

# ANTITRUST REFORM: IMPLICATIONS OF PROSPECTIVE THREATS BY DIGITAL PLATFORMS TO RELOCATE ABROAD

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*Facebook, Amazon, Apple, and Alphabet (Google) are four of the world's most expansive business empires, both in terms of public visibility and market value. This paper examines a hypothetical scenario. If Congress introduced a bill to enact new antitrust regulations over digital platforms, what would happen if these companies responded by threatening an expatriation of some or all of their United States business assets? It is argued in this paper that if these companies threatened a costly and unpopular expatriation of business, that the United States Congress will capitulate to their demands. If true, these companies have reached a critical threshold of market concentration that poses a threat to democracy because domestic governance and control cannot rein them in. Further, it suggests that the global span and prodigious growth of these companies has dwarfed the ability of political institutions to hold them to account. The paper ends with a proposed solution using Google as a case study example. The proposal calls for the implementation of a corporate monitor program pursuant to a deferred prosecution agreement between the Department of Justice and Google.*

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*“The current world of huge corporations and their counterparts, government commissariats, steadily pushes economic power holders into the wider theater of politics and statesmanship.”<sup>1</sup>*

- Adolf Berle

## INTRODUCTION

The meteoric rise of digital platforms such as Facebook, Amazon, Apple, and Alphabet (Google) has had a transformative effect across the globe.<sup>2</sup> Some commentators praise the numerous benefits that these large businesses bestow on the average individual. For example, Tyler Cowen suggests that these companies are potentially humankind’s single greatest achievement.<sup>3</sup> Others see these digital platforms as problematic in that they raise timely and critical policy questions concerning their political power.

Some commentators cite globalization as a primary factor for why transnational corporations, such as the major digital platforms, have become formidable political actors.<sup>4</sup> Globalization has eroded established national institutions and weakened the authority of sovereign states to rein in large-scale private economic enterprises.<sup>5</sup> Citing a similar concern, one commentator utilizes the power theories put forward by Michel Foucault to suggest that multinational corporations are successfully imposing their objectives on individual states that seek to govern their conduct.<sup>6</sup> As such, it

1. ADOLF A. BERLE, *POWER* 148 (1969).

2. These corporations now account for nearly 10% of the market value of all listed U.S. stocks. Robert W. Crandall, *The Dubious Antitrust Argument for Breaking Up the Internet Giants*, 54 REV. INDUS. ORG. 627, 627 (2019); see also Erin Duffin, *The 100 Largest Companies in the World by Market Value in 2019*, STATISTA (Aug. 12, 2019), <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/> [<https://perma.cc/9XRX-WWWE>].

3. TYLER COWEN, *BIG BUSINESS: LOVE LETTER TO AN AMERICAN ANTI-HERO* 8 (2019).

4. Andreas Georg Scherer & Guido Palazzo, *Toward a Political Conception of Corporate Responsibility - Business and Society Seen from a Habermasian Perspective*, 32 ACAD. MGMT. REV. 1096, 1108–09 (2007).

5. Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. OF MGMT. REV. 166, 171 (2005).

6. Eduardo Vicencio has identified this development as a new form of “corporate governmentality.” See Eduardo Rivera Vicencio, *The Firm and Corporative Governmentality: From the Perspective of Foucault*, 5 INT’L J. ECON. & ACCT. 281, 281–82 (2014) (“The power that has been built around the firm is so powerful that large corporations have taken over the political power and/or

has become increasingly difficult for individual governments to regulate the activities of colossal, transnational corporations.

To curb the excessive power of the major digital platforms such as Facebook, Amazon, Apple, and Google, some commentators have called for a series of legislative reforms in the U.S. These reforms include changes to antitrust policy as well as the establishment of a specialized antitrust court.<sup>7</sup> Perhaps the most ambitious proposal is a call for a sectoral regulator to govern the conduct of digital platforms. The scope of this regulator would be comprehensive and include issues outside of an antitrust purview, such as privacy, media, data-use restrictions, and consumer protection.<sup>8</sup>

Such proposed reforms are likely to be met with resistance by the major digital platforms. What is less clear is the reactions and responses of politicians; in particular, the responses of those in Congress who have the power to enact these reforms into law. In order to become law, these regulations must go through Congress, which is a politically charged environment that is subject to pressure from the very companies who stand to lose their market power if subject to increased antitrust oversight.<sup>9</sup>

It has been suggested that some corporations such as Facebook, Apple, Amazon, and Google, are uniquely set apart from other multinational enterprises in that they are multifaceted, political agents capable of preventing further government oversight.<sup>10</sup> These advantages are varied in nature. First, these companies are well financed and positioned in order to lobby politicians and regulators.<sup>11</sup> Second, in some cases these

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manipulated it at their will, leaving the state under their control and giving way to corporate governmentality”).

7. *Stigler Committee on Digital Platforms: Final Report*, U. CHI. BOOTH SCH. BUS., at 95–99 (2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> [https://perma.cc/4YYG-PS9C] [hereinafter *Stigler Committee Final Report*].

8. *Id.* at 95–119 (providing an overview on specific areas of possible antitrust reform).

9. *Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee Report*, U. CHI. BOOTH SCH. BUS., at 72 (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf> [https://perma.cc/7XGA-FBGG] [hereinafter *Market Structure Subcommittee Report*].

10. In their report, the Politics Subcommittee found that “the social media platforms enjoy a unique constellation of structural political advantages that may transform them into some of the most successful political agents of our times . . . .” *Committee for the Study of Digital Platforms: Politics Subcommittee*, U. CHI. BOOTH SCH. BUS., at 13–14 (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/politics---report.pdf> [https://perma.cc/Y63L-HC64] [hereinafter *Politics Subcommittee Report*].

11. Anthony Chen, *In the Private Interest? Business Influence and American Democracy*, in *CAN AMERICAN GOVERN ITSELF?* 15, 23 (Frances Lee & Nolan McCarty eds., 2019).

corporations' role as media outlets allows them to claim First Amendment protections which can potentially hinder certain regulatory changes.<sup>12</sup> For instance, these digital platforms increasingly control the means through which politicians reach their constituents.<sup>13</sup> Third, their connectivity allows them to directly engage users in challenging political initiatives that disadvantage them.<sup>14</sup> Fourth, their growing importance as leading exporters allows them to raise "national champion" arguments asserting that the corporations interests should be protected and unhindered by U.S. regulation.<sup>15</sup>

Part I of this paper outlines the various regulatory concerns that are posed by the market dominance of the major digital platforms. These concerns include antitrust issues, as well as other salient challenges presented by digital platforms. These challenges include the protection of customer privacy, pervasive control over the distribution of media, and as a corollary, the ability to effectively coordinate political messaging and outlets. It is argued that if Congress proceeds to introduce fresh legislation to deal with these concerns, then it is possible that companies such as Facebook, Amazon, Apple, and Google will threaten an expatriation of some or all of their U.S. business operations. In the face of these threats, it is likely that Congress will cede to the demands of these companies.

Part II sets out a literature review on the scope of U.S. antitrust regulation. There are at least two viewpoints towards antitrust policy. The first viewpoint is the Consumer Welfare model, which asserts that businesses that maximize consumer benefits through efficiencies and low prices should not be scrutinized as potential antitrust violators. This is a somewhat relaxed approach to antitrust policy and enforcement and is the fundamental underpinning of the current U.S. framework.<sup>16</sup> The approach in the U.S. towards antitrust regulation was once much more active in breaking up large-scale corporations.<sup>17</sup> However, since a 1979 Supreme

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12. *Politics Subcommittee Report*, *supra* note 10, at 23; *see also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C.D. L. REV. 1183, 1185 (2016).

13. *Politics Subcommittee Report*, *supra* note 10, at 21.

14. *Politics Subcommittee Report*, *supra* note 10, at 21–22. Take as one example, the coordinated online campaigns led by Google and Twitter to mobilize millions of users to sign a Google petition in opposition to the Stop Online Piracy Act and the Protect IP Act. The petition quickly drew 4.5 million signatures. Further, Twitter prompted users to share 2.4 million tweets attacking the bills. Erik Kain, *4.5 Million People Signed Google's Anti-SOPA Petition*, FORBES (Jan. 19, 2010 10:18 AM), <https://www.forbes.com/sites/erikkain/2012/01/19/4-5-million-people-signed-googles-anti-sopa-petition/#55c2bcfe6f03> [<https://perma.cc/GEA2-5KHA>].

15. *Politics Subcommittee Report*, *supra* note 10, at 25.

16. Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2159 (2013).

17. Barak Orbach, *Foreword: Antitrust's Pursuit of Purpose*, 81 FORDHAM L. REV. 2151, 2154–2155 (2013).

Court decision, the Consumer Welfare approach has been the principal strategy of U.S antitrust policy.<sup>18</sup>

Contrasting the Consumer Welfare model is the Brandeisian conception of antitrust law. The Brandeisian model focuses on whether a business has accumulated significant political power that requires intervention by courts and regulators. This is a much more robust approach to antitrust enforcement compared to the Consumer Welfare model.

Part III of the paper sets out a proposed hypothetical circumstance to question what the political implications will be if these digital platforms use the prospect of new federal antitrust regulations as a reason to relocate or move significant assets abroad. Pragmatic options and methods to expatriate the business operations of the major digital platforms are then addressed. This hypothetical scenario is worthy of exploration because it sheds light on whether members of Congress are likely to capitulate to the demands of large digital platforms when attempting to craft new antitrust mechanisms in order to further regulate their activities.

It is argued in this paper that capitulation by Congress is the likely outcome. This is due to the comprehensive and sustained power structures of these corporations in the economy,<sup>19</sup> and perhaps more importantly, throughout society. The result is that regulatory power over digital platforms has shifted away from government institutions and into the private sector. Such a result signifies a relationship between market concentration and undesirable political outcomes, which poses a threat to democracy and to the sustainability of transparent, open markets.

In Part IV, a potential avenue for reform is outlined, which aims at balancing the relationship between U.S. regulators and the major digital platforms. The proposal calls for a settlement agreement between the U.S. Department of Justice and Google, as well as for the use of a corporate monitor program. Typically, the implementation of a corporate monitor results from a legal settlement reached between a government regulator and an organization that is facing criminal, civil, or administrative investigations or prosecutions. The monitor's role involves ensuring that the corporation adheres to the stipulations of the settlement.

The merits of this proposed solution are demonstrated through a case study involving Google as a representative example of the major digital platforms. Two issues have been left unexplored in this proposal: the role of the judiciary and the role of state laws as effective means for raising

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18. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); Orbach, *supra* note 17, at 2153.

19. *Stigler Committee Final Report*, *supra* note 7, at 6 (noting that as of August 2019, Facebook, Apple, Amazon, and Google have more than \$4 trillion in market capitalization).

antitrust concerns to address the dominance of these business enterprises. Further analysis of these two issues is warranted.<sup>20</sup>

### I. THE PROBLEM

Digital platforms are distinctive because they provide valued services to consumers without charging a monetary price in most circumstances. In return, consumers provide their attention and personal data. The challenge is that traditional antitrust enforcement has vastly more experience with transactions based on monetary prices as opposed to personal data.<sup>21</sup>

Digital platforms also pose unusual challenges for antitrust regulators reviewing prospective mergers. There is evidence that U.S. enforcement agencies and courts have permitted too many mergers between competing firms that have led to increased market power.<sup>22</sup> Going beyond antitrust issues, there is a range of other concerns posed by digital platforms, such as the protection of customer privacy, their ability to control the dissemination of media, and their power to mobilize political campaigns. This is why some commentators have called for the creation of new antitrust governance measures aimed at these digital platforms. However, potentially targeted companies such as Facebook, Amazon, Apple, and Google may resist the prospect of new regulations. This paper proposes a hypothetical scenario to examine the political impacts that would occur if these digital platforms demanded a freeze on new regulations, or in the alternative, threaten to relocate considerable portions of their business operations abroad.

What makes this threat to expatriate so potent is that these digital platforms are facing increased regulatory scrutiny in the U.S. For instance, the Federal Trade Commission is currently investigating Amazon and Facebook,<sup>23</sup> while the Justice Department is reviewing the practices of

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20. John D. McKinnon, *Google Resists Demand From States in Digital-Ad Probe*, WALL ST. J. (Feb. 21, 2020), [https://www.wsj.com/articles/google-resists-demand-from-states-in-digital-ad-probe-11582281000?mod=hp\\_lead\\_pos1](https://www.wsj.com/articles/google-resists-demand-from-states-in-digital-ad-probe-11582281000?mod=hp_lead_pos1) [<https://perma.cc/88CT-8TR3>] (noting that as of 2020, there is an antitrust investigation lead by Texas among 48 states, as well as the District of Columbia, Puerto Rico and Guam, into the practices of Alphabet (Google) as one example on the prospect of changes brought about under state antitrust law).

21. *Market Structure Subcommittee Report*, *supra* note 9, at 66.

22. Michael Vita, F. David Osinski & John Kwoka, *Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L. J. 361, 369 (2018).

23. See generally Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L. J. 39, 62 (2019) (providing a noteworthy outline on some of the alleged anticompetitive practices at Facebook).

Apple and Google.<sup>24</sup> The potential liabilities that are being investigated include unacceptable market concentration and the monetization of customer data. Further, the House Judiciary Committee is engaged in a holistic review of the powers amassed by all four of these companies.<sup>25</sup> It is entirely plausible that this regulatory scrutiny will result in a call for mandatory corporate breakups or for the introduction of a sectoral regulator. If so, one or several of these companies may consider options to avoid any new regulations by threatening to expatriate some or all of their U.S. operations.

Many will be incredulous to the provocative idea that these companies would leave the market, workforce, and financial opportunities as well as the legal protections that are afforded to U.S. based businesses. Perhaps the threat of expatriation alone as a negotiation tactic may help avoid the prospect of fresh regulations. In this sense, the digital platforms do not actually have to exit the U.S. to achieve their objective. Some may believe that to take a purposely misleading position during a negotiation is in bad faith, yet it appears to be mainstream. One commentator has titled this practice as the “normalcy of lying” in order to achieve desired ends.<sup>26</sup>

A deceptive threat of expatriation as a negotiation tactic is also an act of brinkmanship. This situation has been described in the language of game theory as playing “chicken” or a “war of attrition.”<sup>27</sup> These game theory tactics occur when the party embracing the strategy deliberately lets the situation get somewhat out of hand, just because the situation being out of hand may be intolerable to the other party and force their accommodation.<sup>28</sup> Maneuvering in this way to avoid the imposition of new

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24. John Swartz, *News Cycle Is Daily Reminder of Big Tech's Antitrust Vulnerabilities*, MARKETWATCH (Aug. 24, 2019), <https://www.marketwatch.com/story/news-cycle-is-daily-reminder-of-big-techs-antitrust-vulnerabilities-2019-08-24> [<https://perma.cc/NA2R-BJ3W>] (noting that technically, the Justice Department is investigating Alphabet Inc., which is Google's parent company).

25. Michael Liedtke, *Antitrust Regulators Dig Deeper Into Dominant Tech Companies*, ASSOCIATED PRESS (Sept. 6, 2019), <https://www.apnews.com/c580125b2b064885863ef2c70405bae9> [<https://perma.cc/9WCL-ZQGA>].

26. Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OH. ST. J. ON DISP. RESOL. 1, 11–13 (2009) (in academic literature, these tactics have been labelled “pretending,” “deceiving,” and even “lying”); see also Moshe Banai, Abraham Stefanidis, Ana Shetach, & Mahmet Ferhat Özbek, Attitudes Toward Ethically Questionable Negotiation Tactics: A Two-Country Study, 123 J. BUS. ETHICS 669, 670 (2014); Ahmet Erkus & Moshe Banai, *Attitudes Towards Questionable Negotiation Tactics in Turkey*, 22 INT'L J. CONFLICT MGMT. 239, 241 (2011) (unsurprisingly, these tactics have been identified as unethical methods of negotiation).

27. BENOÎT CHEVALIER-ROIGNANT & LENOS TRIGEORGIS, COMPETITIVE STRATEGY: OPTIONS AND GAMES 99 (2011).

28. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 200 (Harvard Univ. Press 2d ed. 1980).

regulations is certainly a high-risk strategy for any business, no matter the size of its wealth, influence, and market dominance.

In the long-run, the use of an empty threat as a negotiation tactic may be ill-advised. For one, it may not work. Second, the adoption of ethically questionable negotiation tactics has been found to cultivate distrust,<sup>29</sup> undermine future negotiations, and imperil established business relationships.<sup>30</sup> Third, it could harm corporate image as migrating business outside of the U.S. is an unpatriotic act.

Facebook, Apple, Amazon, and Google are all uniquely situated entities with a host of powers to avoid such negative implications. For instance, these companies are well financed to lobby politicians and regulators, and their growing importance as prominent exporters allows them to claim that they should be protected by Congress as flagship U.S. corporations.<sup>31</sup> Moreover, they increasingly control the means through which elected officials communicate with the public, and their connectivity allows them to engage individuals in challenging political initiatives, such as proposed regulations. For example, through their platforms, they can unleash a media blitz asserting that the proposed new regulations are patently incompatible with a strong business environment and that the impacts of the new rules will bring down American companies.<sup>32</sup> For these reasons, the four major players can leverage their market concentration to ignite a media campaign asserting that these new regulations will be devastating to U.S. competitiveness.

One may suggest that it does not matter if these companies expatriate business outside the U.S. since legislation can be applied extraterritorially. For instance, U.S. antitrust laws such as the *Sherman Antitrust Act* (*Sherman Act*) and *Clayton Act* are already used to regulate foreign conduct.<sup>33</sup> The same may not be true concerning the reach of a sectorial regulator that governs the conduct of these digital platforms. At

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29. Peter C. Cramton & J. Gregory Dees, *Promoting Honesty in Negotiation: An Exercise in Practical Ethics*, 3 BUS. ETHICS Q. 359, 359–60 (1993); Ann E. Tenbrunsel, *Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation*, 41 ACAD. MGMT. J. 330, 334–35 (1998).

30. H. Joseph Reitz, James A. Wall, Jr. & Mary Sue Love, *Ethics in Negotiation: Oil and Water or Good Lubrication?*, BUS. HORIZONS, May–June 1998, at 5, 13–14.

31. *Politics Subcommittee Report*, *supra* note 10, at 21, 25.

32. *See Politics Subcommittee Report*, *supra* note 10, at 21 (for an example on the capability of these digital platforms to pursue such a campaign).

33. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (in the case, the U.S. Supreme Court allowed the *Sherman Antitrust Act* to have extraterritorial effect against foreign companies acting in foreign countries if they succeeded in restraining trade within the U.S. Further, section 12 of the *Clayton Act* broadens the authority of courts over extraterritorial defendants and potential antitrust violations provided the defendants have some form of domestic U.S. presence).

the very least, these companies could challenge the scope of any new extraterritorial legislation in U.S. federal court. The Supreme Court has struck down legislation that purported to apply extraterritorially.<sup>34</sup>

More important to the context of this paper, the significant question is: how will members of Congress react when balancing the value of enacting meaningful regulations over digital platforms against the potential damage that may be inflicted if these companies expatriate significant business assets? Such damage could include, among other concerns, the loss of domestic taxation, the flight of capital to foreign markets, and the loss of U.S. jobs. In the end, this paper concludes that the threat of expatriation would be enough to temper any robust legislative measures that are aimed at further governing the conduct of the major digital platforms from an antitrust perspective.

Before proceeding, it is important to address whether it is possible or appropriate for antitrust law to address questions of a corporation's political power, such as the four major digital platforms. There are at least two schools of thought regarding antitrust policy. One, known as the Consumer Welfare model, suggests that as long as consumers benefit through efficiencies and lower prices from a business, antitrust law should not impact its operations. The other school is known as the Brandeisian conception. Those advocating for this approach support the notion that antitrust regulators must focus on whether a business has amassed political power in a problematic way.

## II. SCOPE OF ANTITRUST REGULATION

There are at least two different approaches that relate to the scope of antitrust regulation. The first approach is the Consumer Welfare model, which focuses on consumer benefits, such as efficiencies and low prices. The second is the Brandeisian approach that focuses on the accumulation of political power by corporations, which may require regulatory intervention.

In his highly influential work setting out the Consumer Welfare model, *The Antitrust Paradox*, Robert Bork asserted that the sole objective of antitrust regulation should be to maximize consumer welfare.<sup>35</sup> This view was part of the so-called Chicago School conception of antitrust law that took hold in the 1970s and 1980s.<sup>36</sup>

Under this Model, maximizing consumer welfare is achieved by focusing on economic factors, such as reducing prices and promoting

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34. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

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

36. Eleanor M. Fox, *The Efficiency Paradox*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK*, 77 (Robert Pitofsky ed., 2008).

efficiency.<sup>37</sup> The most appealing facet of this approach is that it arguably reduces antitrust regulation into a precise formula that can be applied with “consistency, accountability, and scientific rigor.”<sup>38</sup> Bork contented that this view is consistent with the “will of Congress.”<sup>39</sup> In 1979, the Supreme Court followed Bork’s lead and declared that “Congress designed the *Sherman Act* as a consumer welfare prescription.”<sup>40</sup> For the past several decades, the Consumer Welfare model has been embraced as the prevailing philosophy towards antitrust regulation in the U.S.<sup>41</sup>

Some commentators disagree with the Consumer Welfare model and challenge the notion that Congress intended for U.S. antitrust policy to have a narrow consumer welfare focus.<sup>42</sup> These commentators look to the legislative intent of the *Sherman Act* and the 1950 amendments to the *Clayton Act*, which indicate that Congress was just as concerned with the political repercussions of monopolistic power as they were with the economic impacts on consumers.<sup>43</sup>

Under the Consumer Welfare model, the major digital platforms are unlikely to attract regulatory scrutiny from an antitrust perspective. For example, digital platforms generally do not raise prices for their goods and services, as it is generally free for users to sign up for their services.<sup>44</sup> Instead, these companies collect and monetize customer information and preferences by selling the information to third parties, which focuses on growth over profit. This is why digital platforms that do not charge a

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37. MAURICE E. STUCKE & ALLEN P. GRUNES, *BIG DATA AND COMPETITION POLICY* 108 (2016).

38. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 *ANTITRUST L. J.* 835, 835 (2014).

39. BORK, *supra* note 35, at xi; *see also* Barry C. Lynn, *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?* *OPEN MKTS.* (Dec. 13, 2017), <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf> [<https://perma.cc/S9HH-6GAD>].

40. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

41. Fox, *supra* note 16, at 2159; Lena Kahn, *Amazon’s Antitrust Paradox*, 126 *YALE L. J.* 710, 716 (2017); Orbach, *supra* note 17, at 2151.

42. Orbach, *supra* note 17, at 2151; *see also* Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 *FORDHAM L. REV.* 2349, 2354 (2013).

43. *See* the following articles for a history on the legislative intent behind the *Sherman Act*, *Clayton Act*, its subsequent amendments, and these laws treatments in the courts: Fox, *supra* note 16, at 2158; Kahn, *supra* note 41, at 740–42; Robert Pitofsky, *The Political Content of Antitrust*, 127 *U. PA. L. REV.* 1051, 1053–54 (1979); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 76–77 (2018).

44. *See* Maurice E. Stucke, *Should We Be Concerned about Dataopolies?*, 2 *GEO. L. TECH. REV.* 275, 281 (2018) (pointing out that when Facebook acquired WhatsApp and Instagram they did not start charging users a fee. Instead, Facebook eliminated WhatsApp’s small fee in some countries for its texting app).

traditional fee for products and services, such as Google and Facebook, will typically avoid raising antitrust concerns under a strict consumer welfare model. This is despite the fact that serious questions are raised about the litany of personal information these companies have amassed and the implications of what they do with it.<sup>45</sup>

Those who oppose a consumer welfare model suggest that antitrust policy should seek to protect what Justice Louis Brandeis called “industrial liberty.”<sup>46</sup> To this end, antitrust laws should seek to fulfill “public ends” for the greater good.<sup>47</sup> Further, antitrust laws should be interpreted to prevent excessive concentration of economic power, as it inexorably leads to political power in the hands of a few elite corporations.<sup>48</sup>

This view of antitrust policy has been termed interventionist, populist, Jeffersonian, and “Brandeisian.”<sup>49</sup> More colloquially it has been called the “hipster” antitrust approach.<sup>50</sup> Regardless of its branding, central to this conception is the understanding that excessive control in a marketplace creates a threat to the common good and to democratic institutions.<sup>51</sup> As one extreme example of a potential threat to democracy, a powerful corporate enterprise could, during a time of domestic crisis, facilitate the overthrow of a duly elected government.<sup>52</sup>

One notable proponent of the Brandeisian approach is Lina Khan. She argues that companies, such as Amazon, should be subject to increased antitrust scrutiny, despite a track record of providing low prices to consumers.<sup>53</sup> Khan points out that Amazon has amassed significant growth in its business operations; however, it continues to generate little profit as it chooses instead to keep consumer prices down and to focus on its growth. Khan submits that this strategy, which seemingly appears to serve the best interests of consumers, has allowed Amazon to escape meaningful antitrust probing under the Consumer Welfare model.

Khan argues that the Consumer Welfare model is not adequate to address the harmful effects of Amazon’s power in the modern economy.

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45. Dylan Curran, *Are You Ready? Here Is All the Data Facebook and Google Have on You*, GUARDIAN (Mar. 30, 2018), <https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy> [<https://perma.cc/6MBB-4UL9>].

46. LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 38 (Osmond K. Fraenkel ed., 2d ed. 1964).

47. Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2544 (2013).

48. Pitofsky, *supra* note 43, at 1051.

49. Crane, *supra* note 38, at 835.

50. Andrea O’Sullivan, *What is ‘Hipster Antitrust?’*, MERCATUS CTR., GEO. MASON U. (Oct. 18, 2018), <https://www.mercatus.org/bridge/commentary/what-hipster-antitrust> [<https://perma.cc/BE42-P83W>].

51. Kahn, *supra* note 41, at 742.

52. Pitofsky, *supra* note 43, at 1054.

53. Kahn, *supra* note 41.

For example, a chief concern posed by Amazon's market dominance and financial resources includes its extensive ability to lobby government regulators in order to achieve desired ends for its shareholders and managers.<sup>54</sup> As proposed in this paper, this could include influencing members of Congress to capitulate to Amazon's demands when attempting to further regulate their activities through fresh antitrust regulations. Thus, according to the Brandeisian approach, focusing antitrust regulation exclusively on consumer welfare in the context of large-scale digital platforms is misguided. In other words, a consumer welfare approach ignores the legislative intent evidence that Congress passed antitrust legislation to safeguard against excessive concentrations of economic and political power.<sup>55</sup>

In sum, the Brandeisian model of antitrust policy encompasses not only the welfare of consumers, but also the sustainability of open markets, the prevention of monopolies, and the protections against political power in the hands of a few corporate titans. Utilizing this approach, the major digital platforms such as Facebook, Amazon, Apple, and Google should face increased regulatory scrutiny concerning their market concentration and political power. This would occur despite the appearance that these businesses do not harm consumer welfare in terms of fees for services or products.

On the other hand, the consumer welfare model continues to have strong support. As one example, Carl Shapiro argues that antitrust laws are not well suited to directly address concerns associated with the political power of large corporations, such as Facebook, Amazon, Apple, and Google.<sup>56</sup> As such, it is not appropriate for antitrust law to address questions of political power in the hands of private corporations. Despite this and similar objections, on balance, this paper endorses the Brandeisian model, as it would be a revealing and valuable exercise for antitrust regulators to examine the political powers of the major digital platforms.

It must be acknowledged that it is potentially too late to reverse course and to use federal U.S. antitrust laws to intervene in the operations of these large-scale companies. For one, the spectre of using federal antitrust laws to diminish the major digital platforms' political power could trigger a decision by these companies to migrate significant business assets outside of the U.S. If faced with this threat, it is likely that Congress will capitulate to the demands of Facebook, Amazon, Apple, and Google.

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54. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (this concern was exacerbated by the landmark case of *Citizens United* that held that the First Amendment prevents the government from restricting financial support for political communications by corporations and other private entities).

55. Kahn, *supra* note 41, at 743.

56. Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 714 (2018).

If the political capital of these companies has reached a threshold where they can sway members of Congress to cede from the prospect of enacting new regulation, then only the judiciary, individual states, and politically independent regulators will be able to shift U.S. antitrust policy towards potentially diminishing their powers. Questions on the ability of these institutions to assert authority over the dominance of the major digital platforms is beyond the scope of this paper.

It should be noted that U.S. antitrust laws, such as the *Sherman Act*, were purposely designed to be flexible legislative instruments by Congress, in order to leave discretion concerning enforcement and interpretation with the courts and regulators on a case-by-case basis.<sup>57</sup>

This paper focuses on the political influence of the major digital platforms and methods that may be utilized to achieve the desired ends of Facebook, Apple, Amazon, Google and other large-scale companies. One potential method to avert Congressional action would be to threaten an expatriation of some or all of a company's business operations to outside of the U.S. Prospective methods for expatriating the business operations of the major digital platforms are set out below.

### III. THE HYPOTHETICAL

If Facebook, Amazon, Apple, or Google threatened to migrate business outside of the U.S. what would that realistically look like? In other words, how and where might these businesses relocate? One method to effectuate a relocation is through a corporate inversion. This is a process where a U.S. company shifts its place of incorporation to another country with a lower tax rate without undergoing a major change in ownership.<sup>58</sup> Beyond the tax incentives, inversions are particularly attractive to businesses because the process can be structured to lessen obligations requiring compliance with burdensome domestic regulations.<sup>59</sup> While much has been written on the tax implications of corporate inversions,<sup>60</sup> an

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57. Fox, *supra* note 16, at 2157.

58. See Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649, 1650–51 (2015) (providing an overview of the inversion process).

59. Gregory Day, *Irrational Investors and the Corporate Inversion Puzzle*, 69 SMU L. REV. 453, 453 (2016).

60. Douglas Chiu, *Inversion Subversion: Corporate Inversions and the New Federal Laws Against Them*, 20 FORDHAM J. CORP. & FIN. L. 717, 717 (2015); Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807, 808 (2015); Inho Andrew Mun, *Reinterpreting Corporate Inversions: Non-Tax Competitions and Frictions*, 126 YALE L. J. 2152, 2152 (2017); Hale E. Sheppard, *Fight or Flight of U.S.-Based Multinational Businesses: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend*, 23 NW. J. INT'L L. & BUS. 551, 551 (2003); Brian Thompson, *Solving the Corporate Inversion Phenomenon: An Exercise in Free Market Patriotism*,

underdeveloped aspect of this process is the ability of inverted businesses to moderate their obligations to comply with other regulatory frameworks such as securities, banking, and antitrust laws.<sup>61</sup>

Corporate inversions began to appear in the 1990s and grew with increasing frequency into the 2000s. Federal government regulations aimed at preventing inversions were introduced in 2004, 2014, and 2015.<sup>62</sup> Despite these regulatory responses, there has been a surge of inversions in the past decade.<sup>63</sup> In 2014, U.S. public companies with a combined value over half a trillion dollars announced their intention to invert.<sup>64</sup>

Examples of successful corporate inversions include Burger King to Canada (2014), the world's largest medical device company, Medtronic to Ireland (2015), and the telecommunication company, Arris International to England (2016), among several others.<sup>65</sup> In 2016, Pfizer Inc. announced its desire to move to Ireland as part of a \$150 billion acquisition of Allergan PLC. The combined company was set to manufacture many popular pharmaceutical products including Botox and Viagra, with projected annual sales over \$65 billion.<sup>66</sup> The U.S. Department of Treasury and the Internal Revenue Service (IRS) responded by implementing new measures directly targeting the Allergan-Pfizer inversion-styled merger.<sup>67</sup> As a result, the proposed inversion was subsequently cancelled.

The weakness with the 2016 regulations of the Department of Treasury and the IRS is that they are ad hoc and narrowly targeted at the

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*Protectionism Through Facilitation*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 556, 557 (2017); James G.S. Yang & Frank J. Aquilino, *Corporate Inversion Strategies Versus Anti-Inversion Treasury Regulations*, TAXES 47, 47–48 (2016); *Developments in the Law: Jobs and Borders*, 118 HARV. L. REV. 2171, 2275 (2005).

61. See generally Talley, *supra* note 58 (providing an example of literature on the subject).

62. Yang & Aquilino, *supra* note 60, at 51–53.

63. Press Release, Ways & Means Comm. (Democrats), U.S. H.R., New CRS Data: 47 Corporate Inversions in the Last Decade, (July 7, 2014), <https://waysandmeans.house.gov/media-center/press-releases/new-crs-data-47-corporate-inversions-last-decade> [<https://perma.cc/CQE2-667V>].

64. Anton Babkin, Brent Glover & Oliver Levine, *Are Corporate Inversions Good for Shareholders?*, 126 J. FIN. ECON. 227, 227 (2017).

65. *Tracking Tax Runaways*, BLOOMBERG (Mar. 1, 2017), <https://www.bloomberg.com/graphics/tax-inversion-tracker/> [<https://perma.cc/8N6A-U4J2>].

66. Geoffrey Smith & Claire Groden, *Pfizer, Allergan Confirm \$160 Billion Merger Deal*, FORTUNE (Nov. 23, 2015 7:00 AM), <http://fortune.com/2015/11/23/pfizer-allergan-merger> [<https://perma.cc/FT7F-GYZZ>].

67. Press Release, U.S. Dep't of Treasury, Fact Sheet: Treasury Issues Inversion Regulations and Proposed Earnings Stripping Regulations (Apr. 4, 2016) <http://www.treasury.gov/press-center/press-releases/Pages/j10404.aspx> [<https://perma.cc/Y33M-YPKB>].

individual Allergen-Pfizer deal.<sup>68</sup> As such, these regulations, as well as the earlier 2004, 2014, and 2015 regulatory responses, do not prevent corporations from circumventing certain obstacles by utilizing new strategies to expatriate business. One commentator has described this cycle between preventative regulation and new inversion methods as a game of “cat-and-mouse” between businesses seeking to expatriate and the federal government attempting to stop them.<sup>69</sup>

Further, there are other examples of marque U.S. companies moving some of their business ventures overseas without the use of inversion. For instance, in 2015, Coca-Cola announced they were moving part of their bottling operations as part of an international merger with Iberian and German bottling companies. The new company has over \$12 billion in annual net revenues and is headquartered in the U.K.<sup>70</sup>

In order to curb these corporate exits, Congress has proposed numerous bills that have not been enacted. As of 2019, a Bill to revise the rules for the taxation of inverted corporations is under review in the Senate Committee on Finance.<sup>71</sup> Judging by the success of the previously introduced bills, it appears unlikely that this current iteration of the Bill will be passed into law.

The next question beyond the method of expatriating is: where these companies would relocate and why? According to Bloomberg, popular destinations for U.S. corporations to expatriate between 1990 to 2016 included Ireland, England, Netherlands, Canada, Bermuda, Luxembourg, Switzerland, Denmark, and the Bailiwick of Jersey in the English Channel.<sup>72</sup>

A good starting point may be to cross places off the list that are potentially hostile and unsafe environments or that do not have stable and thriving economies. Another factor is to avoid places where these companies will face the same regulations that they are seeking to avoid in the U.S. The recent track record of regulatory sanctions in Europe suggests that EU countries should be excluded from consideration. For instance, Google has undergone tremendous scrutiny in Europe. EU

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68. See Yang & Aquilino, *supra* note 60, at 52 (explaining that the 2016 regulations were designed to specifically halt the merger).

69. Mun, *supra* note 60, at 2158.

70. Nicholas Rossolillo, *What Coca Cola Enterprises' Merger Means for Investors*, MOTLEY FOOL (May 20, 2016), <https://www.fool.com/investing/general/2016/05/20/what-coca-cola-enterprises-merger-means-for-invest.aspx> [<https://perma.cc/9JNK-ULFX>]; *Coca-Cola Enterprises, Coca-Cola Iberian Partners and Coca-Cola Erfrischungsgetränke AG to Form Coca-Cola European Partners*, BUS. WIRE (Aug. 6, 2015), <https://www.businesswire.com/news/home/20150806005605/en/Coca-Cola-Enterprises-Coca-Cola-Iberian-Partners-Coca-Cola-Erfrischungsgetr%C3%A4nke> [<https://perma.cc/7RQP-LH8V>].

71. Stop Corporate Inversions Act of 2019, S. 2140, 116th Cong. (2019).

72. *Tracking Tax Runaways*, *supra* note 65.

regulators imposed nearly \$10 billion in fines against Google for abusing the power of its search engine, digital ad network, and Android software for smartphones.<sup>73</sup> Additionally, the EU's Antitrust Chief has been exploring whether Amazon is using data to gain an edge on third-party merchants, which are both its customers and rivals.<sup>74</sup> Further, the European Commission has ordered Apple to pay over €14 billion to Ireland for activities occurring in 2016.<sup>75</sup> As such, EU nations do not appear to be an ideal location to relocate the business operations of these digital platforms.

One appealing choice may be to expatriate key assets to Singapore which, according to a 2019 World Bank report, is second only to New Zealand as a business-friendly environment.<sup>76</sup> Another alternative is South Korea, ranked fifth by the World Bank, and is known as a country with a dominate high-tech sector. For example, according to the annual 2019 Bloomberg Innovation Index, South Korea is the number one country in the world when it comes to research and development spending, manufacturing capability, and concentration of high-tech public companies.<sup>77</sup>

There are other safe choices such as New Zealand or Canada, which both have stable economies, secure legal systems, and an educated workforce. In contrast, a bold decision may be to relocate somewhere exotic, such as the Principality of Monaco. Monaco is not formally part of the EU which would allow a digital platform company some autonomy from the restrictive EU regulations. As noted by the global accounting firm KPMG, Monaco is a tax haven and business-friendly environment that enjoys an ideal geographic location, security of its people and goods, a cosmopolitan work force, and strong political stability.<sup>78</sup> Although it is a constitutional monarchy, the ruling Prince wields immense political and legal power. It is possible that a microstate, such as Monaco, might be so

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73. Liedtke, *supra* note 25.

74. *Id.*

75. David Meyer, *Apple Has Paid the \$14.3 Billion It Owes the Irish Tax Authorities—But the Check Hasn't Cleared Yet*, FORTUNE (Sept. 19, 2018), <https://fortune.com/2018/09/19/apple-ireland-tax-payments-escrow/> [https://perma.cc/LN6T-TR9J].

76. *Doing Business 2019: Training for Reform*, WORLD BANK GRP., at 3, 5, [https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report\\_web-version.pdf](https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf) [https://perma.cc/P27P-5LFA] (last visited July 25, 2019).

77. *The World's Most Innovative Countries in 2019 – and 2 Surprising Areas Where South Africa Stands Out*, BUS. TECH. (Jan. 27, 2019), <https://businesstech.co.za/news/technology/294614/the-worlds-most-innovative-countries-in-2019-and-2-surprising-areas-where-south-africa-stands-out/> [https://perma.cc/KQ6T-E9SV].

78. *Relocation to Monaco, an Attractive Location for Individuals, Families and Private Businesses*, KPMG INT'L (Oct. 1, 2016), <https://home.kpmg/xx/en/home/insights/2016/09/relocation-to-monaco.html> [https://perma.cc/8ZDC-GHJ8].

tempted by the benefits of housing a major digital platform that it would let the corporation operate *carte blanche* with little to no oversight.

Instead of choosing one jurisdiction, perhaps these digital platforms could spread themselves across several nations, in a strategic move, to demonstrate that they can come and go as they please. Further, they can deploy their activities worldwide and choose where to report profit.<sup>79</sup> In this way, it is possible that these corporations have reached a sphere of dominance and control where they have become, in effect, transnational and ungovernable by any one particular state.<sup>80</sup> It has been predicted that increasing concentration of corporate power may result in tyrannical organizations that are beyond domestic regulatory control.<sup>81</sup> In order to govern their activities, new international rules will have to be developed and targeted at these fluid multinational business structures. This is essential as the world transitions away from the post-Cold War Neoliberal order towards a “Goeconomic Order.”<sup>82</sup> In this new era, the rise of economic power becomes the dominant force in geopolitics.<sup>83</sup>

In this sense, one commentator has written of the need for the “modern law” to give way to the “post-modern law” in order to adjust to a new normal.<sup>84</sup> One noted historian has even envisaged the progression towards a dystopian world order, where transnational corporations align with multinational military forces, such as NATO, to form a “supranational nexus” that rivals the power of any particular state, or alliance of states which seek to regulate them.<sup>85</sup>

While the prediction outlined above represents an extreme and unlikely outlook of the future, it does appear that Facebook, Apple, Amazon, and Google currently possess significant means to exert political

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79. See EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* (2019).

80. See, e.g., Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 493–94 (2020) (It has even been suggested that some states are using the world’s largest businesses to routinely police other businesses).

81. DAVID KORTEN, *WHEN CORPORATIONS RULE THE WORLD* 19 (Kumarian Press, Inc. & Berrett-Koehler Publishers, Inc., Beth Richards ed., 2d ed. 2001) (1995).

82. Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Goeconomic Order in International Trade and Investment*, 22 J. INT’L ECON. L. 655, 655 (2019).

83. Edward Luttwak, *From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce*, 20 NAT’L INT. 17, 17–23 (1990).

84. Matej Avbelj, *Transnational Law Between Modernity and Postmodernity*, 7 TRANSNAT’L LEGAL THEORY 406, 406–428 (2017).

85. ALFRED MCCOY, *IN THE SHADOWS OF THE AMERICAN CENTURY: THE RISE AND DECLINE OF US POWER* 234 (2017) (this concept is similar to others raised, such as in the compelling book: MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000)).

and public pressure in order to resist new antitrust regulations. This may signify a shift in control over digital platforms away from government institutions and into the private sector.

One option that may be employed by the U.S. Department of Justice for controlling the dominance of the major digital platforms is the use of a corporate monitor program. Corporate monitors are typically appointed by U.S. federal regulators pursuant to deferred prosecution agreements regarding antitrust, securities, environmental, *Foreign Corrupt Practices Act*, workplace safety, and other types of violations.

It is argued in this paper that corporate monitors have been shown to cultivate rehabilitative effects within organizations that have raised regulatory concerns among federal agencies. Further, effective corporate monitor programs may have beneficial impacts beyond regulatory compliance and reach into areas such as the promotion of stakeholder-friendly corporate governance. As discussed in the next section, Google is used as a case study to explore how the implementation of a corporate monitor program could potentially work in practice.

#### IV. A PROPOSED SOLUTION

At the time of writing, the U.S. Department of Justice (DOJ) and state attorney generals are investigating whether Google is abusing its power, including as the dominant broker of digital ad sales.<sup>86</sup> Further, the DOJ has requested from Congress a 71% increase in funding for its Antitrust Division.<sup>87</sup> This appears to be an indicator that the DOJ is serious about its pending investigations into digital platforms such as Google.

Attorney General William Barr has also stated that he wants the DOJ to “fish or cut bait” on its probe into Google and the other major digital platforms.<sup>88</sup> By using this statement, the Attorney General is

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86. Keach Hagey & Vivien Ngo, *How Google Edged Out Rivals and Built the World's Dominant Ad Machine: A Visual Guide*, WALL ST. J. (Nov. 7, 2019), [https://www.wsj.com/articles/how-google-edged-out-rivals-and-built-the-worlds-dominant-ad-machine-a-visual-guide-11573142071?mod=article\\_inline](https://www.wsj.com/articles/how-google-edged-out-rivals-and-built-the-worlds-dominant-ad-machine-a-visual-guide-11573142071?mod=article_inline) [<https://perma.cc/7R25-XRJ2>].

87. Leah Nylén, *DOJ Seeks 71 Percent Bump From Congress for Antitrust*, POLITICO (Feb. 10, 2020), <https://www.politico.com/news/2020/02/10/doj-bump-antitrust-enforcement-113340> [<https://perma.cc/NQW5-6LQG>].

88. Keach Hagey & Rob Copeland, *Justice Department Ramps Up Google Probe, With Heavy Focus on Ad Tools: Antitrust Enforcers Have Reached Out to More Than a Dozen Publishers, Ad Tech Rivals and Ad Agencies*, WALL ST. J. (Feb. 5, 2020), [https://www.wsj.com/articles/justice-department-ramps-up-google-probe-with-heavy-focus-on-ad-tools-11580904003?mod=hp\\_lead\\_pos2](https://www.wsj.com/articles/justice-department-ramps-up-google-probe-with-heavy-focus-on-ad-tools-11580904003?mod=hp_lead_pos2) [<https://perma.cc/LF9Q-95SS>] (“Google’s ad-tech business consists of software used to buy and sell ads on sites across the web. The company owns the dominant tool at every link in the complex chain between online publishers and advertisers, giving it unique power over the monetization of digital content”).

indicating that he wants his department to act promptly on these investigations or let them go.

There is another route for the DOJ to consider that falls somewhere between full throttle litigation and simply ending these investigations that can serve the interests of both parties. For example, the DOJ could offer Google a deferred prosecution agreement (DPA) in order to resolve the existing antitrust investigation that they are undertaking into the company.<sup>89</sup> DPAs serve the dual purpose of punishing corporations without passing on the punishment to the public and they allow the corporation to avoid the stigma of a federal prosecution.<sup>90</sup> Additionally, it is the usual practice of the DOJ to employ corporate monitors as part of any DPA. A monitor's role involves ensuring the corporation adheres to the stipulations in the DPA.<sup>91</sup> The specific terms of the monitorship are laid out in the DPA, which allows the DOJ and the corporation to tailor the monitorship to the specific misconduct.<sup>92</sup>

Monitors are known by different names including, among others, independent consultants, independent compliance consultants and corporate compliance monitors.<sup>93</sup> Since the early 2000s, U.S. enforcement authorities have increasingly utilized corporate monitor programs to help promote legal compliance and reduce future violations.<sup>94</sup> These enforcement agencies include various government regulators such as the DOJ, the Securities Exchange Commission, the Drug Enforcement Agency, the

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89. Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Changing Policies*, 51 ST. LOUIS L. J. 1, 17–18 (2006) (noting that typically these settlement agreements contain: “some recitation of the illegal acts, an acceptance of responsibility, and a promise of past, present, and future cooperation—including making employees available to testify before a grand jury, production of documents, and otherwise helping the government in its criminal investigation”).

90. Caelah E. Nelson, *Corporate Compliance Monitors Are Not Superheroes with Unrestrained Power: A Call for Increased Oversight and Ethical Reform*, 27 GEO. J. LEGAL ETHICS 723, 728 (2014).

91. See Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713, 1721 (2007) (noting that corporate monitors are a recent legal innovation, but the concept of an independent trustee ensuring compliance with a judicial order stems from the equitable courts of England. The concept is borrowed from the English Chancery's use of agents of the courts to ensure parties to a case complied with legal and regulatory judgments).

92. Nelson, *supra* note 90, at 729.

93. F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 322 n.2 (2011).

94. See *id.* at 328, for a discussion of one of the first major cases employing a corporate monitor program, SEC v. Prudential Sec., Inc., No. 93 Civ. 2164, 1993 WL 473189 (D.D.C. Oct. 21, 1993).

Environmental Protection Agency, the Federal Highway Safety Administration, and the Food and Drug Administration.<sup>95</sup>

Monitors report their findings regarding compliance to both the regulator and the corporation and make recommendations for improvements during the period of oversight. These monitorships typically last two to three years and the cost is paid by the corporation.<sup>96</sup> The fact that the corporation is burdened with the cost of the program, as opposed to the government regulator, is seen as a benefit to tax payers. Further, a corporate funded monitor is a more efficient means of regulation as compared to the often protracted litigation efforts that are required when antitrust disputes proceed to trial.<sup>97</sup> For this reason, both sides may find a corporate monitor program appealing simply to avoid the cost and uncertainty of a trial.

Other benefits on the use of DPAs and corporate monitors are that they can provide an individualized set of recommendations for the corporation, as opposed to a generic list of compliance goals. This allows the regulator and corporation to “tailor the terms of the monitorship as necessary to effectuate optimal compliance with the law and ethical behavior.”<sup>98</sup> Similarly, a DPA may be a valuable alternative to criminal convictions or civil regulation because a monitor can address “firm-specific

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95. Letter from Brian A. Benczkowski, Assistant Att’y Gen., U.S. Dep’t Just. Crim. Div. to All Crim. Div. Pers. (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download> [<https://perma.cc/DXT2-WNWE>]; see Bart Schwartz, *When to Appoint a Monitor*, in *THE GUIDE TO MONITORSHIPS* 69, 74 n.17 (Anthony S. Barkow, Neil M. Barofsky, & Thomas J. Perrelli eds., 2019), <https://globalinvestigationsreview.com/benchmarking/the-guide-to-monitorships-first-edition/1180961/when-to-appoint-a-monitor#footnote-022> [<https://perma.cc/4P9G-C82D>] (citing to Assistant Att’y Gen., Brian A. Benczkowski’s October 11, 2018 Letter).

96. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 126 (2020).

97. See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (providing a noteworthy example of prolonged litigation. The U.S. government accused Microsoft of establishing a monopoly position in the personal computer market. The lawsuit began in 1998, with the DOJ joined by twenty U.S. states and the District of Columbia against Microsoft. The DOJ was also suing Microsoft for violating a 1994 consent decree by forcing computer makers to include its internet browser as a part of the installation of its software. In 1999, Microsoft lost at trial and appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit. Protracted litigation efforts continued until 2001 when the DOJ announced that it was no longer seeking to break up Microsoft and would instead seek a lesser antitrust penalty).

98. Veronica Root, *The Monitor - “Client” Relationship*, 100 VA. L. REV. 523, 533 (2014).

information about corporate defects” that can be cured through a monitor program.<sup>99</sup>

DPA and corporate monitor programs have also been suggested to be more effective than fines.<sup>100</sup> For instance, unlike fines, the appointment of a monitor usually results in structural changes that have a rehabilitative effect within an organization. This is likely because most monitors have the power to fire employees and to create new compliance programs.<sup>101</sup> As such, during the course of the monitorship, employees are incentivized to take directions from the corporate monitor as opposed to their existing managers.<sup>102</sup> This change in supervision and oversight cultivates a motivation to implement the objectives of the DPA among the organization’s workforce under the auspices of the corporate monitor.

Despite these benefits, there have been criticisms about the use of DPAs and corporate monitors. For one, the monitor’s dual responsibility to report findings to the corporation and the regulator suggests a lack of clarity in the scope and responsibilities of the monitor.<sup>103</sup> Second, the process may not be transparent, as the content of a DPA is typically not reviewable by judges nor subject to appeal.<sup>104</sup> It also appears that DPAs and corporate monitor programs are on the decline. For example, in 2018, there was just one DPA that was accompanied by an independent monitor.<sup>105</sup> However, the reduction in the use of corporate monitors is likely on account of a change in policy, under the Trump Administration, to utilize monitors more selectively.<sup>106</sup> However, this change in policy does not negate the benefits

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99. Lawrence A. Cunningham, *Deferred Prosecution and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 20 (2014).

100. Khanna & Dickinson, *supra* note 91, at 1724.

101. Nelson, *supra* note 90, at 731.

102. *See generally* Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1155 (1983) (discussing effects of the power to impose sanctions on a corporation).

103. Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 734 (2009).

104. Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1509–11 (2017).

105. *See* Deferred Prosecution Agreement at 1, *United States v. Panasonic Avionics Corp.* (D.D.C. 2018) (No. 1:18-cv-00118) (Doc. No. 2-1), <https://www.justice.gov/opa/press-release/file/1058466/download> [<https://perma.cc/MM45-6Z2A>] (that case involved the Panasonic deferred prosecution agreement concerning the *Foreign Corrupt Practices Act*).

106. Garrett, *supra* note 96, at 112–13; Brian Benczkowski, Assistant Att’y Gen., U.S. Dep’t Just., *Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance*, DEP’T OF JUST. (Oct. 12, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program> [<https://perma.cc/38MB-MHXU>] (in these remarks, the Assistant Attorney General

of corporate monitors, such as the rehabilitative effects within organizations and the ability to tailor the monitorship to specific corporate misconduct.

For these reasons, in terms of cultivating compliance within the enterprise it is argued that the appointment of a corporate monitor within Google as part of a DPA will prove much more effective than the introduction of new federal antitrust legislation. Moreover, successful corporate monitor programs may have beneficial effects beyond antitrust compliance and reach into areas such as the promotion of stakeholder-friendly corporate governance.

To this end, one condition of the proposed DPA should be to require Google to invoke a pledge similar to that made by Airbnb in early 2020 in which the company laid out a vision to operate for the benefit of all stakeholders.<sup>107</sup> Specifically, Airbnb identified five stakeholders including guests, hosts, communities, shareholders, and employees. This commitment appears to be actionable and meaningful as it includes tying executive bonuses to performance on Airbnb's social goals, and it calls for the creation of a stakeholder subcommittee on the board of directors. Currently, Google does not have comparable stakeholder pledges regarding its corporate governance strategy.<sup>108</sup>

In a similar way to Airbnb, Google could be mandated to introduce its own commitments to stakeholders. This could include a list of identified stakeholders and a strategy on how the corporation can best serve the goals of these stakeholders beyond profit seeking activities. If this mandate, among other requirements under the DPA, is met by Google in a prescribed time period, the DOJ could agree to suspend antitrust enforcement and eventually end the corporate monitor program. The ending of the corporate monitorship could be conditional on Google agreeing to inspections and audits in the future to ensure that the adjustments made under the monitor program continue.<sup>109</sup>

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announced that the new policy explicitly recognizes that, “the imposition of a monitor will not be necessary in many corporate criminal resolutions”).

107. *An Update on Our Work to Serve All Stakeholders*, AIRBNB (Jan. 17, 2020), [https://news.airbnb.com/serving-all-stakeholders/?mod=article\\_inline](https://news.airbnb.com/serving-all-stakeholders/?mod=article_inline) [<https://perma.cc/4TQL-YKK3>].

108. *Corporate Governance Guidelines*, ALPHABET (adopted July 18, 2018), <https://abc.xyz/investor/other/corporate-governance-guidelines/> [<https://perma.cc/NKY7-S3PN>].

109. See generally Thomas J. Perrelli, *The Life Cycle of a Monitorship*, in *The Guide to Monitorships*, 28, 38–39 (Anthony S. Barkow, Neil M. Barofsky, & Thomas J. Perrelli eds., 2019), <https://globalinvestigationsreview.com/benchmarking/the-guide-to-monitorships-first-edition/1190478/the-life-cycle-of-a-monitorship#footnote-001> [<https://perma.cc/3PV5-PJ5M>] (ongoing auditing is not generally the norm in corporate monitor programs. However, over the course of a monitorship, new obligations may be imposed by the monitor that require a new corrective action).

All of this leads to a major question on whether a formidable company such as Google would agree to a DPA under these conditions. Potentially, Google's management might welcome a pledge parallel to the one made by Airbnb regarding stakeholder commitments. Currently, large-scale U.S. corporations are publicly embracing analogous strategies. Take, as one example, the 2019 announcement of the Business Roundtable's *Statement on the Purpose of the Corporation*, in which 181 CEOs of large-scale U.S. companies committed to leading their organizations for the benefit of all stakeholders.<sup>110</sup>

The commitment made by Airbnb and the Business Roundtable's Statement both illustrate the stakeholder conception of corporate accountability. Stakeholder theory extends the concept of corporate managers' obligations to several stakeholders to include shareholders, creditors, employees, suppliers, customers, the public, and the environment, among others.<sup>111</sup>

In terms of corporate structure, stakeholder theory does not question that corporate managers should be responsible for the running of a corporation. Proponents of this theory question the traditional stakeholder interests that should be regarded and promote a more community based decision-making process. In this way, shareholder wealth is seen as one of many competing interests rather than the dominant constituent.

The stakeholder conception is challenged by the Shareholder Primacy model. Included among the shareholder primacy theorists is the late Nobel Prize winning economist Milton Friedman. He argued that the socially responsible objective for corporations is to increase profits.<sup>112</sup> More recent proponents of shareholder primacy have been extraordinarily confident in the inevitable success of this model, so much so that two noted experts declared the "end of corporate law" as consensus was forming in "leading jurisdictions" around shareholder primacy.<sup>113</sup> The recent Airbnb pledge and the Business Roundtable's Statement suggest that there is a place for the stakeholder model as well.<sup>114</sup>

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110. *Statement on the Purpose of the Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://opportunity.businessroundtable.org/wp-content/uploads/2020/02/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-Feb2020.pdf> [<https://perma.cc/RSD7-UADH>].

111. Corrine Fiesel, *Fiduciary Duties of Directors, Corporate Governance and the End of Shareholder Primacy*, in CORPORATE GOVERNANCE AND SECURITIES REGULATION IN THE 21ST CENTURY, 77 (Poonam Puri ed., 2004).

112. Milton Friedman, *The Social Responsibility of the Corporation is to Increase its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 33.

113. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 440–41 (2001).

114. Melsa Ararat, Asli M. Colpan & Dirk Matten, *Business Groups and Corporate Responsibility for the Public Good*, 153 J. BUS. ETHICS 911, 924 (June 7, 2018) (an emerging concept in corporate accountability closely linked to the

For many reasons, it will not be concessionary on the part of Google to adopt a stakeholder-friendly pledge as part of its corporate governance strategy. It could be advantageous to Google because businesses that are perceived to be socially responsible may attract more customers and talented employees. Further, as part of an effort to prevent more restrictive legislation from Congress, the implementation of a stakeholder responsible agenda may “forestall legislation and ensure greater corporate independence from government.”<sup>115</sup> Embracing stakeholder-friendly commitments may also protect Google’s reputation in the event that Google is cast in a negative light as a result of being caught in a scandal. Highlighting commitments to responsible business practices may cushion reputational harm or buy goodwill from consumers, shareholders, civil society, and the public.<sup>116</sup>

Alternatively, it can be argued that the recent Airbnb pledge and the Business Roundtable’s Statement are not genuine embraces of the stakeholder model. Rather, some commentators have suggested that these pledges are a mere exercise in public relations and that corporations are creating stakeholder-friendly initiatives as a way to avoid government oversight.<sup>117</sup> Others have argued that these activities may increase corporate executives’ ability to opportunistically exploit corporate resources through unnecessary increased spending outside the primary activities of the business.<sup>118</sup>

Another concern is the concept of greenwashing. By greenwashing, a corporation might increase profits or boost its brand through environmentally and socially responsible rhetoric, but at the same time decline to spend money on its pledges or otherwise honor its

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stakeholder model is the various frameworks developed on corporate social responsibility. Today, corporate social responsibility is about maximizing corporate profit along with the public good in all its forms).

115. ANDREW CRANE & DIRK MATTEN, *BUSINESS ETHICS: MANAGING CORPORATE CITIZENSHIP AND SUSTAINABILITY IN THE AGE OF GLOBALIZATION* 47 (2d ed. 2007).

116. Yung-Ming Shiu & Shou-Lin Yang, *Does Engagement in Corporate Social Responsibility Provide Strategic Insurance-like Effects*, 38 *STRATEGIC MGMT. J.* 455, 455–470 (2017).

117. Luigi Zingales, *Don’t Trust CEOs Who Say They Don’t Care About Shareholder Value Anymore*, *WASH. POST* (Aug. 20, 2019), <https://www.washingtonpost.com/opinions/2019/08/20/dont-trust-ceos-who-say-they-dont-care-about-shareholder-value-anymore/> [https://perma.cc/SB47-J9TU] (Zingales points out that the Business Roundtable’s Statement “is at best misleading marketing, at worst a dangerous power grab”); see also S. Prakash Sethi & Donald Schepers, *United Nations Global Compact: The Promise-Performance Gap*, 122 *J. BUS. ETHICS* 193, 194–98 (2014) (discussing background and overview of corporate social responsibility).

118. Ronald W. Masulis & Syed Walid Reza, *Agency Problems of Corporate Philanthropy*, 28 *REV. FIN. STUD.* 592, 592–93 (2015).

commitments.<sup>119</sup> While this may be the case with many businesses, one measure to prevent Google from merely embracing a hollow commitment to its stakeholders is the presence and power of the corporate monitor. For one, the monitor would be able to ensure the new stakeholder goals are entrenched within the organization. This could be achieved by tying executive bonuses to performance based on these goals. Further, oversight regarding the goals could become a key responsibility of a new stakeholder subcommittee on the board of directors, made up of a majority of independent directors.

More generally, instead of appealing to stakeholder responsibility arguments to entice Google to agree to a DPA, the company may agree simply to avoid the uncertainty of the DOJ's continued investigation and the potential litigation that could result. A likely significant factor in winning the consent of Google to accept a DPA is that key U.S. politicians would have to show support for the DPA and make overtures to Google and other major digital platforms that entered into similar agreements that they will hold off on new antitrust legislation for the foreseeable future. This would be a somewhat unusual step for government officials to take in order to pacify a handful of corporations or a single industry. However, without this commitment that additional antitrust regulations will not be forthcoming, it is possible that the major digital platforms such as Google may refuse to entertain the possibility of entering into a DPA in the first place.

A further incentive for Google to consider a DPA and the imposition of a corporate monitor is that the DOJ has requested a sizable increase in funding from Congress for its Antitrust Division.<sup>120</sup> This tactical move by the DOJ suggests that they will continue to engage in a robust and extensive investigation into Google's antitrust practices. Once that investigation is complete, it is possible that actions will be taken by the DOJ against Google, which may lead to litigation. That moment may present an opportunity, both timely and unique, for the DOJ to clamp down with leverage and insist on a DPA along with a corporate monitor component under the parameters set out above.

Due to these possibilities, it has been argued in this paper that companies, such as Google, would be less likely to threaten an expatriation of their business interests in the face of a DPA because they could avoid the stigma of federal prosecution. Further, the prospect of more restrictive legislation could be costly, whereas settling existing antitrust concerns with its regulators could provide the company stability in its current and developing operations. This would reduce legal risks and enforcement

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119. Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 985 (2010).

120. Nysten, *supra* note 87.

actions involving the company. As an associated benefit, Google would agree to stakeholder-friendly commitments as part of its corporate governance strategy.

### CONCLUSION

Facebook, Amazon, Apple, and Google all have formidable financial and political means to launch effective campaigns to exert pressure over the government to prevent the enactment of new federal antitrust legislation aimed at curbing their power. It appears that for these particular corporations, the ability to regulate a substantial portion of their conduct has shifted away from government institutions. This poses a myriad of pressing threats to U.S. democratic institutions, including the protection of privacy, the dissemination of distorted news, and the ability to mobilize political networks into the hands of an unregulated private authority.

For these reasons, it is crucial for governing authorities, such as Congress, to get a handle on the implications of these companies' market concentration and political power to determine what, if anything, can be done moving forward in terms of potential antitrust regulatory solutions.

In contrast to the Consumer Welfare model of antitrust policy, the findings of this paper support the Brandeisian approach as the optimal system for assessing antitrust abuses. Despite this conclusion, the paper also finds that the idea of shifting antitrust legislation towards the Brandeisian conception is potentially futile. It has been argued that a critical threshold of corporate power has been reached among the major digital platforms, where they can now effectively challenge any further exercise of Congressional oversight and control. Thus, it appears that a tipping point has been reached where Facebook, Amazon, Apple, and Google command the political influence necessary to prevent a shift in U.S. federal antitrust policy away from the Consumer Welfare model and towards a Brandeisian framework. This essentially leaves the courts, individual states, and politically independent regulators to marshal their own antitrust resources to address the dominance of these companies in the U.S. A topic for future research and study is whether these institutions will be able to harness antitrust policy in a way that effectively regulates the economic and political power of Facebook, Amazon, Apple, and Google. However, the findings of this paper suggest that the time has passed to realistically expect meaningful regulatory changes enacted through Congressional action, given the prodigious political capital of the major digital platforms.

In using Google as a case study, it is argued that one potential avenue left for federal regulators, such as the DOJ, which is currently undertaking antitrust investigations into the company, is to offer a DPA. Part of the proposed DPA between Google and the DOJ would require the imposition of a corporate monitor program. Corporate monitors have been

shown to cultivate institutional changes within corporations that have raised antitrust concerns. Moreover, effective corporate monitor programs may have socially constructive impacts beyond antitrust compliance and reach into areas such as the promotion of stakeholder-friendly corporate governance. For instance, a monitor could oversee the implementation of a new corporate governance policy similar to the framework announced by Airbnb in 2020. This could include a process to identify key stakeholders that encompass social and community interests and setting up a stakeholder subcommittee on its board of directors.

In sum, the implementation of a DPA and a corporate monitor program will prove the most sound and pragmatic method for holding major digital platforms, such as Google, to account in regulating antitrust compliance under existing laws. In particular, it is a more pragmatic option than the introduction of fresh regulations by Congress that target these companies. The prospect of new antitrust legislation could mobilize the resources at the disposal of the major digital platforms in an effort to portray the proposed new regulations as incompatible with a competitive business environment.

The DOJ and state attorney generals are currently investigating digital platforms, such as Google and Facebook, meaning that it is an ideal time for regulators to propose a DPA. This outcome is potentially the most realistic in terms of achieving practical results that meet the objectives of regulators in governing the conduct of the major digital platforms, as well as yielding acceptable outcomes for these business enterprises. This paper argues that a DPA and an associated monitor program are the appropriate mechanisms to reach this compromise. This is especially the case in contrast to the notion of introducing new regulations by Congress. If enacted, these regulations could result in a pyrrhic victory that could potentially cost the United States the opportunity to house the substantial business interests of the major digital platforms.