regardless of the supply models that they use. (Sutton, 2019, p. 4)

Emphasizing technological neutrality and the product market downplayed the very real competitive advantages over offline retailers afforded by Amazon's scale, rich consumer and third-party seller data, and vertically integrated business model (Khan, 2017a). Sutton's diagnosis delegitimated these characteristics as factors in antitrust review and obscured all competitive processes prior to product sale at maximally lowest price—namely the consumer welfare standard that defines the goals of existing antitrust review. In his account, to intervene was to disrupt these efficient production and pricing mechanisms to the detriment of the consumer and, more broadly, to the functioning market. Consequently, digital platforms' diagnoses strategically communicated specific policy preferences while marginalizing others.

To further undermine the rationale for policy intervention, representatives from digital platforms contested the durability of the problem, arguing their market position was temporary, threatened by already existing market mechanisms. As Matt Perault (2019) argued about Facebook, invoking the Silicon Valley ethos of constant technological disruption and innovation that precluded the need for oversight (Levina & Hasinoff, 2017), "[t]ech is, after all, an industry where major players rise and fall quickly. We continue to witness … seismic change, and history shows that it is very difficult to predict which online companies will thrive over the next few years" (p. 3). He argued that entry barriers were low as costs of launching new online services fell because of cloud computing: "young companies no longer need to build expensive and complex data centers; they can rent (and seamlessly scale) computing power, dramatically decreasing the time and capital necessary to start and grow their businesses" (p. 3). Moreover, app stores provided startups access to a global audience. By describing the global digital marketplace as characterized by incumbent instability, dynamic competition, low barriers to entry, and constant innovation, this discourse downplayed the durability of platforms' gatekeeping power over key sectors in this marketplace: Amazon's dominance in online retail, Facebook's dominance in mobile social traffic, Google and Apple's dominance over the mobile operating system market, and Facebook and Google's digital ad duopoly (Hendrickson & Galston, 2017; Net Marketshare, 2017; Perrin, 2019). More importantly, it also ironically described the platformization of commerce, as companies like Amazon increasingly dominated cloud services and logistics markets while only a handful of platforms offered app stores (Mosco, 2017), on which young startups had to rely for distribution.

Legislators interrogated platform representatives about this gatekeeping power, who denied that these companies picked winners and losers across their services. Sutton responded that "Amazon offers one store among thousands of retail options for customers who shop across them every day. Customers pick the winners and losers" (House Judiciary, 2019b), strategically expanding the definition of retail markets to encompass even specialty and niche product retail stores. The committee members also asked how Amazon's product recommendation algorithm settles conflicts between two substitutable products, one directly from Amazon and another from a competing Marketplace seller. In its response, Amazon gave a rare account of how this gatekeeping power operates algorithmically. Its predictions extended beyond price to non-price factors like delivery and fulfillment speed, the product's eligibility for Prime shipping, and seller performance. In all these categories, Amazon products had a clear advantage, relying on the company's own logistics infrastructure and marketplace rules. This power manifested even more clearly in situations when Amazon did not have this advantage:

"[i]n the rare instances that our algorithmic weighting of these factors results in a tie … [we] feature the Amazon retail offer because our customers show a preference for products sold directly by Amazon" (Zapolsky, 2019, p. 4). The stress on seemingly neutral "algorithmic weighting" naturalized Amazon's governance over the competitive process across its platform and depoliticized the selection of algorithmic inputs which privileged its products.

Consequently, digital platforms defended themselves against potential competition policy intervention by locating competition in different markets. They rehearsed the entrenched Silicon Valley ethos and related discourses of dynamic and therefore non-regulable tech innovation that had resonated with policymakers for decades (Levina & Hasinoff, 2017; Popiel, 2018) and the technocratic narrowness of existing antitrust to characterize the state of the digital marketplace. In their accounts, the competition in this marketplace, robust and thriving, drew oxygen from low barriers to entry, threatened only by policy intervention. They represented their business operations, which included maintaining these marketplaces and competing in them, in the language of neutrality, algorithmic or otherwise, that had roots in the strategic discourse of neutral "platforms" (Gillespie, 2010). Yet, in describing all the sectors where they faced competition to strategically argue that no policy problem existed, the platforms indicated both their reach and the absence of a sufficiently precise policy language to describe this reach.

Advocacy organizations and think tanks: power over commerce and democracy

Reform advocates shared competitors and online services' diagnosis of platforms' market power, but also sought to provide the language to describe platform power by stressing its political implications. Stacy Mitchell, co-director of the Institute for Local

Self-Reliance (ISLR), an advocacy group for small business owners, articulated this theme in her testimony on Amazon's impact on small businesses. Mitchell (2019) argued that the retail giant replaced "an open public market, in which commerce is governed by democratic rules aimed a facilitating competition, with a privately controlled 'marketplace,' in which buyers and sellers have to abide by Amazon's rules and pay tribute to it" (p. 9). Amazon's power over this marketplace lay in "its control of essential infrastructure" (p. 14) underlying it—a problem definition that alluded to the ongoing "infrastructuralization of platforms" (Plantin et al., 2018, p. 306). This control enabled Amazon's gatekeeping power and "governing authority over a growing share of our commerce [including] the power to regulate, tax, and punish Americans engaged in trade. Thus the threat that it poses to our liberty and democracy is fundamental" (p. 14).

In an expression of classic liberalism, Mitchell invokes democracy to imply an open marketplace, a level playing field among small competitors, and the freedom to engage in commerce in it. Framing the problem of platform power as a competition problem—a bottleneck on the democratic flow of commerce—implies not just a specific vision of digital markets, where competitors are relatively equal in size and power, engaging in near-perfect competition. It also masks the natural tendencies of these markets, like network effects, to elude competition, complicating this vision. Moreover, defining digital platform power as the ability to supplant democratic governance over a marketplace with private regulation contests platforms' rulemaking and gatekeeping, but not the marketplace itself. Although the problem definition draws attention to infrastructuralization (Plantin et al., 2018), it narrowly focuses on commerce and implies the problem lies with individual actors.

Other stakeholders, like Sally Hubbard of Open Markets Institute, expanded this problem definition, arguing that economic power may translate to political power in the context of the news media, since with "centralized control over the flow of information … ad money, and the relationship between the reader and the news outlet, tech platform monopolists now have unprecedented power over reporters and news publishers themselves" (Hubbard, 2019, p. 2). This framing, which acknowledged the socio-political dimensions of information flows, ultimately critiqued market mechanisms and consequently circumscribed a specific policy approach. If the problem was an aberration of the market, then the appropriate solution involved a technocratic "regulatory tinkering" (Streeter, 1996, pp. 185-186) to optimize market operations—to investigate "the ways in which the market is not performing optimally and identify what legal changes are necessary" (Kimmelman, 2019), as Gene Kimmelman of the prominent progressive media advocacy think tank Public Knowledge argued. Such arguments ultimately anticipated calls for revising the law—competition law in this context—to level the playing field and return the market to its natural, optimally performing status.

Conservative think tanks: political hijacking of antitrust and regulatory overreach

Representatives from conservative and libertarian think tanks shared the digital platforms' optimism about the digital marketplace. As Carl Szabo of NetChoice put it: "The online environment is robust, healthy, and market players are numerous. For consumers, prices are low. For small businesses, opportunity and entrepreneurship are growing. And these results are because competition is robust" (Szabo, 2019, p. 2). Invoking neoliberal antitrust's focus on price effects, these stakeholders stressed that digital platforms "deliver increasing value to end users" (Layton, 2019, p. 2), while innovating. Roslyn Layton of AEI, for instance, argued that platforms' data reservoirs posed no anticompetitive problem because "after time, the data degrades" (House Judiciary, 2019c) in value, though she had little to say about its ongoing collection.

Conservative stakeholders had little to say about platform power, except for stressing these companies' ability to "influence public choices on internet policy and technology" (Layton, 2019, p. 2), particularly net neutrality and privacy regulation of Internet Service Providers (ISPs). By accusing platforms of regulatory capture, conservatives tactically sought to provide a rationale for repealing these regulations. This limited and strategic definition of platform power paired with an optimistic account of competition in digital markets laid the groundwork for these stakeholders' market-based policy interventions.

Policy Responses: Negotiating the Boundary between State and Market

The politics underlying competition policy discourses emerge in stakeholders' characterizations of digital markets, implying not only different accounts of governance over these markets, but also of competition within them. Since these accounts have concrete policy implications, politics also manifests itself in stakeholders' proposals for policy interventions as negotiations over the jurisdictional boundaries between state oversight and market mechanisms in addressing digital platform power. Ultimately, the debates over policy interventions pointed to four approaches: 1) online services and competitors' preference for antitrust status quo and for economic regulation to ensure a level playing field, 2) advocacy organizations and progressive think tanks' preference for revitalizing antitrust and economic regulation with data protections, 3) the conservative think tanks' arguments for abolishing existing regulations for ISPs to stimulate competition, and 4) the digital platforms' preference for antitrust status quo with a limited co-regulatory regime. I outline these in turn here.

Competitors and online services: we believe in the market, so let's fix it

Platforms' competitors and services relying on platforms to reach users traversed a fundamental tension in their statements. On the one hand, these businesses argued platforms posed anticompetitive threats in digital markets that required intervention. On the other, they viewed unfettered digital markets as sites of innovation and economic possibility. Cognizant of potential accusations of self-interest, they expressed faith in self-regulation and market competition. Patrick Spence, CEO of the smart speaker company Sonos, stressed he was "a big believer in self-reliance. … [C]ompanies can take proactive measures to insulate themselves from dominant platforms … winning through innovation, maintaining tight financial discipline; accepting money only from investors with a long-term vision; protecting your intellectual property" (Spence, 2020, p. 6). Likewise, Kirsten Daru of Tile Inc. argued that "I am here today not to ask for protection, but in support of a level playing field on the Apple platform" (Daru, 2020, p. 2). The discourse of level playing fields sought to resolve the tension between faith in unfettered market competition and the necessity for intervention when such competition was elusive. As Horacio Gutierrez (2019), General Counsel of Spotify, emphasized that he wasn't "seeking special treatment. … We want the same fair rules for companies young and old, large and small. It is about supporting and nurturing the healthy ecosystem that made our two companies [Spotify and Apple] successful in the first place" (p.2).

The discourse of level playing fields sought to resolve this tension by casting platforms' anticompetitive practices as aberrations in otherwise dynamic markets. However, since platforms created and managed these markets on which these stakeholders depended and in which they competed, this tension pervaded their proposed policy interventions. While the majority implicitly or explicitly called for limited state intervention, often without specifying the form it should take, many concurrently acknowledged the benefits platforms provided to them. Online services did not want platforms broken up—companies like Spotify need large platforms to reach users to offer their product. The App Association, a lobbying group representing app producers, stressed that “platforms provide significant value for developers [like] access to new markets, and the reduction in prices for software since platforms entered the market. … [App developers] want platforms to compete for their business [and to] ensure competition is robust” (Reed, 2019, p. 2). Such accounts acknowledged the mutual dependency between apps and platforms, as they naturalized platforms’ ownership of these marketplaces.

Aggressive antitrust and structural breakups might jeopardize the markets across which these companies conducted business. Consequently, app developers argued for regulatory restraint. Instead, they wanted more enforcement to ensure competition on platforms is not skewed by platforms. Thus, online services like Spotify, ultimately called for limited intervention to address specific market aberrations, rather than structurally overhaul entire digital platform markets. The preference for self-regulation manifested alongside calls for intervention. As Daru said of Tile Inc’s disagreement with Apple: “It is our hope and preference to work collaboratively with Apple to resolve these concerns and restore competitive integrity to their platform” (Daru, 2020, p. 4).

Others like Sonos acknowledged a deeper problem, arguing that re-evaluating “existing law and policy is necessary … before the ‘network effects’ intrinsic to the digital age fully insulate dominant firms from future competition. [T]echnology quickly evolves — but that does not mean responsible scrutiny and enforcement is not possible” (Spence, 2020, p. 6). The analysis not only noted that competitive concerns inherent to digital markets, but also contested platforms’ discourses of technology as naturally immunizing against oversight. For the minority, the policy solution meant aggressive antitrust intervention. David Pitofsky, General Counsel of News Corp., critiqued the "obsession with price effects, without adequate consideration of the other aspects of consumer and social welfare, including quality, innovation, and choice" (Pitofsky, 2019, p. 7). David Hansson of Basecamp put it even more bluntly: "Google's monopoly on internet search must be broken up for the sake of a fair marketplace" (Hansson, 2020, p. 7). However, few competing businesses were willing to go this far, perhaps because they recognized they were dependent on platforms. Instead, others defended "static antitrust principles [which] should guide antitrust authorities as they enforce antitrust laws" (Reed, 2019, p. 2). Ultimately, most of these stakeholders never referenced competition policy, implicitly aware they needed large platforms to reach users. Aggressive antitrust and structural breakups might jeopardize the markets in which these stakeholders competed. Thus, these stakeholders' policy proposals were constrained by their own stake in digital platform markets.

Progressive advocacy organizations & think tanks: to break up or regulate?

For progressive advocacy organizations, think tanks, economists, and legal scholars, platform power manifested as growing concentration in and private governance of digital markets, facilitated by big data, and the question was how to intervene. Harkening back to the debates examined in the previous chapter, the majority saw digital platform power as a market problem best addressed by aggressively reducing these companies' economic scale, and argued for antitrust reform, stronger merger enforcement, and structural separation, namely breaking up these companies. These interventions required moving beyond "short-run, static price effects" (Furman, 2019, p. 4) to effects on innovation and nascent competition, and embracing the fluidity of market definitions. By rejecting the existing neoliberal antitrust approach for enabling platforms' accumulation of market power, stakeholders like OMI proposed new factors by which to describe, evaluate, and enforce competition in digital markets.

As in the broader policy arena, the discussion turned to the centrality of data to competitive advantage in digital markets and to merger analysis by competition authorities. For instance, economists Stucke and Ezrachi (2019) emphasized the competitive advantages in digital markets afforded by the amount and variety of data companies collected and how fast they collected it. European Commissioner Margrethe Vestager stressed that foreclosure on data or its lack could serve as a barrier to entry and consequently European regulators increasingly calculated data concerns as part of competition analysis (Vestager, 2019). FTC commissioner Rohit Chopra argued that "[m]ore competition will also be critical to how we think about protecting privacy" (House Judiciary, 2019c). These types of testimony sought to bring data into the discussion about how to gauge competitive conduct in the digital marketplace. Foregrounding data at the heart of digital platforms' business models shifted the policy lens by which market power was analyzed, redefining competitive dynamics in digital markets to reveal gaps in existing enforcement. If vast data reservoirs could provide competitive advantages, then platforms' claims about the durability of market position and low barriers to entry no longer made sense.

However, certain stakeholders also stressed communications platforms' historically social and political functions, which were intimately linked to the functioning of the democratic polity. For instance, Gene Kimmelman of Public Knowledge argued that "antitrust alone cannot maximize competition and sustain the democracy to which we aspire" (Kimmelman, 2019, p. 1), alluding to arguments in the broader policy arena about the limits of competition policy expressed in the Stigler Report and other venues. Articulating a solution required thinking historically:

> Whether it was the telegraph, radio, telephone, television, cable, broadband or the internet, these distribution systems have influenced the way journalism is amplified throughout our society … Each of these communications platforms also embodied economic and technological attributes that made robust market competition across platforms difficult, if not impossible, without policy intervention. (Kimmelman, 2019, p. 1)

As in telecom and media sectors, competition in platform markets could only exist with bold legal and policy intervention, like non-discrimination regulations, mandated interoperability and interconnection with rivals, and stricter privacy laws—namely "regulated competition" as Sally Hubbard of Open Markets put it (Hubbard, 2019, p. 15). Importantly, however, none of these proposals included bolder policy interventions like public utility regulation or the public option.

While stakeholders accepted regulation to promote competition, they disagreed on regulation to address non-economic platform issues. For instance, EFF argued for using competition to address issues like online harassment over making platforms liable for content flowing across their services, including hate speech and disinformation. The latter would make platforms liable for user conduct, while entrenching their governance over these communicative, social, and market spaces: "Once we decide that providing a forum for online activity is something that only giant companies with enough money to pay for filters can do, we also commit to keeping the big companies big enough to perform those duties" (Electronic Frontier Foundation, 2019, p. 4). Sally Hubbard pitched competition as a solution to disinformation by dispersing speech (House Judiciary, 2019a), while EU chief competition economist Tommaso Valletti extended the argument to privacy concerns: "Diminished competition on privacy quality should [be included] in any assessment of the state of competition, and market power, of digital online platforms. … consumers should actually be compensated to permit the collection of their personal information" (Valletti, 2019, p. 5). Thus, collection of user data translated to a market problem resolvable through a more efficiently managed marketplace. These arguments ultimately endorsed regulated competition as the best mechanism for addressing non-economic problems associated with platforms.

These interventions tacitly embraced the discourse of level playing fields. Even in drawing attention to how data can be used anticompetitively, these stakeholders inadvertently framed user data as a market problem to be resolved through a more efficiently managed marketplace. For instance, when asked by a committee member why privacy might be an important factor under competition law, Valletti responded: "The locus of competition is multifaceted. It can be prices, it can be innovation, it can be quality. And since consumers seem to care about privacy I would say this is one of the primary things that a healthy competitive market should actually give, healthy privacy to individuals" (House Judiciary, 2019c). Thus, the constraints of the discourse made it difficult to talk of social or public dimensions of data, leaving it to the legal and policy machinery of managing competition.

Nevertheless, other stakeholders cautioned against pursuing competition as the sole policy goal. For instance, Harvard economist Jason Furman noted that "[s]ome consumers value harmful content, like child pornography or instructions on assembling weapons of mass destruction. Competition, by itself, would deliver more of this content" (Furman, 2019, p. 3), without a supplementary regulatory framework. Several stakeholders called for privacy protections. Most strikingly, economists Stucke and Ezrachi (2019) argued that aside from competition law, addressing platform power required "statutory protections of fundamental rights essential to safeguarding privacy, individual autonomy, and well-being" (p.24). This was the only and most explicit reference to any notion of rights with respect to social activity across digital platforms.

Conservative think tanks: market intervention to level the regulatory playing field

If progressive stakeholders embraced a largely interventionist position toward addressing digital platform power, conservative stakeholders' proposals ranged between neoliberal status quo and libertarian reform. On the one hand, they argued reforming antitrust represented government overreach and a political effort to undermine a proven reliable tool. What made antitrust so effective was its narrow focus on consumer welfare and objectively measurable price effects. As former FTC commissioner Maureen Ohlhausen argued, progressives' politicization of antitrust was "a regulatory action meant to reengineer market outcomes to reflect values other than market competition, such as fairness, consumer privacy, or the protection of small business" (Ohlhausen, 2019, pp. 2-3). Conservatives relegated such concerns to legislation or regulation, not competition law. This policing of the boundaries of antitrust, a pervasive tactic in the broader policy arena, involved defending antitrust's focus on narrow price effects, even though this focus failed to capture competitive dynamics in digital markets. Claiming politicization, conservatives simultaneously foreclosed on adapting competition law to these new market conditions, arguing that regulators are not experts in "divining the next big innovation in technology-based offerings" (Ohlhausen, 2019, p. 8) and deferring to the incumbent players in these markets. Ironically, this defense and the discourse of narrow competition enforcement was itself a political stance on antitrust. With nothing to say about the competitive distortions in digital markets identified during the hearings, these arguments raised the question: what then, is the purpose of antitrust?

While a couple stakeholders discussed the possibility of limited regulation, others argued against any government intervention into platform markets. Think tanks like AEI left digital platforms' powerful market dominance to market mechanisms—namely they sought to address the absence of competition through competition. AEI acknowledged platforms' dominance but framed it as a byproduct of regulatory disparity between the unregulated platforms and their regulated competitors, namely Internet Service Providers (ISPs). AEI's Roslyn Layton argued that "regulatory interventions [in ISP markets], however well-intentioned, such as data protection, privacy regulation, and net neutrality, have strengthened the market positions" (Layton, 2019, p. 2) of digital platforms, skewing naturally efficient market outcomes in these two markets. In Layton's estimation, net neutrality and privacy regulation of ISPs were simply products of digital platforms' lobbying—an anticompetitive tactic and a form of regulatory capture. Thus, the solution to digital platform power involved facilitating competition from ISPs by leveling the regulatory playing field and leaving platforms' market dominance to market mechanisms.

Aside from the questionable assumption that ISPs and digital platforms competed in enough markets to have an overall disciplining effect, these stakeholders opposed leveling the playing field by applying applicable ISP regulations to digital platforms, such as for privacy. In their view, such regulatory parity would further distort natural market outcomes to the detriment of future innovation: "When they were founded, Google, Amazon, Facebook, Apple, and Microsoft enjoyed permissionless data collection and processing innovation; the next wave of innovators will not" (Layton, 2019, p. 14). Moreover, AEI cautioned that regulating platforms would entrench their dominant market position, echoing concerns of progressive stakeholders like EFF: "if we regulate them like monopolies, they will be around a lot longer than without the help of regulation" (Layton, 2019, p. 3). However, while progressive stakeholders promoted policy levers like interoperability and privacy rules, think tanks like AEI fell back upon the classic libertarian solution of deregulating both sectors. In foreclosing on state intervention and hanging their hopes on the classically noncompetitive ISP market, they essentially called for allowing the platforms to entrench their own market power unimpeded, until a competitor materialized to discipline their behavior. Thus, both neoliberal and libertarian police responses, despite deference to competition as a core value, offered little to meaningfully advance it in digital markets.

Digital platforms: regulate us—here is how

More open to state intervention than conservative and libertarian think tanks, but also dedicated to carefully delineating its limits, platforms used the hearings to make the case for a co-regulated oligopoly in three steps. First, they implicitly opposed antitrust intervention by framing their size as a success achieved by playing by rules that were both uniquely American and now being contested. For instance, Matt Perault of Facebook stressed that "Facebook is where it is today because we have worked hard and taken risks. Our efforts have resulted in significant success, and America does not punish success; it rewards it" (Perault, 2019, p. 5). Moreover, as the president of the CCIA argued, those rules should be stable, predictable, and measurable: "The approach of U.S. competition law is to preserve incentives for companies to become successful. ... For antitrust law purposes, relevant markets are not defined on a subjective, ad hoc basis, or by arbitrary line-drawing" (Schreuers, 2019, p. 6). Notwithstanding the criticism of antitrust's focus on price effects as out of step with competition in digital markets, CCIA made a conservative case for retaining a traditional approach: it was stable, predictable, and measurable. Reforming antitrust would not only politicize it, but also destabilize the same markets that produced the most successful American companies.

Second, digital platforms argued that the very size under scrutiny allowed them to perform key tasks the government required of them. Whether terrorism, disinformation or hate speech, Facebook argued that "we view our size as an asset: we can dedicate 30,000 people to keeping our users safe, invest in industry initiatives to jointly combat terrorism, and develop the new technologies that are needed to confront these evolving threats" (Perault, 2019, p. 5). This argument recalled the tradeoffs between regulated oligopolies and breaking platforms into smaller companies articulated both by progressive and conservative stakeholders. Digital platforms reminded legislators that more competition in digital markets meant the loss of at-scale content moderation and more players for the government to coordinate in responding to national security threats. Consequently, forcing competition in digital markets would also create significant political inefficiencies.

This dovetailed with a third point: while platforms welcomed government regulation, they were already regulated and championed the values regulators hoped to advance through policy intervention. Apple stressed that "[w]e see our customers' privacy as a fundamental human right, and we embed that value in everything we create" (Andeer, 2019, p. 1). Meanwhile, Adam Cohen (2019) of Google reminded the committee that a "wide range of rules already apply to technology products and services, including antitrust, advertising standards, copyright, privacy, and consumer protection" (p.6). The companies strategically accepted inevitable regulatory intervention, but also sought to spell out its terms. Facebook declared that

> [W]e would welcome an updated regulatory framework. The rules should reflect the American ideals that have guided and shaped the creation of the Internet: they should incentivize and reward innovation, preserve the freedom for people to express themselves and for entrepreneurs to build new things, and protect society from harm. We would be happy to work with Congress to create policies that protect people, give them choices and enable developers to innovate and compete. (Perault, 2019, pp. 5-6)

The company's call invoked values whose advancement requires specific sets of policies. Innovation denoted minimally regulated markets, strong IP protections, tax incentives, and relaxed trade regulations, among others. Maximizing expression implied minimizing third-party liability for user content flowing across digital platforms' services, without restricting the generation of user data. Ultimately, such declarations signified an embrace of co-regulation that comes with market dominance. Digital platforms' openness to regulation signaled they prioritized dictating the regulatory conversation over advancing any one specific policy issue—a goal that would be undermined if they faced more competition.

Postscript: Policy or Politics?

As this dissertation was being finalized, the House Antitrust Subcommittee announced and then held a sixth hearing, in which tech CEOs Jeff Bezos, Tim Cook, Mark Zuckerberg, and Sundar Pichai testified. In their opening statements they echoed their top executives who testified over a year earlier to the competition Amazon, Apple, Facebook, and Google face globally. Jeff Bezos emphasized that "Amazon accounts for less than 1% of the $25 trillion global retail market and less than 4% of retail in the U.S." (Bezos, 2020, p. 5), even though it owns 40% of the U.S. e-commerce market and its share has only increased during the pandemic (Stevens, 2020). Similarly, Mark Zuckerberg proclaimed that tech companies like Facebook broke the telecom and cable stranglehold on online communication and media (House Judiciary, 2020, 00:45:38), characterizing competition broadly as creative destruction of older technologies. Sundar Pichai argued that "a discussion about competition is a discussion about opportunity" (Pichai, 2020, p. 1) as a preface to claiming that Google served as an engine for both competition and opportunity for smaller businesses, particularly amidst the pandemic. Tim Cook said of Apple that "[o]ur goal is the best, not the most" (House Judiciary, 2020, 00:40:02), signifying the company's commitment to competition on the merits rather than at any cost, including through gatekeeping.

Yet in this hearing, even more so than the one in which these companies' legal executives testified, the members of the Antitrust Subcommittee signaled their thinking about competition in digital platform markets to the public. The policymakers' questions for the witnesses sought to identify competitive concerns in digital markets, illustrate why these concerns matter, and either explicitly or implicitly hint at possible policy solutions, while confronting tech CEOs with the findings of their investigation.

Increasingly typical of US politics, the committee's policy thinking was, at best, fractured. Reflective of the growing stamp of right-wing populism, Republican representatives Jim Jordan and Matt Gaetz falsely accused platforms of censoring conservative speech, with Gaetz attacking Amazon for consulting with the Southern Poverty Law Center (SPLC), an established civil rights advocacy organization, as evidence of political bias. These grandstanding speeches were met with puzzlement from the CEOs who struggled to address them in their responses. The rhetoric often waxed performative: after praising American capitalism for ending World War II, defeating the Soviets in the Cold War, and putting a man on the moon, representative Ken Buck accused Google of betraying the US military by withdrawing its bid from the JEDI (Joint Enterprise Defense Infrastructure) contract, a Department of Defense cloud computing initiative, after pressure from its employees. Gaetz argued the company refused to support law enforcement. Stammering, Pichai disturbingly noted that Google collaborates with the military and law enforcement on several initiatives, provided they follow due process. These lines of questioning revealed the increasingly prominent politicization of competition policy to adjudicate contested concerns about anti-conservative speech bias on the platforms examined in the previous chapter. They also signaled a potential political obstacle to passing meaningful legislation in Congress, even if this fracture was not entirely along partisan lines—Republicans like Kelly Armstrong joined other committee members in pressing the witnesses about anticompetitive practices and contradictions in big tech rhetoric about their business operations.

The policymakers' lines of attack involved exposing how these companies utilized data and the algorithms it powered—access to which was a source of gatekeeping power—to undercut competitors and maintain their market power; how Facebook acquired competitors that threatened its dominant position; how the lack of competition in these markets enabled ongoing profit off hate speech, misinformation and, in the case of Amazon, counterfeit merchandise; and how the tech giants undercut the news industry. A testament to their dominant market positions, the companies thrived during the pandemic (see also Paul & Rushe, 2020). A testament to poor antitrust enforcement, the committee revealed internal Facebook emails obtained by the FTC in its review of the Facebook-Instagram merger, in which Zuckerberg framed Instagram as a competitive threat best neutralized through acquisition:

> Even if some new competitors springs [sic] up, buying Instagram, Path, Foursquare, etc [sic] now will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products won't get much traction since we'll already have their mechanics deployed at scale. (Newton, 2020, para. 4)

In response, Zuckerberg claimed that there was no guarantee Instagram would have become a competitor. The company succeeded in part "because we invested heavily in building up the infrastructure and promoting it and working on security and working on a lot of things around this" (House Judiciary, 2020). However, there was also no guarantee that Instagram would have failed successful without Facebook's investment.

Lawmakers noted other problematic practices. Democratic representative Pramila Jayapal compelled Bezos to admit Amazon routinely fails to successfully enforce its prohibition on the use of internal data about third party sellers to promote its own competing products. Armstrong confronted Pichai about Google foreclosing on non-Google owned ad tools on YouTube's advertising platform under the banner of privacy enforcement. Lawmakers charged Apple with engaging in a similar practice toward competing apps in its App Store. As the CEOs prevaricated on many of these issues, the policymakers made a case Cicilline summarized in his exchange with Zuckerberg about weeding out fake political ads: "there's no competition forcing you to police your own platform" (House Judiciary, 2020, 4:21:45). Thus, they largely aligned with the progressive stakeholders in their diagnosis of competition as a crucial, but absent disciplining mechanism in digital platform markets.

The representatives articulated platform power alternately as the ability to stave off competition and innovation; as having a negative impact on the economy by killing its dynamism; and as having control over data, which gave platforms control over online marketplaces. But the definition extended beyond strict economics to platforms' extensive sway over the increasingly public spheres they operated. As Cicilline put it, "Because these companies are so central to our modern life, their business practices and decisions have an outsized effect on our economy and our democracy" (House Judiciary, 2020). The policymakers also offered some clues in the hearing about their preferred policy solutions. For instance, Republican representative Jim Sensenbrenner argued that breaking up the tech companies ultimately would harm consumers, with which the tech CEOs readily agreed (House Judiciary, 2020, 2:38:30). He argued that big companies can provide many efficiencies, even though big tech might benefit from data regulation. Cicilline, in his closing remarks adopted a stronger stance: "these companies … have monopoly power. Some need to be broken up, all need to be properly regulated and held accountable. We need to ensure the antitrust laws first written more than a century ago work in the digital age" (House Judiciary, 2020, 5:27:07).

In a rapid turnaround, the committee not only held a seventh and final hearing about potential policy solutions to the problems it identified, but also issued a sweeping, more than 400-page report on competitive concerns in digital markets (Nadler & Cicilline, 2020). Despite Cicilline's conclusion that platforms impacted the economy and democracy more broadly, the report proposed predominantly economic solutions aimed at incentivizing competition. In this respect, it fell short of the policy options debated in the broader policy arena, like public utility regulation. Nevertheless, many of the report's competition policy proposals were relatively bold, including structural separation along business lines for companies like Google and legislative changes to antitrust law, like overturning the *Amex v. Ohio* ruling.

Advocates widely lauded the report and its recommendations. Barry Lynn of OMI called it "a true blueprint for action to ensure that the internet economy can be made safe for democracy in the 21st century and for American capitalism" (Schechter, 2020, p. 9). Republicans did not sign onto this report, with Representative Buck authoring the conservative reply (Buck, 2020). Notably, there was agreement on many of the proposed solutions, but divergence across the bolder ones, including structural separation and the imposition of nondiscrimination requirements. There was also a third report, authored by Jim Jordan and signed by Buck along with other right-wing representatives, which focused on accusing tech companies of censoring conservative speech (Jordan et al., 2020). These responses reveal the political fault lines facing potential legislative solutions to antitrust reform.

Exemplar Stakeholder	Problem Definition	Policy Intervention	Digital Communication
Competitors & online services	Gatekeeping power; privileged market position	Investigate; Bolster enforcement; Regulate data	Open competitive environment; platforms intact
Progressive advocacy organizations & think tanks	Private governance of digital markets; threat to privacy, democracy	Reform antitrust; Economic regulation; Privacy regulation	Open competitive environment; Multiple smaller, competing public spheres; Certain user rights
Conservative think tanks	Regulatory disparity skews natural market outcomes	Antitrust status quo; Deregulate competitors	Market-based system; Disciplining innovation and competition; Minimal government restraints
Digital platforms	Success punished, antitrust intervention creates inefficiencies in governance	Co-regulation; Antitrust status quo	Lightly co-regulated, global marketplace

Table 2 – A map of the discourses of competition and their implications for digital communications

Mapping Competition Policy Debates

Scholarship has identified several policy approaches to addressing digital platform power (Flew et al., 2019; Khan, 2019; Moore & Tambini, 2018). As the previous chapter argued, the organizing policy approach in the US has occurred through the discourse of antitrust reform. However, between policy proposals and their implementation lies policymaking, which involves balancing often conflicting interests and values among a range of stakeholders (Iosifidis & Andrews, 2019; Van den Bulck, 2012). Tracing those interests can illuminate the boundaries circumscribing the range of policy options available to policymakers (Freedman, 2010). Accordingly, this chapter foregrounded the politics of addressing platform power through competition policy.

The policy debates during the congressional hearings reveal a lack of consensus not only about appropriate policy interventions, but also about the problem to be addressed, namely platform power. The policy interventions, in turn, carry implications for digital communications across digital platforms. These policy debates are mapped out below in Table 2. Competitors and online services defined the problem of platform power as a privileged gatekeeping position in a two-sided market that platforms anticompetitively exploited to their advantage. However, the benefits accrued to them by platforms' size and reach, their dependence on platform markets, and their reticence about regulation constrained their policy proposals. While online services and some competitors faced the threat of foreclosure due to platforms' dominant market position, they also benefited from platforms' size and scope in reaching users. Consequently, despite offering careful diagnoses of platforms' market power, some were more willing to support antitrust intervention than others. Despite invocations of democratic values to bolster the rationale for the interventions proposed, these policy proposals envisioned platforms as sites of commerce rather than public spheres.

Progressive stakeholders approached platform power as private governance over digital markets with political dimensions, facilitated by data and economic concentration. Their interventions were two-fold. First, they offered a diagnosis of competition within digital markets that revealed gaps in existing antitrust approaches and challenged claims about contestability of platform dominance over those markets. Second, they outlined robust state oversight: economic regulation, stronger antitrust enforcement, and data and privacy protections. As the conversation focused mainly on commerce and data flows, these stakeholders often equated platform power with market power, which competition could effectively discipline. While the proposed "regulated competition" aimed to rein in platforms' market power, several stakeholders extended the approach to non-economic concerns like the spread of disinformation and privacy concerns. Thus, user data and privacy became subsumed into antitrust calculus as commodities, obscuring their social and public dimensions (Napoli, 2019a). Ultimately, the policy proposals prioritized consumer choice over potential for social activities like interaction, communication, or community building. Nevertheless, though in the minority, certain stakeholders stressed the limits of competition in addressing platform power. In addition to competition policy, these stakeholders explicitly called for legislation, emphasizing the need to safeguard public rights related to social activity in digital spaces.

Conservative stakeholders and digital platforms contested accounts of platform power, characterizing the digital marketplace as bustling and regulated by the disciplining forces of innovation and market competition, and supported by minimal government restraints. In the hearings, conservative stakeholders offered the most radical policy proposals, defining the problem as one of state disruption of natural market mechanisms. For conservatives, retooling antitrust was ultimately an exercise in politics. Revising antitrust rules would only skew competitive processes, with regulators selecting winners and losers in a marketplace that digital platforms understood better. By advocating for trusting the "natural" competitive processes over actual competitive outcomes— "protecting competition over competitors"—they strategically defended neoliberal, narrow antitrust review. They argued for removing ISP regulations in adjacent, marginally overlapping markets to address any market distortions. Thus, conservative stakeholders contributed little to the debate about changing competition in digital markets beyond the familiar refrain of regulatory restraint and, consequently, had nothing to say about the public dimensions of digital communication occurring across these platforms.

For digital platforms, the problem was political scrutiny and the threat of antitrust intervention, which they defined as punishment inconsistent with America's values for economic success achieved by following established competition rules. These companies' representatives argued that fetishizing competition not only ignored their contributions to economic growth, but also created inefficiencies in addressing a range of policy issues from moderating hate speech to national security. These arguments implicitly rejected antitrust intervention in favor of co-regulatory regimes that would keep their businesses largely intact. As a strategic response to growing political scrutiny, these policy proposals envisioned a role for digital platforms in driving the regulatory conversation, while obscuring and naturalizing their growing market dominance. Moreover, their implicit policy preferences, communicated via values they wished to see advanced, aimed to minimize their liability without jeopardizing the data flows that fueled their business models. Consequently, these stakeholders envisioned social activity occurring across their services as a lightly regulated, generally unrestricted global community and marketplace that was increasingly embedded in political life and one for which they advocated a shared governance regime.

The variance in these proposals reveals significant ideological fault lines and the underlying politics of competition policy. Whether competition is constructed as a natural outcome of uninhibited market mechanisms, as absent or distorted without state intervention, or as secondary to the efficiencies afforded by large firms carries major policy implications for the democratic governance of the digital marketplace. At the same time, these competition policy debates largely confine communicative activity across digital platforms to market-based mechanisms, ranging from unrestricted logics of accumulation to a more democratically managed arena of commerce. Tellingly, unlike in the broader regulatory debates examined in the previous chapter, public utility regulation constituted a policy silence. The subcommittee's final report erred on the side of competition more aggressively than the Stigler Report, unafraid to pursue structural separation, but was limited in its regulatory imagination. By focusing on a select number of dominant firms, on addressing their power by unleashing market mechanisms, and remaining largely within the confines of competition policy, its interventions remained siloed. This cumulative policy paradigm is severely limited in addressing the social dimensions of communicative power these platforms hold and therefore constrained in articulating "a comprehensive approach that tackles the widespread structural disparities of power, welfare, and economic opportunity in an online world" (van Dijck et al., 2018, p. 157).

Conclusion

This chapter examined the politics underlying competition policy discourses in the context of a US congressional investigation into digital platform markets. These debates involved negotiations over the boundaries between state and private governance in addressing platform power. On the one hand, digital platforms' representatives sought to naturalize and obscure platforms' market dominance by locating competition in other sectors to foreclose on state intervention, while capitalizing on the absence of a robust policy discourse to articulate their expanding presence across multiple sectors. Additionally, they promoted co-regulatory regimes to advance cultural and national security policy goals through public-private power sharing arrangements. This "neoliberal market constructivism" (Hathaway, 2020, p. 5), or the extension of market logics to a wider array of social and political arenas, also drew strength from conservative stakeholders, who deferred to tech incumbents as better equipped than regulators to ensure the best market outcomes.

On the other hand, these discourses contested the power of digital platforms by redrawing competition policy to diagnose platform power and reveal its economic reach.

If “neoliberal ideas have put corporations in a privileged discursive position so that they realize their interests more than they would have otherwise inside the political arena” (Hathaway, 2020, p. 3), then competition law reform represents a political effort to contest that position. The antimonopoly critique of antitrust, its counternarrative of competition in digital markets, and its reform proposals sought to introduce a “taxonomy of techno-commercial mechanisms that can adequately delineate power relationships between various actors” (van Dijck et al., 2018, p. 157) amidst ongoing platformization. They contested both platforms’ governance regimes over digital markets and, to a degree, their role in ongoing processes of datafication (Zuboff, 2019). By denaturalizing existing dynamics within digital markets and by forcefully reasserting the state’s role in market governance, reformists contested the dominant policy discourse by animating debates “about political economy, about market institutional arrangements, and about a whole range of basic yet important questions such as ‘what is a market?’, ‘what is competition?’” (Hathaway, 2020, p. 5).

Nevertheless, without expanding complementary policy discourses that fundamentally contest platform “common sense regarding digital technology and market innovation involving the unfettered commodification of individuals’ data and the individualization of responsibility for the avoidance of harms” (Cammaerts & Mansell, 2020, p. 145), such interventions risk naturalizing the expression of non-economic dimensions of platform power in market terms. Thus, the analysis of politics underlying these policy debates suggests that formulating policy interventions to tackle platform power requires addressing the neoliberal logic of narrowed antitrust and deregulation, platform-driven co-regulatory frameworks, and solely market-oriented policy interventions, however robust. To a degree, the maintenance of this power rests on the siloed policy discourses, confined to competition policy, articulating platforms' expanding presence in multiple spheres of socio-political and economic life.

Chapter 5 – Conclusion

On October 20, 2020, two weeks before the most contested US presidential election in recent memory, during a global and resurging pandemic, and following months of racial justice protests policed aggressively with presidential backing, the Department of Justice filed an historic monopolization antitrust lawsuit against Google. Amid the surreal uncertainty and anxiety produced by the confluence of these events, for anti-monopolists and public interest advocates who were still celebrating the congressional report issued just two weeks earlier, the lawsuit only added to the sense that concrete, sizeable policy victories had been achieved. With its echoes of *United States v. Microsoft*, the DOJ case resonated as an activist win, a sign of bolder antitrust enforcement, and the emergence of serious oversight of tech markets. It also signaled that the Silicon Valley ethos (Levina & Hasinoff, 2017), which framed platform giants like Facebook and Google as disruptive underdogs whose technologies naturally liberated and democratized, had finally begun to crack.

By then, activists, public interest advocates, academics, and certain government attorneys had been sounding the alarm bells for over a decade. Thus, however tempting it is to see the 2017-2020 antitrust debates as a historical moment of policy change, the debates advanced arguments that were tested and perfected through earlier antitrust losses (e.g., Comcast-NBCU, Verizon v. Trinko) and influenced by the economic critiques forged in response to the 2008 Financial Crisis. The global economic crash shaped the views of several antimonopoly activists who cut their teeth in the policy world during it and who steered the debates examined here. Matt Stoller, a fixture of the antimonopoly movement, was asked at a panel whether he thought that 1990s Democrats who believed that technological innovation would improve the economy and benefit society were wrong, by Reed Hundt, a former FCC chair and one of those Democrats. Stoller stammered, but then stated that an unqualified embrace of the Schumpeterian belief in the benefits of technological creative disruption was short-sighted. He added: “I was like that too. I mean, I didn't know this stuff until the financial crisis too. … I was an idiot” (The Capitol Forum, 2020a, p. 13).

It is likely that these linkages to the financial crisis steered the policy conversations to giant corporations and antitrust. Undoubtedly, the Snowden disclosures and the Cambridge Analytica scandal coupled with the right-wing populist victories in the US and abroad—which shocked the political establishment and likely to some extent Silicon Valley—helped put the focus on digital tech markets. In mid-2020, as COVID-19 took hundreds of thousands of lives in the US alone, brutalized the economy causing unemployment levels not seen since the Great Depression, forcefully reasserted existing social inequalities and disparities, put political institutions to yet another test, and confined much of social and professional life to virtual platforms, major tech companies made record revenues. They provided an essential service: many people, some elderly and at risk, all confined to their homes, relied on platforms for basic groceries, for news, and for contact with others. Having embedded themselves increasingly deeply in basic social infrastructures, a process called the “infrastructuralization of platforms” (Plantin et al., 2018, p. 306), tech companies extracted profits from the public’s crisis-induced dependence upon these infrastructures. In a twist on 2008, the disconnect between the discourse of “big is good,” which lies adjacent to existing antitrust’s reluctance to intervene in markets, and the larger public economic devastation was on full display. The contradiction served as a distilled demonstration of the critiques I explored here: the machinery of surveillance capitalism compounded inequalities that no technological tweaks or hope for a competitor would fix.

Absent a regulatory infrastructure overseeing these markets, with the FCC's jurisdiction narrowed following decades of neoliberal reforms, competition policy emerged as the site where a new governance paradigm for digital markets would be forged. It helped that the critique of neoliberal power underlying the antimonopoly movement was enshrouded in technocratic terms and careful economic and legal analysis that resonated with the discursive repertoire (Streeter, 1996) of the competition policy community. It also helped that the antimonopoly analysis of dynamics in these markets to critique existing antitrust provided the most holistic account of platform power in the policy arena thus far; one that appeared to touch on other related debates, including about content moderation, data collection, and the future of news.

On the one hand, as we are often told, these are business model problems: Facebook profits off hate, YouTube profits off misinformation, and Amazon profits off the exploitation of labor. In this context, the pliability of a more robust competition policy makes it an attractive option to address these problems: harnessing a market mechanism—competition—to incentivize companies to alter these practices. On the other hand, these are not just business model problems. Like communications industries, digital platform markets have a public dimension. In the run-up to the 2020 US presidential election, dominant platforms served as sites of targeted political advertising and information. Facebook, Google, and Twitter provided an unyielding stream of voting reminders, while Amazon advertised that its Alexa speaker can provide polling information. Facebook's Instagram introduced a series of stickers that users could deploy to celebrate having voted, while Google's YouTube streamed presidential debates. These platforms also served as sites of political coordination. In the summer of 2020, Black Lives Matter activists used Facebook to coordinate protests, helping citizens locate where such civic action would take place often with minimal advance notice. They used Twitter and Facebook to document the widespread and unrelenting police brutality against both protestors and journalists covering those protests. Amid platformization's ongoing embedding in social infrastructure, competition policy proposals miss "the way social media platforms structure not just the circulation of discourse, but the exchange of goods, the shape of collaboration, and the organization of labor" (Ananny & Gillespie, 2017, p. 2), and political participation.

Moreover, the business model problems undergird larger structural processes of datafication and platformization. As Van Dijck (2020) argues, the expansiveness of platformization as a process reveals the shortcomings of policy responses, since policymakers "are bound to act within the available [policy] frameworks" (p. 1) applicable to platforms, while other regulatory paradigms are either focused on specific sectors (e.g. banking) or infrastructures and utilities. Each framework has its own limited jurisdictional scope, specific goals, and focuses predominantly on individual companies. Even the application of competition policy is complicated because, despite clear dominance in multiple markets, there are also complex interdependencies between the tech giants: "Apple's iCloud is built on Amazon Web Services and Microsoft's Azure; and Facebook is dependent on Apple and Google for allowing its platforms in their app stores" (p. 9), for example. These interdependencies elude policymakers who focus on individual companies. Additionally, symptomatic of neoliberalism, platformization erases the boundaries between market and nonmarket domains. Antitrust focuses on reining in private power and by itself cannot reassert these boundaries.

As the debates examined here evolved, many stakeholders began to recognize that regulation would need to supplement stronger antitrust enforcement. The growing set of international reports on platforms written by experts and regulatory agencies (Puppis & Winseck, 2020), represent the products of these conversations in the broader policy arena. As Flew and Wilding (2020) argue about the Australian competition regulator's report, these reports illustrate "the difficulty of neatly containing 'platform regulation'" (p. 14). Convergence introduced the problem of *policy silos*, namely different regulatory structures overseeing different technologies, like telephony, broadcasting, and print. As I argue here, these silos undermine the emergent governance paradigm's ability to tackle the larger structural problems associated with platformization. In the rest of this chapter, I review the key features of this paradigm and consider ways to address its shortcomings.

The Politics of Competition Policy: A Review

This dissertation's starting point is that policy is fundamentally a political arena, where various stakeholders strategically deploy real political power to shape laws and policies. Accordingly, I foreground the politics in policy discussions about how to address platform power across three policy arenas—judicial, policy expert, legislative—that took place between 2017-2020 and continue still.

In the first case study, I examine the predominantly legal debate unfolding in the AT&T-Time Warner merger case about the merger's implications for the new media landscape. The case straddled two worlds: the familiar world of consolidation in communications markets and the emerging world of platformized media with no regulatory oversight. Since the FCC had no jurisdiction over the merger, the case provided a glimpse of how existing antitrust law fills the emerging regulatory gaps in addressing platformization in digital media markets. In essence, the merging parties claimed that consolidation was justified as bringing competition to tech giants. Thus, platformization created incentives for consolidation in traditional communications markets as a response, but at a cost to smaller OTT and video competitors. The merger reveals how antitrust law, with its leniency toward vertical mergers, legitimates this process by protecting market entry of incumbents—AT&T-Time Warner into platform TV—over smaller competitors. I argue this was deliberate: trumping the interests of these competitors was the cost of bringing potential competition to the digital advertising market dominated by the Google and Facebook duopoly. The merging parties and the neoliberal court justified this decision to expand platform TV markets under the banner of "protecting competition over competitors" and "innovation in dynamic markets," namely only *potential* merger efficiencies. Both discourses mask legal deference to industry incumbents, while insisting on the narrowest boundaries of antitrust. Concurrently, key public interest concerns, including the expansion of digital advertising and growing data collection driving datafication and surveillance capitalism (Dencik & Kaun, 2020; Zuboff, 2019), remained outside the remit of the legal analysis. The discourse of "merger-specific harms" erased these broader concerns from antitrust's purview. In fact, by framing AT&T's plans to expand data collection to offer more targeted ads as a legitimate competitive strategy, the court legitimated these practices and enshrined them in legal precedent.

In the expansive second case study, I analyze debates about antitrust reform vis-à-vis digital platform markets that unfolded in the shadow of the AT&T-Time Warner merger case and its eventual approval. Driven by a burgeoning antimonopoly movement and intersecting with various political economic interests, these debates took place in the broader policy arena—legal journal articles, newspaper op-eds, nonprofit events, academic conferences—where a critique of existing antitrust began to take form. Antimonopolists engaged in robust problem definition (Fischer, 2003; Schmidt, 2008, 2015), analyzing competitive concerns arising in digital platform markets so painstakingly they simply could not be swept aside by the antitrust establishment. By critiquing the outcome-focused consumer welfare standard as benefiting incumbents, they ideologically reconnected competition with the competitive process, as in liberal democratic theory. They also worked to normalize antitrust tools considered radical, like breakups, significantly expanding discursive space in the competition policy arena. The subsequent process of policy sense-making (Andrews, 2020) involved intense political debate and critique of these proposals by the industry and by various stakeholders on ideological grounds. As the less radical ideas were taken up by the liberal antitrust establishment, including many Obama-era antitrust regulators, many of the antimonopoly critiques became legitimated. Importantly, some of these proposals also resonated with right-wing populists, who saw antitrust as a tool for exerting political information controls. A new discourse had emerged: competition as a tool of democratic governance over private markets. However, competition is elusive in platform markets and the problems arising in them extend beyond competitive concerns. The proposals for regulatory oversight of these markets emerged as the product of two seemingly opposing forces. Conservatives and libertarians argued that antitrust was purposely too narrow to address these concerns as an attempt to fend off any antitrust reform proposals. Liberals and progressives agreed, particularly those steeped in decades of media advocacy, who instinctively linked market failure with regulation. Leftists also saw competition as fundamentally limited in achieving key policy goals, such as worker protections. Even some anti-monopolists expanded their definition of competition policy to accommodate regulation. These debates remained siloed from complementary policy debates about issues like privacy, political influence, and content moderation. Even efforts to overcome policy silos, like the Stigler Report, largely focused on individual platform companies and often deferred to the corrective power of market mechanisms. Consequently, they came up short in providing a policy answer to the processes of platformization and datafication.

These blind spots emerge from the intersection of political and economic interests of stakeholders invested in the competition policy arena outcomes, as I argue in the third case study which examines a prominent congressional inquiry in digital platform markets. The competition policy discourses in the legislative arena largely reflect the dynamics in the broader policy space, with many participants in the latter providing testimony. The familiar discourse of protecting competition over competitors clashed with reasserting democratic governance over private markets. However, the case study offers a glimpse into how both platforms and their competitors approach these policy issues. Representatives from platform companies, capitalizing on the absence of a robust policy discourse to describe and therefore address the process of platformization, promoted what I call elsewhere "frictionless regulation" (Popiel & Sang, in press): a minimal regulatory framework intended to coordinate smooth platform business operations and capital flows internationally, responding to the needs of digital markets at a speed that matches their pace. Competitors, on the other hand, often offered robust diagnoses of the problems in digital platform markets. However, in a manifestation of platform power, they were conflicted or constrained in advocating for robust policy solutions since they relied on these platforms for scale and reaching consumers. Yet, that the problems defined and debated in the broader policy arena were taken up in the legislative arena is a mark of the antimonopoly movement's success. The bold competition policy reforms vis-à-vis digital platform markets proposed by the largely liberal committee, though with not insignificant conservative support, compounds this success. Yet, the report ultimately reduces the problem of platformization to individual companies and focuses exclusively on competition policy solutions. Moreover, while in the broader policy debates, certain stakeholders expressed openness to different approaches to organizing markets, including public utility regulation and public options, these governance approaches became policy silences in the legislative arena.

This dissertation began and ends with prominent antitrust lawsuits: the AT&T-Time Warner vertical merger and the monopolization case against Google. Without legislative changes, like those proposed by the congressional report overturning problematic decisions like *Ohio v. Amex*, the courts will continue to build on existing case law and rely on Chicago School economics to adjudicate competition cases. Thus, politics unraveling in all three of these arenas is interconnected and all three require significant transformation to truly address platform power.

This research has important limitations. On the one hand, it prioritizes scope, particularly in its analysis of the broader policy debates, over a deeper engagement with specific competition issues. However, this choice was strategic in the hope that where nuance is lost perspective might be gained, particularly since the policy problems debated are expansive. On the other hand, the scope of the research is concurrently narrow, focusing extensively on competition policy without looking at simultaneous debates occurring in arenas of privacy, data collection, and speech, even if the second case study touches on them. I focus on competition policy partly due to its prominence among policymakers and significant media attention. Focusing on this arena also reveals how siloed the existing policy debates are from one another. Yet, this dissertation only marginally considers the links between traditional communications industries, like telecom which holds massive sway over US communications policy, by looking at the AT&T-Time Warner merger. Future research will need to closely scrutinize how these different sectors both collaborate and compete to shape policy. Additionally, this research focuses exclusively on the US, whereas the debates are international in scope.

However, I argue that the US focus resonates with international efforts, not least because dominant tech giants are US companies embedded in a complex fray of geopolitics. For instance, the US has viewed how foreign governments treat these firms as a trade issue (Andrews, 2020, p. 43). More crucially, the challenges these companies pose are international in scope and there is a concurrent and unprecedented degree of co-operation and dialogue between regulators from different countries to address the issue (Andrews, 2020, p. 44). Likewise, there are also important divergences that must be studied closely. Even leaders experimenting with more robust governance of digital markets like the EU still largely rely on fines, although EU's competition law analysis is more comprehensive, and the General Data Protection Regulation (GDPR) has been rightly lauded as a step in the right direction.

Emergent Governance

By examining the politics of competition policy in digital communications markets, this dissertation makes three related, but distinct contributions. First, it contributes to communications policy literature examining how policymakers address industry and technological change (e.g., Ali, 2017; Evens & Donders, 2018; Mosco, 2017) by providing an account of the emergent governance paradigm for digital platform markets. By situating it within a historical trajectory of policy efforts to regulate communications, my research shows how the discourses circulating within the competition policy arena draw on and attempt to repurpose traditional policy frameworks (e.g., public utility) and values to define this policy framework. This process is uneven at best, but many of the forces shaping it are familiar: neoliberal ideas about the state's role in markets, industry influence, legal conservativism, neoclassical economics, and progressive activism, among others. However, there are also divergences, as some right-wing policymakers support selective antitrust enforcement, muddying accounts of a neoliberal withdrawal from governance over private markets, even if these interventions are unquestionably politically driven. The result is an emergent governance paradigm—the product of serious policy deliberation, but also an incomplete one, too narrow for the problem, and marked by unyielding contradictions and blind spots. These contradictions stem from the centrality of market competition to the governance framework design for markets that pose both competitive dilemmas and immensely significant noneconomic ones. These, too, have antecedents in the growing centrality of competition as a value in communications policy. I discuss the features of this framework below.

Second, it contributes to critical policy studies by theorizing how policy silos, as both a spatial and temporal metaphor, not only thwart robust problem definition (spatially) but also can create false policy tradeoffs (temporally). While Flew and Wilding (2020) suggest *harmonization* as a strategy to overcome the spatial silos, I borrow the notion of *policy sequences* from traditional policy studies and foreign policy literature (Almeida, 2008; Daugbjerg, 2009; Demont & Rizzotto, 2012; Howlett, 2009; Ozkececi-Taner, 2017) to surmount temporal silos. Although policy sequences can be deployed to maintain the status quo and forestall truly radical reforms by relegating them to some nebulous future, as a conceptual tool the term can aid in mapping long term strategy for meaningful policy change. I provide a more detailed account of both concepts in the concluding section.

Finally, third, it contributes to platformization and datafication scholarship (Dencik & Kaun, 2020; Plantin & Punathambekar, 2019; van Dijck et al., 2018) by revealing how specific discourses constrain sufficiently robust policy responses to address these processes. My findings extend accounts of industry discourses like tech giants strategically referring to themselves as “platforms” (Gillespie, 2010) while avoiding the “media company” label (Napoli & Caplan, 2017) to escape oversight. As I show, these industry discourses have evolved to calls for co-regulatory arrangements that relegate the state to fulfilling a coordinative function for the flow of capital (see also Popiel & Sang, in press). Moreover, they find allies in the policy arena. The problem is not just that policymakers are beholden to existing policy frameworks that are insufficient to address platformization (Van Dijck, 2020), but also that various stakeholders actively work to preserve the boundaries of these frameworks to prevent them from being applied robustly in the first place. This boundary maintenance work (Star, 1999; Star & Griesemer, 1989) is likely ideologically-driven, with conservative and centrist neoliberals committed to the existing policy paradigm’s boundaries, and economic, supported by the industry whose financial interests are at stake along with an entire legal and economic profession trained to work within these boundaries.

Several discourses support this boundary maintenance work. First, the discourse of protecting competition over competitors naturalizes the narrow, pro-incumbent focus of antitrust. Hoisted as antitrust’s primary goal and guiding logic, the discourse equates antitrust intervention with skewing naturally occurring competition to protect specific competitors. Yet, as the AT&T-Time Warner case illustrates, Chicago School antitrust makes powerful decisions about where competition can and cannot occur, often to the benefit of dominant market players, which this discourse obscures. The consumer welfare standard as a measure of market competition legitimates this logic: as long as it is *potentially* maximized, and often industry promises suffice, competition is sufficient and therefore the market requires no intervention (Davies, 2014). Second, the discourse of “big is good” frames market dominance as necessarily tied to innovation and efficiencies. Conversely, this discourse pits favoring the competitive process over the consumer welfare standard as a tradeoff for the significant benefits platforms produce through their size and scope. Pervasive in all three case studies, this discourse inherently revealed its own internal valuation, privileging economic innovation over any other values, such as limiting mass data collection, surveillance, or hate speech. Third, as stakeholders debated whether data plays a competitive role in digital markets, the discourse of valueless data framed it as a non-asset and therefore outside antitrust's jurisdiction. Any value derived from data resulted from a company's innovative, thus by definition *competitive* business model, and necessarily benefited consumers through more relevant products, services, or ads. Finally, fourth, as the problem definition began to expand, the discourse of competition's limits worked to narrow the boundary of antitrust by emphasizing that market competition could not address a host of problems increasingly associated with it—even as that competition did not exist. There was truth to these claims, as I argue below. However, instead of proposing an alternative, holistic governance framework, the discourse undermined antitrust reform while broadly gesturing outside it to tackle a growing list of grievances associated with platforms. Indeed, harms outside the immediate economic framework like political disinformation, algorithmic discrimination, hate speech, or electoral interference are "relegated to become the concern of some type of regulation" (Mansell & Steinmueller, in press, p. 10). Ironically, this discourse brought together critiques from the right and the liberals, adding fuel to the idea of a digital regulator, which the Stigler Report ultimately proposed.

The emergent governance framework—an ongoing project—is partly the product of antimonopoly critiques of these discourses as they sought to reform antitrust. Anti-monopolists saw existing competition policy as an abrogation of meaningful oversight of digital or any other markets. Contradictory, weakened, and blind to a host of problematic market dynamics, Chicago School's imprint on antitrust served the interests of the biggest corporations, actively undermining those of the public. Like financial markets in 2008, big tech grew larger and more expansive with no meaningful oversight, thwarting competition, buying startups instead of innovating, exploiting labor and thwarting its ability to organize, and raised other policy concerns. Thus, the antimonopoly critiques were only technocratic on the surface and eventually came to constitute a discourse of competition policy as democratic governance over private markets.

However, this discourse embodies a specific notion of democratic governance. The arguments about platforms' gatekeeping power over markets they host, pervasive in the testimony of competitors and progressive antitrust experts during the congressional investigation, illustrate that democratic governance meant protecting competition from incumbents' extensive influence over digital markets. This critique contested platform power by defining it as market power with political dimensions, drawing on historical notions of antitrust as fundamentally about diluting private power in the political sphere (Pitofsky, 1979). Recalling the dichotomy identified by Peritz (2000) in his historical account of competing visions of competition in US competition policy, the discourse envisioned competition as a tool *to* achieve equality, fairness, and freedom from market power that arises from economic concentration. This vision serves as a counterpoint to the conceptualization of competition as liberty and freedom *from* the government. Yet, the positive / negative dichotomy misses that all stakeholders in the debates examined here fundamentally staked out positions about the role of the state in defining competition policy. For instance, as anti-monopolists argued, the neoliberals invoked competition as freedom from public accountability facilitated by legal, judicial, and enforcement deference to incumbents.

Yet, democratic governance involves more than just ensuring fair and equitable competitive dynamics in markets. The gaps in the emergent governance paradigm mirror gaps in the competition discourses examined here. A competition frame entails a particular problem definition that individualizes the industry, decoupling competitive aberrations from systemic economic features of surveillance capitalism. For instance, defining markets where competitive harms take place, essential to existing antitrust and reasserted by the Supreme Court's *Amex* decision, places the focus on individual markets, while platformization involves cross-sectorization (Van Dijck, 2020) and therefore implicates multiple markets. Moreover, platformization engulfs a growing range of socio-political and economic relations (Van Dijck, 2020) that competition cannot fully address.

The problem manifests when the discourse approaches the issue of data collection as a problem that skews market outcomes by giving large companies unfair advantages. The diagnosis is accurate but incomplete as literature documenting the growing datafication of political governance reveals (Dencik & Kaun, 2020; Micheli et al., 2020). As mass data collection becomes normalized across multiple domains, the rhetoric of data as a competitive advantage draws the behavior under the jurisdiction of competition policy. While the maneuver represents an attempt to address the problem, the proposed solution actually contributes to its normalization—datafication can continue as long as it is fairly distributed among companies under the watchful eye of the antitrust enforcer. However, attempting to address data collection by increasing competition on privacy-friendly business models does little to radically contest surveillance capitalism. Instead of rejecting "the fundamental legitimacy of surveillance capitalism's declarations … including the illegitimate rendition of human experience as behavioral data" (Zuboff, 2019, p. 324), such proposals naturalize data ownership and exchange, but on fairer terms. This critique is not meant to imply that antitrust review should ignore data, but that factors like data have important socio-political dimensions whose preservation requires a complementary, broader policy framework. The Stigler Report sought to provide this framework, normalizing expansive thinking about the problems posed by platformization and recommending a digital regulator. The significance of its policy interventions is undercut by its overwhelmingly individualized focus and, in key arenas like political influence, deference to market mechanisms.

Likewise, competition does not redress the asymmetrical distribution of communicative resources in society along the lines of deeply entrenched inequalities. By itself, competition does little to guarantee society's information needs are being met. For instance, to protect the struggling news industry, the congressional report on digital platform markets proposed legislation to "provide news publishers and broadcasters with a narrowly tailored and temporary safe harbor to collectively negotiate with dominant online platforms" (Nadler & Cicilline, 2020, p. 389) to alter the bargaining leverage between them. However, such proposals simply entrench the structural forces accelerating the decline of journalism (Pickard, 2020) rather than address them. In this sense, initial antitrust reform proposals mirror the shortcomings of the massively popular net neutrality regulation that was repealed as the antimonopoly movement entered the policy arena. Net neutrality served as a narrow fix, focused on rebalancing competitive dynamics in the downstream online content market, leaving the much deeper structural forces driving upstream industry concentration untouched (Newman, 2019; Pickard & Berman, 2019).

Moreover, competition policy approaches focus on empowering individuals vis-à-vis digital platforms (Flew, 2019, p. 14), and therefore are ill-suited to resolving the tension between individual uses and broader social functions. Thus, more competition in platform markets may represent a tradeoff with a sizeable public sphere and arena for collective action. After all, network effects not only facilitate monopoly, but also social contact and collective action. These problems arise because, as Davies (2014) points out, competition serves "as a form of quasi-justice, which lacks a substantive concept of the common good" (p. 105). Thus, an expansive definition of democratic governance is essential to fundamentally addressing the non-economic dimensions of digital communications systems.

With its roots in the contestation of neoliberalism following the 2008 global financial crisis and its focus on antitrust reform, the discursive critique that produced the emergent governance paradigm privileges economic justice over other values. The anti-monopolists' focus always has been antitrust reform rather than fixing the problems associated with platformization. Its limitations notwithstanding, this emergent governance paradigm reintroduced policy concepts that had been rendered taboo under neoliberalism. Terms like structural separation, competition as a process rather than consumer welfare, and essential facility were dusted off by policy stakeholders. Despite libertarian critiques and the neoliberal defense of existing antitrust, this dormant policy lexicon circulated within the broader policy arena and, to a large extent, the legislative arena where it made its way into the congressional report. However, more radical options remained sidelined, even as the discourse itself began to evolve in response to critiques from the left, expanding antitrust to competition policy to governance over private markets. As my interviewees made room in their framework for foundational terms like public utility, co-ops, and even the public option, these concepts remained more controversial than structural separation, which was immensely provocative even in the broader policy arena. Despite proposing an entirely new regulatory body to oversee digital markets in a neoliberal policy scene hostile to any new regulation, even the Stigler

Report stopped short of recommending any alternatives to market-based options, including public utility regulation.

Moving Forward

Beyond the limitations identified above, the emergent governance paradigm faces two general problems. First, the essential paradox of market competition is that its goal is its own annihilation (Davies, 2014; Wood, 2003), and this is especially true in communications sectors, whose history is one of ongoing consolidation and concentration (Aufderheide, 1999; Crawford, 2013; Evens & Donders, 2018; Holt, 2011; Horwitz, 1989; McChesney, 2013; Murdock & Golding, 1973; Streeter, 1996). For example, as Hindman (2018) demonstrates in his analysis of the dynamics and composition of web audience traffic flows, "[u]nfettered competition never guarantees consumer-friendly outcomes in markets with strong economies of scale" (p. 37). Web traffic follows a power law distribution, with an immense amount concentrated among few of the biggest sites. Dominant, well-resourced players produce stickier sites, retaining audiences and building new ones faster than less advantaged competitors. As more visitors come, they increase incumbents' revenue to improve their sites and attract even more users in a naturally occurring feedback loop that continues without external disruption. Neoliberal antitrust abets these persistent trends. However, as Benkler (2019) argues, "[s]imply making markets 'more competitive' will not solve the problem without deploying counterpower—usually through state regulation … to contain the power-seeking behavior among all market actors" (p. 3). Without meaningful regulation that specifies public obligations private actors have in these markets, like public utility regulation, competition policy oversight will play catch-up with the industry, responding to the most egregious problems and often too late. However, an even deeper problem is the lack of meaningful public alternatives in the existing communications system, while experiments to offer them, as in community media or municipal broadband, are often thwarted by the private actors and neoliberal allies (Ali, 2012; Crawford, 2018; Dunbar-Hester, 2009; Pickard, 2020; Wolfson & Funke, 2014).

Second, as I have argued here, competition policy is too narrow to address the multitude of policy concerns falling under the umbrella of platformization without coordinating with other policy arenas. Even if it comes short in its recommendations, the Stigler Report represents an attempt to address the problem of policy silos. An antecedent, smaller attempt involves anti-monopolists expanding the competition policy tool arsenal to include a host of regulatory agencies, like the Department of Agriculture, and legal frameworks, like intellectual property and trade law (e.g., Khan, 2018a). These efforts acknowledge the importance of breaking spatial policy silos, namely those along jurisdictional legal and regulatory lines, and reasserting the linkages between them. Flew and Wilding (2020) refer to such tactics as *harmonization* of laws and regulations to address platform power. While the term captures the coordinative effort required to overcome spatial silos, the silos to be coordinated first must be identified. This crucial primary step requires policy mapping, namely tracing the relevant policy architecture to be coordinated. An illustrative example involves the work of Flensburg and Sophus Lai (2019), which maps the policy undergirding the increasingly complex digital communications system. Such work is essential since the problem of spatial silos persists. For instance, the congressional inquiry focused primarily on addressing dominant platforms' market power.

However, "policymaking is an inherently temporal process" (Howlett, 2019, p. 36) and policy silos are also temporal. The temporal silos manifest most clearly in the debates examined here as an apparent conflict between structural separation and public utility regulation or even the public option. In this case, both policy options may be desirable since any hope of imposing strong public-focused regulations on platforms requires contending with their immense market power and attendant political influence, which can be curbed initially via structural separations or breakups. To overcome temporal silos, I draw on policy studies (Daugbjerg, 2009; Demont & Rizzotto, 2012; Howlett, 2009, 2019) and foreign policy literature (Ozkececi-Taner, 2017) to invoke the concept of *policy sequences*. Policy sequences are a temporal metaphor (Daugbjerg, 2009; Howlett, 2009, 2019) focusing policymaker attention on the linkages and incongruities between and compounded effects of successive policy interventions. They enable us to perceive policy options on a temporal scale where they may cease to be substitutes and become deliberately ordered complements. Indeed, I refer to emergent governance instead of simply governance because policymaking and regulation are processes "unfolding over time" (Andrews, 2020, p. 5). Thinking about policy on a temporal plane expands the scope of potential policy options available to policymakers and facilitates malleable political strategizing about policy implementation. The term captures the spirit of certain antimonopoly proposals, with antitrust intervention occasionally framed as a precondition of more aggressive interventions—not least to loosen platforms' stronghold on political institutions to enact those interventions. Likewise, the concept allows for considering the shifting political context in implementing policy reforms. For instance, the right-wing populist control of political institutions may impede their implementation or exploit policy reforms to discipline private markets to control information flows in the public sphere. While there is a danger that policy sequencing may be captured by industry or hostile political interests to delay or thwart crucial future reforms, procedural tools "can aid the sequencing of policy elements and promote robustness, resilience and the continuing effectiveness of a policy" (Howlett, 2019, p. 36), codifying the order of implementation.

I invoke policy sequencing here in the spirit of Natalie Fenton's (2016) notion of "political pragmatism" (p. 11) in her account of radical politics. She points out that many analyses of activism overlook "what is at stake in the actual politics on offer [and fail to] grapple with the issue of power" (p. 11). She argues that, as a "coalescence of a variety of causes and campaigns, a radical politics is not more than the sum of its parts; it is its parts" (p. 12). These interventions can occur in different policy spaces, but also at different policy times as part of a deliberate political strategy to counter neoliberal capitalism and right-wing populism. In this sense, policy sequencing denotes seeing interdependencies between available and imagined policy frameworks and options and charting a path to radical reform on a temporal scale. Thus, sequential thinking is inherently political.

Yet, it is difficult to future-proof regulation. Policymakers addressed the problem of Microsoft's monopolization in 2001 only to have new tech giants crop up. Democratic governance requires deliberation, transparency, and accountability in regulatory decision-making—processes that by nature introduce friction into designing regulations. Regulatory agencies in the modern state have leeway to act more quickly, but even they require deliberation, transparency, and public accountability. At the same time, technology moves quickly as dominant players in digital markets advance regulatory proposals that remove policy friction (Popiel & Sang, in press). Rather than race with technological and industry innovation and development, temporal policy thinking can draw inspiration from normative calls to slow down technology (Hallnäs & Redström, 2001; Mattern, 2018; Odom et al., 2012). Economic growth may hinge on innovation in the short run, but the tradeoff is often democracy's losses. To rebalance the scale requires adopting a new policy imagination that holistically problematizes, contests, and addresses the systemic problems at the heart of our digital communications system.

Envisioning alternate policy discourses is also difficult, yet the analysis and findings presented here point to at least four immediate directions. First, given that "platform common sense" (Cammaerts & Mansell, 2020) naturalizes platform operations, one key starting point involves contesting policy responses that prioritize the governance by actors in digital tech markets. For instance, the claim that anything short of co-regulation between states and platforms will destroy innovation and the economy does nothing to contest the power platforms already hold over policy (e.g. Popiel, 2018). In fact, the discourse of competition policy as democratic governance contests this common sense by forcefully reasserting public accountability and oversight of these markets. The discourse stresses platforms' dependence upon laws and regulations, while framing their ability to sidestep existing legal frameworks as an ideologically legitimated privilege. Moreover, co-regulatory and civil society sanctions have important limits. As Mark Zuckerberg's dismissal of the ad boycott against Facebook for failing to remove hate speech shows, private sanctions even when coordinated by civil society fail to effectively dent platform power. Protests by tech workers like walkouts or internal opposition can be effective, but also raise questions about who can afford to participate in them and therefore bring issues to the table as well as to what extent do they address only the most visible and egregious problems around which participants can build a coalition instead of establishing lasting "rules of the game." Thus, political solutions can be more representative, consistent, and durable.

Second, relatedly, the breadth of problem definition must expand from individual offenders to systemic-level processes like platformization and surveillance capitalism. To broaden the definition of the problem requires that policymakers abandon thinking in terms of GAFAM and start thinking about mass data collection and its commodification. The focus on individual companies distracts from "the coordinating, rule-setting power of the connective ecosystem as a whole" (Van Dijck, 2020, p. 11). However, importantly, broadening the definition of the problem does not mean problem analysis should not take note of important micro-level differences between market processes or even companies: tackling platformization requires analytically dissecting where and how market power is exercised by Google or its subsidiaries versus Uber or Facebook. Indeed, while the antimonopoly critique tellingly began with Amazon (Khan, 2017a), the intervention jumpstarted more holistic economic and legal analysis of market power in digital markets.

Third, the policy imagination must not only expand, but also complexify. The purpose of my interventions to approach policy problems cross-spatially and temporally is to start thinking about policy tools like antitrust and content regulation not as distinct approaches (e.g., Helberger, 2020, p. 848), but in a relational, complementary sense to develop more holistic policy frameworks. There are attendant political and institutional obstacles that must be addressed for this to happen. Efforts to complexify policy thinking exist in policy scholarship. For instance, the aforementioned work by Flensburg and Sophus Lai (2019) usefully maps the components of and policies undergirding digital communications systems and their interdependencies, breaking down spatial silos (see also Flensburg & Sophus Lai, 2020).

Finally, fourth, any alternate governance discourse that contests platform power must also center both rights-based discourses and social justice concerns over empowering market mechanisms like competition to forge a democratic governance paradigm of communications systems. As a preliminary step, policy discourse should shift from thinking about rights of companies engaged in platformization vis-à-vis legal systems to their obligations vis-à-vis those systems, the public, and society more broadly. The discursive emphasis is similar to the proposal by Steedman et al. (2020) to move from speaking about trust in data-driven systems to the trustworthiness of those systems, emphasizing their responsibilities toward users. However, rights-based discourses must be paired with social justice concerns. This specificity is especially important given right-wing populist efforts to deploy policy tools like antitrust to exert political information controls in digital communications systems. Too often these efforts are cloaked in rights discourses to defend the circulation of hate speech or falsely claim censorship of conservative views. Only a democratic rights-based discourse with commitment to social justice can begin to push back against both neoliberal and authoritarian politics, including the status threats driving the latter (Mutz, 2018), though both are likely intimately linked (Fetzer, 2019; Guiso et al., 2017). Concurrently, as the existing political economy structuring policy responses persistently and actively marginalizes thinking outside optimizing market mechanisms, such a discourse should also challenge private ownership and oversight of ubiquitous data—an essential component of platform common sense—as well as of communications systems more broadly. Moving beyond market-based discourses to consider policy interventions like public alternatives requires advancing robust notions of the public interest, while contesting those that equate it with lower prices and better managed markets.

Robust communications policy requires holistic problem definition that captures often hidden interdependencies and linkages between seemingly unrelated policy concerns. The analytical breadth is a prerequisite for grappling with digital communications systems advancing platformization, datafication, and surveillance capitalism. Policymaking also requires imaginative policy solutions that address problems of structure, realistically assess political and institutional obstacles, and traverse spatial and temporal silos. As such, policy analysis must not only be structurally thorough at the macro level, but also painstakingly meticulous in understanding the components at the micro level to withstand inevitable critique. In short, the democratic governance of digital communications requires that we think expansively, but analyze problems methodically with a merciless precision, and that we foreground public values, communications rights, and private obligations. The emergent governance paradigm has begun forcefully asserting these obligations, but whether it will collect is, like its own origins, a question of politics.

Appendix A

Interview Protocol

1. Can you describe your role within [the organization]?
2. Why are antitrust debates so prominent now? Why digital platforms and not media companies or telecom?
3. How does [your organization] view the role of competition in digital markets?
4. Is competition a realistic or worthwhile goal in these markets?
5. How much can antitrust do to address the issues here? What steps do you believe that policymakers can take to address these issues?
6. Are there any communications policy issues that [your organization] believes can be best addressed through market competition?
7. Are there any policy issues that [your organization] believes cannot be addressed through market competition?
8. What roles does [your organization] believe antitrust and regulation should play in digital communications markets, respectively?
9. Is there a role data plays in competition? How should it be regulated, if at all? Do we need a new agency to regulate tech giants?
10. Is there a change in thinking about competition? If so, how?
11. Are policymakers receptive to these ideas? Why is this time different? What is the path, strategically to effect reform here?
12. What are the key obstacles? Enforcement? Courts? Politics? Industry? Mindset?
13. How does [your organization] believe that competition is best assessed in communications markets? What are the biggest challenges in assessing it?
14. How would [your organization] define an ideal level of competition in digital platform markets?

Appendix B

Interviews[23]

In chronological order:

1) Lina Khan, Associate Professor of Law, Columbia Law School – 10/22/2019
2) Tom Wheeler, Visiting Fellow, Brookings Institute; former FCC Chair – 11/20/19
3) Sandeep Vaheesan, Legal Director, Open Markets Institute – 11/26/19
4) Michael Copps, Special Advisor, Common Cause; former FCC Chair – 12/4/19
5) S. Derek Turner, Research Director, Free Press – 12/5/19
6) Charles Duan, Senior Fellow, R Street – 2/20/20
7) Tom Struble, Former Manager, Technology & Innovation, R Street – 2/26/20
8) Herbert Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Law School – 2/27/20
9) Sally Hubbard, Director of Enforcement Strategy, Open Markets Institute – 2/28/20
10) Charlotte Slaiman, Competition Policy Director, Public Knowledge – 2/28/20
11) Harold Feld, Senior Vice President, Public Knowledge – 3/6/20
12) Lina Khan, Associate Professor of Law, Columbia Law School – 5/13/20

[23] All interviews were conducted by phone except for Herbert Hovenkamp, who was interviewed in person.

Events

I attended twelve events convened by various organizations between 2018-2020, either in person or via webinar, particularly during the COVID-19 pandemic. In chronological order, these were:

1) "New Debates and Tensions in Antitrust: What Does the Future Hold?" (online)
Organizer: *Georgetown Center for Business and Public Policy* – 12/10/18

2) "Big Business: 'Beautiful' or a 'Curse'?" (online)
Organizer: *Information Technology and Innovation Foundation* (ITIF) – 12/11/18

3) "Is 'Big Tech' Now Synonymous with Big Oil or Big Tobacco?" (online)
Organizer: *Information Technology and Innovation Foundation* (ITIF) – 12/12/18

4) "New Debates and Tensions in Antitrust: How to Handle Big Tech?" (Washington, D.C.)
Organizer: *Georgetown Center for Business and Public Policy* – 9/30/19

5) "The Post-Chicago Antitrust Revolution" (Philadelphia, PA)
Organizer: *University of Pennsylvania Law School* – 10/11/19

6) "The Bipartisanship America Needs: Left-Right Convergence on Confronting Monopoly Power" (Washington, D.C.)
Organizer: *The American Prospect* and *The American Conservative* – 11/14/19

7) "Populism and Political Economy" (Washington, D.C.)
Organizer: *The Capitol Forum* – 2/5/20

8) "Reforming Antitrust Policy for an Era of Global Competitiveness" (online)
Organizer: *Information Technology and Innovation Foundation* (ITIF) – 3/26/20

9) "More Powerful Than Ever: Do We Need a Regulator for Digital Platforms?" (online)
Organizer: *Public Knowledge* – 6/18/20

10) "Mapping U.S. Law and Political Economy: Antitrust" (online)

Organizer: *The Law & Political Economy Project* – 7/1/20

11) "New Debates and Tensions in Antitrust: The 2020 Vertical Merger Guidelines?" (online)
Organizer: *Georgetown Center for Business and Public Policy* – 7/30/19

12) "Anti-trust and Platform Regulation" (online)
Organizer: *The Research Conference on Communications, Information, and Internet Policy* – 8/13/20

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