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## **Platform Power and Regulatory Politics: Polanyi for the 21st Century**

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**Platform Power and Regulatory Politics:  
Polanyi for the 21<sup>st</sup> Century**

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## **Abstract**

Intensifying concerns about on line platform firms' rapid rise, expansion, and growing asymmetric power have attracted political scrutiny and undermined the legitimacy of a minimalist regulatory regime that is giving way to intense debate and increasingly interventionist governmental policies and enforcement actions. First, we view the rise of, and recent political responses to, the often-predatory power and manipulative conduct of platform firm in terms of a "Polanyian" double movement in which the destabilizing and destructive effects of unchecked corporate activities and market development eventually generates political and regulatory responses to constrain private power that threaten the social, political, and economic order. Second, incipient legal changes, most notably the EU's proposed Digital Markets Act and Digital Services Act, indicate a shift in regulatory emphasis from competition (and antitrust) policy and law towards more intensive and encompassing forms of socio-economic regulation. Finally, these regulatory changes will likely vary in character and significance across political jurisdictions, and embody distinctive and possibly divergent developmental trajectories. The EU may have a first-mover advantage in regulating platform firms, but we are only at the very beginning of a protracted and conflictual transformational process.

# I. Introduction: The Power of the Platform and the Rise of the Platform

## Economy

Over the last two decades, online platforms have grown in ways that go beyond the typical Chandlerian dimensions of scale and scope and, as a result, have had a transformative impact on virtually all areas of social life, including business competition, firm organization, labor relations, technological innovation, and the conduct and content of social and political discourse (Kenney & Zysman, 2016; Kenney et al. 2020; Srnicek 2017).<sup>1</sup> A growing number of scholars, commentators, and policy makers have recognized that online platforms, and the firms deploying and embodying them, represent a new organizational form (Frenken and Fuenfschilling 2020; McIntyre, et al. 2021; Stark and Pais, 2020).<sup>2</sup> Their distinctive attributes endow them with extraordinary capacities for expansion and for the development of asymmetric power with respect to other firms and the consumers that interact through them.<sup>3</sup> The belated recognition of the increasing power and pervasiveness of platform firms has within the last several years resulted in a remarkably rapid change in the policy and discourse among political elites and other state actors who had for so long viewed with little concern the unfettered growth, expansion, self-organization, and largely unilateral private ordering of platform business models and governance. As a consequence, the *laissez faire* neoliberal regulatory ideology of the past quarter

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<sup>1</sup> See, e.g., Kenney & Zysman, (2016) and Kenney et al., (2020). For an excellent comprehensive overview of platform firms, see generally Cusumano et al. (2019).

<sup>2</sup> Frank Pasquale (2015) and Shoshona Zuboff (2019) critically assess and situate the novel character and economics of platform firms in the broader framing of information economics and the political economy of the information society in the era of pervasive digital communications and data processing technologies.

<sup>3</sup> In the economics literature these are termed “sides” of the platform or market (Rochet & Tirole, 2003).

century that has prevailed with respect to the Internet in general and to web-based business platforms in particular is rapidly losing its political and societal legitimacy.

The rapidity and global diffusion of this change has been striking. Notwithstanding prior signs of growing societal and political concern directed at “Big Tech, there has been limited regulatory intervention. But within the past year there has been a sea change in the regulatory and legislative treatment of powerful platform firms. That sea-change reveals a decisive shift towards governmental intervention in the internal structures, practices, and business strategies of platform firms, precisely because they affect the society more generally. Further, in a shift within this pro-intervention swing of the governance pendulum, governmental authorities appear to be contemplating increased enforcement of competition and antitrust law, but also (and arguably more importantly) the authorities are moving towards more intensive and comprehensive regulation of platform firms and markets.<sup>4</sup> We see evidence of this changing regulatory and legislative environment in the European Union, the United States, China, and India—all the most significant jurisdictions and geographical markets comprising the global economy. These emergent political and juridical responses to the growing power of platforms and platform firms signal a transformation of the political economy of the online economy and thus the most dynamic, disruptive, and innovative areas of modern capitalism.

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<sup>4</sup> Skepticism and frustration with competition policy and law is neither new nor novel. As antitrust legal scholar William E. Kovacic (1989: 1105-6) wrote over thirty years ago,

To most students of antitrust, the history of Sherman Act deconcentration endeavors is largely a chronicle of costly defeats and inconsequential victories. Even the lustre of the government's greatest triumph—for example, the dissolution of Standard Oil in 1911 and the restructuring of AT&T in the 1980s—often dims in the face of recurring criticism that the execution of admittedly sweeping relief was either counterproductive or essentially superfluous.

(footnotes containing numerous supporting citations omitted). For a collection of more recent essays criticizing the influence of the *laissez faire* Chicago School of economics on antitrust law and adjudication, see Robert Pitofsky (2008).

In *The Great Transformation* Karl Polanyi argued that the pathological disruptive and destructive effects unleashed by the coupling of radical technological innovation and unchecked private market power can trigger social and political mobilization and resistance that reshapes the political economic order (Polanyi 2001). We argue that contemporary society is at one of those rare historical inflection points in the constitution (or re-constitution) of socio-economic relations. At such moments, societies go through a “double movement” dynamic in which the reorganizational power and prerogatives of private interests and organizations imposing a utopian ideal of the self-regulating market (the first movement) drive a reassertion of political authority and thus broader societal interests (the second movement). This engenders a struggle within which social forces attempt to create regulatory and governance mechanisms to constrain and potentially redirect political economic and social development in new ways and often along unexpected developmental trajectories (Polanyi, 2001). The *ecole d’regulation* theorists view these conjunctures, as periods of intense socio-institutional creation.

The current explorations of efforts to regulate the platform economy reveal a renewed contestation of the balance and, more fundamentally, the nature of the relationship between public and private power. This transformation is still in its early days, but it raises consequential questions regarding a new era in political economic relations and development. How and to what degree should government and governmental authorities respond to platform power? What ends should government intervention pursue? Using what legal and regulatory tools? At what level of public or private governance?

There are no clear answers to these questions, either as a normative or as an empirical matter. We suggest that we are at the beginning of what promises to be long and conflictual processes of political economic change that will open multiple paths and possibilities of

development before any possibility of platform firms settling into new and reasonably predictable path-dependent trajectories acceptable to the societies and polities in which they are embedded. In the meantime, the technological and organizational changes fueled by the vertiginously growing capacities and market power of platform firms and markets will continue to disrupt political economic relations and transform the foundations of social order.

This essay identifies the emerging regulatory and political dynamics of this socio-political transformation and rebalancing of the platform economy. First, it frames the rise of and recent political responses to platform firm organized markets in terms of the “Polanyian” double movement political economic development. Change in the legal mechanisms and policy initiatives regarding platform firms and markets reflect an underlying struggle over the future configuration of the platform economy. Second, it then examines the substance and form of incipient legal changes in the treatment of platform firms and markets. We trace the shift in regulatory emphasis from competition (and antitrust) policy and law towards broader and more encompassing forms of social and economic regulation. Finally, the essay concludes with a set of observations on how the dynamics of legal and institutional change open up new possibilities for political economic and societal reordering, how the particular changes will likely vary in character and significance across political jurisdictions, and therefore follow distinctive—and possibly divergent—development trajectories.

## **II. The Double Movement of the Platform Economy—Polanyi in the 21<sup>st</sup> Century**

The internet and the online platforms that it enabled emerged during the zenith of American neoliberalism and its characteristic resistance—if not outright hostility—to regulation of

businesses and markets. The libertarian ideology, as characterized by the iconic phrase (often attributed to Uber’s founder, Travis Kalancik), “it’s better to beg forgiveness than ask permission,” characterized the rise of a particular mindset and business model. This was complemented by the libertarian politics underlying the techno-utopianism of the early internet era. This encouraged, whether naively or cynically, a *laissez faire* approach to governing the emerging online platforms, the most successful of which experienced venture capital-fueled explosive growth, increasing structural power, and rise to economic centrality as expressed in their stock market valuations.<sup>5</sup>

This historical arc shares significant parallels with Polanyi’s account of the double movement in the rise, crisis, and eventual reform of industrial capitalism (Grabher and Konig 2020; Kenney et al. 2020). Our hypothesis is that we have been living through a quarter century of the “first movement” of an economic upheaval in which private interests, enterprises, organizations create enormous power and seize the developmental initiative sometimes by circumventing or simply ignoring regulation, and often through political influence or state capture by firms command increasingly concentrated market power and control over resources. We assemble anecdotal evidence that we may be entering an era of the “second movement” during which societal (which can include not only oppositional forces such as “classes”, but also business sectors, firms (such as Walmart, Target, and other retailers’ increasing opposition to Amazon), and other community interests crystalize ideationally and mobilize politically in opposition to the increasingly dominant firms. These become political conflicts to subordinate and re-embed the newly dominant firms within acceptable and sustainable institutional

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<sup>5</sup> See Kenney & Zysman (2016); Kenney et al., (2020a); and see also Pistor (2020: 105) who writes that “power seems a better explanation for the rise of Big Tech than the standard transaction cost argument.”



arrangements. In Gramscian terms, firms and business models founded on new platform technologies and technologically-enabled organizational forms have destroyed the old trench lines and platform firms and their adversaries are embarked on a struggle to build new stable fortifications. Figure 1 summarizes the principal features of these two movements in the age of the platform economy:

### **Figure 1: Double Movement of the Platform Economy**

#### **Movement 1: Managerial/Financial Control—Private Ordering**

- Expansion of platform firms & markets with the state frequently without the proper tools and/or will to regulate the dramatic changes.
  - E.g., Airbnb ignoring zoning ordinances, Amazon refusing to collect state sales taxes.
- Transformative effects of platforms on markets, competition, firms, work, and socio-political relations.
  - E.g., Google and Facebook reorganizing music and advertising markets; Amazon reorganizing publishing, then retail sales, and then logistical/delivery services, entertainment media, and web services.
- Recursive increase of asymmetric market and socio-political power/influence of platform firms.
  - E.g., Facebook, Instagram, Twitter in determining political discourse; Google Search and Maps determining what can be found and, in this respect, what exists.

#### **Movement 2: Political/Regulatory Control—Public Ordering**

- Growing societal support & political momentum to regulate platforms in response to their growing scale, scope, and power.
  - E.g., Democrat and Republican legislators supporting the appointment of a leading platform critic to a seat on the Federal Trade Commission; local legislation regulating Airbnb; demands that Facebook and Google compensate news media for use of content
- Expansion of regulatory control over platform structure & conduct—reassertion of the primacy of politics.
  - E.g., Chinese government blocking the Ant Financial IPO and demanding that it register as a bank; European Union introducing the DSM and DSA
- Re-embedding of platforms in broader social and political relations.
  - Intensifying debate over potential regulation and sanctions for on line “fake news,” disinformation, and harassment.

The online economy has always harbored a fundamental contradiction between the ideal of an open and unfettered domain of freely flowing information and communication idealized by Yochai Benkler (2008), and the pattern of monopolistic dominance achieved as firms come to dominate the various functionalities that have become essential facilities or infrastructure in 21<sup>st</sup> Century economies (Plantin et al., 2018). From the “Wintelist” duopoly of the Microsoft OS running on Intel’s chips (Borrus & Zysman, 1997), to the later ascendance of online platforms designed and controlled by Google, Amazon, Apple, and Facebook, the brief history of the digital network era is one of increasing concentration of technological and economic power under private corporate control (Pasquale, 2015; Zuboff, 2018). This self-reinforcing concentration of market power underpinned the growing dominance of new forms of economic and social organization that rivaled and increasingly displaced those of the analog industrial era (see, e.g., Van Dijck et al. 2018).

The power wielded by these rising platform firms derived from both their distinctive structural characteristics and from the largely passive (and, in important ways, enabling) stance of governments in eschewing regulatory oversight and intervention.<sup>6</sup> Left to the private ordering of platforms and platform markets, the most successful platform firms expanded in scale, scope, and power through the *technological design* and architecture of their digital platform technologies and the remarkably unconstrained *legal design* of their contractual relations. These firms have deliberately constructed platforms at the center of two-sided (or multi-sided) markets in which they linked together and mediated vast webs of commercial relationships between

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<sup>6</sup> To illustrate, the US, in particular, allowed platform firms such as Google, Facebook, etc. to use copyright protected content under generous fair use provisions, expressly insulated them from legal liability for potentially illicit content posted by users, and generally refused to recognize user rights to data and online privacy. In both the US and EU, permissive legal doctrines and weak enforcement of competition law allowed the largely unfettered growth and market dominance of platform firms and their expansion into new markets.

buyers and sellers, vendors and consumers, and firms in different sectors—all of whom became increasingly, if not entirely, dependent on the platform (Cutolo & Kenney 2020; Cutolo & Kenney 2021; Pasquale 2015).<sup>7</sup>

The distinctive and peculiar interaction of technological, contractual, and physical characteristics of platform firms endowed them with additional (anti-)competitive advantages over their various categories of users and over legacy brick-and-mortar firms. As these firms digitally automated their mediation among platform users, they effectively insulated themselves from risk exposures that traditional firms could not shed (Parker et al. 2016). For example, platform firms can structure themselves to avoid taking physical possession of goods, and dictate the contractual terms under which they do—entirely at their discretion. Likewise, platform firms can position themselves contractually to shield themselves from legal responsibility for services purchased on their platform other than those involved in mediating and linking the various parties.

Although this protective structuring is not absolute, platform firms have insulated themselves far more effectively than traditional firms from a wide array of legal risks and potential liabilities, including those under consumer protection, intellectual property, product liability, and labor and employment law. They may also shield themselves from potential liability for tortious and criminal behavior conducted by third parties on their platforms. Further, due to their central role in the mediation of on-line transactions and relationships, platform firms have vast advantages in accumulating, analyzing, and commodifying information for their own

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<sup>7</sup> In addition, the United States Supreme Court has ruled that the ability of platform firms to construct such one-sided contractual frameworks in furtherance of firm expansion, market concentration, and rent-extraction was outside the scope of antitrust liability unless *both* sides of a two-sided market, e.g., third-party vendors *and* their buyers, are harmed by the contractual terms and practices. See *Ohio v. American Express Co.* (2018).

use and for sale to parties, including but not limited to their users. Finally, and perhaps most vital, the powerful network effects of online platforms not only underpin and magnify all these economic advantages, they also create winner-take-all dynamics that define the incentives of the managers and financiers of platform firms and drive the monopolistic tendencies within the platform economy (Rahman & Thelen 2019).

Under conditions of governmental unwillingness, or prevailing political inability, to impose regulatory constraints on the structure, operation, or growth of platform firms and markets, the economic and juridical advantages enjoyed by platform firms enabled their explosive and monopolistic growth patterns (Kenney et al. 2021). The concentration of market power in the largest platform firms has been seen by some to constitute a failure of government during the rise of the platform economy (Khan 2016). Despite a series of enforcement actions brought against major platform firms by the EU's DG Competition, competition law and enforcement authorities—often hobbled by the interpretive purview of skeptical and hostile EU courts—revealed the inadequacy of the political and legal status quo to constrain either the market power or growth of platform firms.<sup>8</sup>

If the first Gilded Age (ca 1880-1929) was based on coal, oil, steel, and large-scale integrated industrial firms, the present one is increasingly based on silicon microprocessors, the ownership of widely adopted computer code, and network effects. In each case, increasing returns to scale and the power of new forms of corporate and market organization short-circuited competition and undermined the ideology of self-regulating markets on which governmental passivity relied. Between 2019 and 2020, the regulatory politics with respect to platform firms

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<sup>8</sup> Notably, despite their largely ineffectual enforcement record, the EU competition authorities were zealously interventionist compared to the quiescent passivity of US antitrust authorities in the Federal Trade Commission and the Department of Justice.

and markets reached an inflection point. Scholars will no doubt debate the precise timing, causes, and substantive character of this political shift from an internationally pervasive *de facto*, and often *de jure*, norm of permissive restraint regarding the conduct and growth of platform firms to one of increasingly far-reaching regulatory expansion. But the shift towards regulation in the context of platform firms and markets is as undeniable as it is dramatic, highly visible, and increasingly politicized. To understand the possibilities for regulatory politics, we must look to regulatory tools and forms available in the platform economy.

### **III. The Regulatory Trajectory: From Competition to Socio-Economic Regulation?**

The growing pervasiveness, disruptiveness, and influence of online platforms have drawn scrutiny and criticism in the U.S. and Europe during the past decade.<sup>9</sup> However, with the notable exception of concerns regarding privacy rights and personal data, regulatory debates regarding platforms were almost entirely framed in terms of competition policy and law. Consequently, the debate focused on both the *market expansion* and the ever-expanding *market power* of platform firms. This may be considered the “old” regulatory debate with respect to platform market and firms, which remained premised on and largely limited to the ideal of market competition and continued largely intact as a matter of public discourse and policy through the first two decades of the 21<sup>st</sup>-century. As vast platform firms and markets came to dominate a rapidly growing share of the economy, the warning Frank Pasquale issued in 2015 had become reality:

a few giant firms with a viselike grip over the very marketplaces where their competitors would need to succeed in order to thrive. Antitrust law flirts with irrelevance if it disdains the

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<sup>9</sup> See, e.g., Khan (2016); Pike (2018); Suominen (2020); Newman (2015); and Todino et al. (2019); (noting the growing tensions between EU Commission competition regulation and enforcement policy and established legal orthodoxy defended by the ECJ).

technical tools necessary to understand a modern information economy. (Pasquale, 2015, p. 162)

With astonishing speed, this competition-centered framing of the regulatory debate has been displaced and decades of competition law orthodoxy challenged by a broader and more comprehensive conception of online platform regulation.<sup>10</sup> The new regulatory debate reflects a widespread and deep transformation in public opinion and among political elites around the world as unease has grown with respect to platform firms and markets. If the central question of the old debate was whether competition law should be strengthened in response to platforms' growing market power, the new debate that is crystallized over the past year raises the question of what expansion of multiple areas of regulation and governance are necessary to address the pervasive and complex economic, social, and ultimately political significance and effects of online platforms.

To understand the importance of this change and regulatory politics one must examine more closely the relationship between competition policy and law, on the one hand, and socio-economic regulation more broadly speaking, on the other. Competition (or anti-trust) law is in fact a narrow and limited subcategory of economic regulation, and one biased towards market mechanisms, private ordering, and minimal governmental intervention into the private sphere. The limitations of contemporary competition law are by now deeply entrenched in legal doctrine and jurisprudence, with liability contingent on evidentiary findings of market dominance and

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<sup>10</sup> Lina M. Khan's (2016) path breaking article on the antitrust issues raised by Amazon's growth strategies has been widely credited for inspiring this fundamental rethinking and upheaval of competition and antitrust law and policy as applied to online platforms. See also Kahn (2019). However, increasing support for platform regulation among scholars and policy professionals did not become openly manifest within political and policy making institutions until more recently, and it has been fueled by growing concern within political, regulatory and business circles over the concentration of power wielded by the largest platform firms.

harm to consumer interests narrowly defined in terms of market prices. As a form of regulation, competition law is generally characterized by *ex post* case-specific enforcement, either fashioned by or subject to the far-reaching review of courts, i.e., ideally suited to a “beg-forgiveness business strategy.”<sup>11</sup> In online markets, the assumption by entrepreneurs is that by the time regulators question their actions the market will have tipped and there will no longer be alternative firms or paths. This business logic is ideally suited for a regulatory logic based on *deterrence* of harmful behavior by the risk of later enforcement action and/or civil liability, undercut by the delays in enforcement and uncertainty over the applicable legal rules. Likewise, legal remedies in competition anti-trust law are case-specific and tailored in ad hoc fashion with respect to specific firms and markets, leaving maximum latitude for the firm-driven private ordering of corporate and platform structures and practices. In short, competition law is the form of regulation well suited to the neoliberal paradigm of political economy and perfectly suited to the expansion of platform firms who brush aside deterrent threats.

In contrast, the broader domains of social and economic regulation are commonly typified by *ex ante* proscriptive and /or prescriptive rules of general application governing widely varying categories of behavior in order to *prevent* categorical forms of harm. Whereas competition law is narrowly concerned with the actions of firms abusing their market power, social and economic regulation beyond competition law recognizes and addresses a broader range of economic and non-economic interests, values, and constituencies. Regulation in this broader sense not only implicates the interests of a wider array of social, economic, and political constituencies, it may

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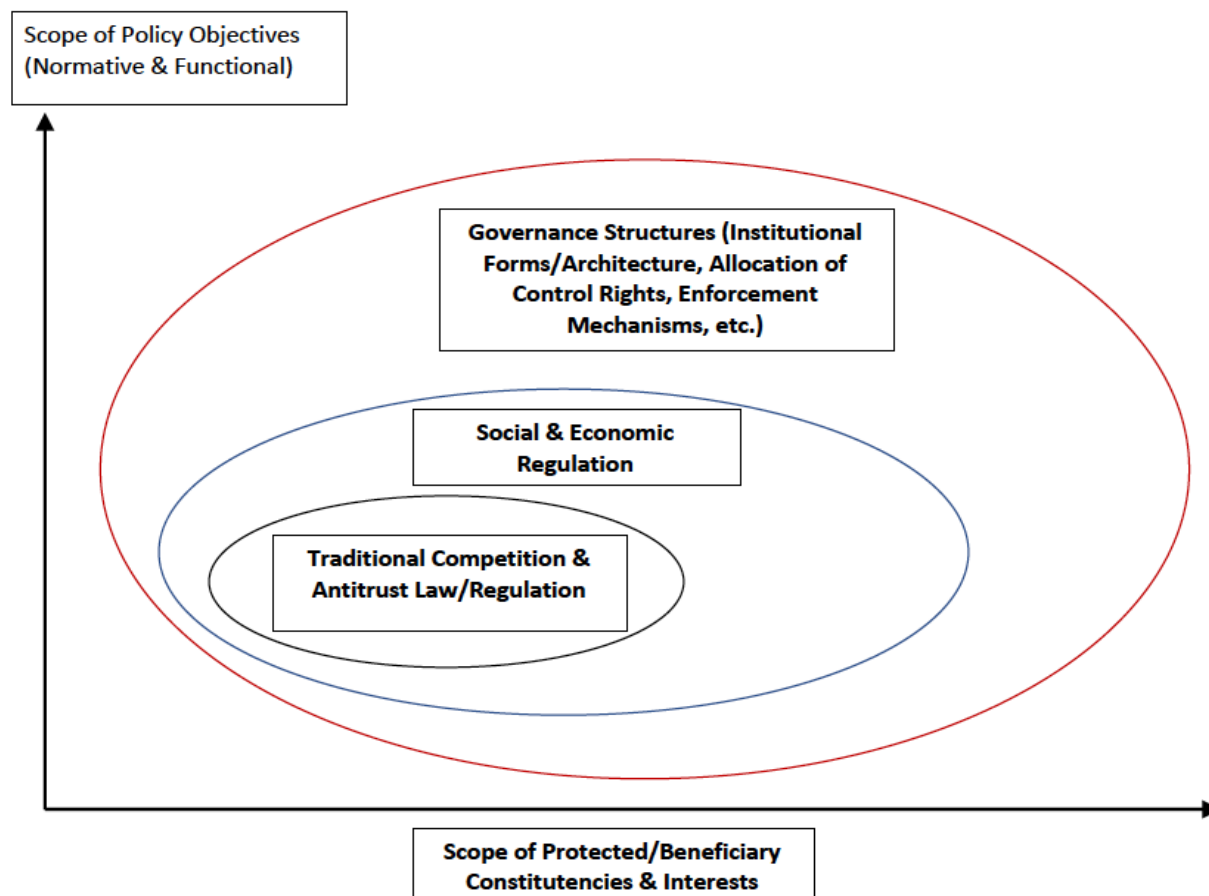
<sup>11</sup> To be sure, competition and antitrust law contains *ex ante* procedures as well, most importantly in the area of mergers and acquisitions. Merger review and assessment is thus a more classically “regulatory” function within competition and antitrust law, but in recent decades these review processes have either been undermined by prevailing politics and jurisprudential paradigms, or has simply been inadequate and unequal to the challenges posed by platform firms.

also embody rules and deploy enforcement mechanisms that explicitly or implicitly override or displace market mechanisms. Accordingly, regulatory politics and debates beyond competition policy in law represent a categorical shift in the relationship between the private sphere of the economy and the public sphere of politics, law, and the regulatory state.

Figure 2 illustrates the relationships among different forms of regulation in government in highly abstract and simplified form. Essentially, there are two scope dimensions. The first represents the scope of normative and functional objectives of policy. The second is the range of groups and interests recognized politically and juridically within regulation. Several implications flow from the broadening of each scope condition. As the subject matter and normative concerns of regulation expand, the greater the number of constituencies and socioeconomic groups become swept up and involved in regulatory politics. It follows that the politics of regulatory change and reform only becomes more complex, it also potentially becomes more indeterminate and uncertain with respect to the outcomes in terms of legislation and regulatory rules.



**Figure 2: Relationships among Forms of Regulation and Governance**



#### **IV. The European Union’s Platform Regulation Proposals and the Double Movement of Regulatory Expansion**

Officially released in December 2020, European Union’s proposed Digital Markets Act and Digital Services Act represent the furthest reaching expansion of platform regulation in the OECD nations to date -- at this point, China appears to be the leader in addressing platform firm power (European Commission, 2020a; European Commission, 2020b).<sup>12</sup> As such, the broad

<sup>12</sup> Further underscoring the close relationship between the proposed regulations, the Commission released both together on December 15, 2020.

contours and formal characteristics of these regulatory proposals indicate the emerging political and institutional dynamics of political change and regulatory upheaval surrounding online platforms. At first glance, the DMA appears aimed at revamping of the EU's competition law has applied to online platforms, while the DSA takes on the task of regulating platforms beyond the limits of competition policy. The DMA however, departs from the establish structure of competition law in several ways. First, it establishes quantitative criteria to designate large platform firms as “gatekeeper” platforms subject to the terms of the act and therefore to heightened scrutiny. (European Commission, 2020a)<sup>13</sup> In contrast to existing state of competition and antitrust law, these gatekeeper firms *do not have to be shown to have achieved market dominance* before the terms of the act apply to their structure, practices, and behavior. (Ibid.) Likewise, *all* mergers and acquisitions conducted by gatekeeper firms are subject to review by the EU competition authority. (Ibid., Chap. 1, ¶ 31, Chap. 5, Art. 1, ¶¶1-3) Finally, financial penalties for violation of competition law by gatekeeper platforms are calculated on the basis of the firm's global turnover (ibid., Chap. 2, Art. 3, ¶¶2(b), 6(a)), rather than through the more laborious and difficult process of calculating economic damages that is typical under extant competition and anti-trust law. Indeed, these departures from the classic competition and anti-trust law paradigm have been sufficiently significant such that competition authorities in the EU do not regard the DMA as part of the competition law, but rather as a distinct and ancillary body

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<sup>13</sup> The DMA provides that

Providers of **core platform providers** can be deemed to be **gatekeepers** if they: (i) **have a significant impact on the internal market**, (ii) **operate one or more important gateways to customers** and (iii) **enjoy or are expected to enjoy an entrenched and durable position in their operations**.

Such gatekeeper status can be determined either with reference to clearly circumscribed and appropriate quantitative metrics, which can serve as rebuttable presumptions to determine the status of specific providers as a gatekeeper, or based on a case-by-case qualitative assessment by means of a market investigation. (European Commission, 2020a, pg. 2 (emphasis in original))

of regulation that has been placed under their authority—a striking display of legal formalism and avoidance of cognitive dissonance among regulatory professionals.<sup>14</sup>

That said however, there are striking *omissions* in the substance of the DMA that will likely both weaken its effects and further spur the expansion of administrative regulation over platform firms and markets. DMA contains no substantive strengthening or other alteration of merger review procedures or standards. Consequently, the single most effective way in which platform firms achieve and perpetuate market dominance and expand their market power, and arguably the most injurious to competition and technological innovation is unaddressed. In addition, the DMA contains no provisions expanding the discretionary authority or sanction mechanisms through the imposition of structural remedies beyond those already permitted by existing law. Given that the status quo in terms of competition law remedies has proven inadequate and left EU regulators reliant on demonstrably ineffective monetary sanctions, the failure to include more expansive structural remedial powers in the DMA is a glaring omission that calls into question the effectiveness and primacy of competition law as a mode of regulating and policing the power of platform firms in the markets. What makes these omissions particularly important in the likely trajectory of continued regulatory expansion is that merger review and structural remedies are the most “regulatory” aspects of the classical competition law paradigm. They intervene most directly and displace most completely the private ordering of contractual and market relations. When regulatory effectiveness is not—or cannot—be achieved and maintained through the reform of competition law, the political forces that have generated this wave of regulatory

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<sup>14</sup> Whether this continued narrow construction of the scope and core substantive concerns of competition law is a de facto rear-guard defense against and subversion of more stringent regulation of platform firms by DG Competition is possible and, if it is, its success will depend on multiple factors, including the final form of the legislation, the leadership of the competition authority, changes in staff, and the reaction of the EU courts.

expansion over platform firms and markets will likely manifest themselves in bodies of regulatory law outside of competition policy. Hence, we are likely to see the continuation and perhaps the acceleration of regulatory expansion beyond the conceptual and institutional confines competition law and its enforcement.

If this is the case, then it follows that the DSA, a more quintessentially regulatory statute, is likely the shape of things to come in the EU when we look to the future of platform governance and regulation. The DSA is both broader and immediately applicable to a wider array of platforms. Moreover, it is more uniform in its approach and normative provisions, and targets specific forms of platform behavior. In this sense, the DSA, like other bodies of socio-economic regulation, covers a broader scope of regulated entities, behaviors, and substantive normative concerns than does competition law. Likewise, the form of legal rules promulgated by the DSA diverges from that common in competition law. Whereas competition law tends to take the form of broad abstract principles to be applied *ex post*, the regulatory approach of the DSA contains a large number of more precisely drafted and detailed *ex ante* prescriptive and proscriptive rules of general application. Among the more expansive range of policy objectives embodied within the DSA are consumer protection, personal privacy, transparency of market practices and terms, the prescribed modes of handling personal and financial data, the correction of a wider array of market failures, and the recognition and protection of explicitly non-economic interests and values.

The indications that regulatory politics in the EU is now moving away from competition policy and towards more comprehensive regulation has both functional and institutional causes. The regulatory approach, particularly when compared with the post-Chicago School orthodoxy that has become dominant in competition law, appears increasingly attractive for purposes of

efficacy and political control. Relying more on administrative regulation serves the goals and ambitions of political elites seeking not only to constrain platform power, but also to retain more control over policymaking and its implementation and enforcement. This has become an increasingly salient concern in light of the limited success of competition authorities in addressing concentrations and abuses of market power by platform firms and the frustration of enforcement efforts by courts, particularly the European Court of Justice, which has shown itself to be skeptical or manifestly hostile to the more stringent enforcement of competition law. Administrative regulation is associated with the expansion of discretionary authority and power by governmental officials. The consequent limitation on the power of court is itself a justification and rationale for the expansion of the regulatory state under conditions where the courts have become an impediment to the development and implementation of social and economic policy.

Socio-economic regulation also confers functional advantages over a narrower emphasis and reliance on competition policy and law. Controlling the behavior of platform firms through regulation provides the possibility of addressing market failures or the complete collapse of market competition with measures short of the extraordinary and potentially profoundly disruptive remedy of breaking up platform firms or the continued reliance on ineffective post hoc monetary sanctions. Finding such regulatory alternatives to effectively constrain platform power becomes particularly imperative when the platform *is* the market itself, and that increasing returns to scale and centralized coordination and control of such a monopoly market is intrinsic to the benefits created by the platform.

Administrative regulation may be the legal modality and institutional structure best suited to address the novel problems posed by the new organizational form of the digital platform. Further, the uniformity of *ex ante* rules and their general application creates a level playing field

on which all market participants must play and to which they must conform. In this respect, however, regulation may become a double-edged sword. On the one hand, the uniformity of regulatory rules and their broad applicability should reduce opportunities and incentives for platform firms to engage in regulatory arbitrage endowing them with economic advantages unrelated to productive activity. On the other hand, however, the broader imposition of increasingly detailed and complex *ex ante* regulatory rules across-the-board to all economic actors or firms regardless of size may also have the practical effect (perhaps by intention and design) of becoming a barrier to entry warding off would-be competitors via the increased costs and other associated burdens of regulatory compliance.

## **V. Regulatory Politics and Political Realignment**

It is not surprising that these most visible signs of a critical shift on the regulatory paradigm and politics surrounding platform firms and markets emerged first outside the US.<sup>15</sup> The European economy at the national and EU levels has few, if any, powerful home-grown platforms, the ranks of which are dominated by American firms. As a consequence, platforms are less politically influential in European politics at the national and EU levels than incumbent firms and other interests threatened by the geographical spread and growing economic power of platforms. Similarly, as indicated by the far more extensive and effective regulatory efforts by European and EU authorities to protect on line privacy and personal data, European politics appears less captured by corporate interests and by platform firms in particular than is the case in the US. Finally, the EU encompasses a sufficiently large market and wields enough geo-political

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<sup>15</sup> Notably, both China and India have been moving toward greater regulation of their platform firms with concrete actions not just fines. China in particular has moved rapidly and dramatically to deploy competition law and other forms of regulation as means of expanding the scope and degree of discretionary state control over platform markets and firms (Jia & Kenney 2021; McKnight et al. 2021).

and legislative power to resist anti-regulatory pressure from even the US and its powerful platform firms.

While not yet enacted, the proposed DMA and DSA also raise important and potentially disquieting questions regarding the future regulatory policy and politics around platforms. As the scope of regulatory concerns and objectives embodied in legislation and rule-making widens, a growing number of constituencies, social groups, and substantive interests have begun to interpose themselves in the intensifying regulatory politics engulfing platforms. This opens the way for more complex, divisive, and potentially unpredictable policy and legal outcomes. Different regulatory forms appeal to different constituencies. Competition law may appeal to firms and “dependent entrepreneurs” who are otherwise typically wary of regulation. Other constituencies and societal groups, ranging from organized labor to racial or ethnic minorities to social activists of many stripes, with interests and core values not served by or contrary to market competition frequently favor social regulation to advance their economic and non-economic agendas. Yet, as the number of groups, interests, policy ends and tradeoffs, and competing political agendas grows within regulatory politics, the number of possible alliances, coalitions, and outcomes also increases. This also means that policy and regulatory outcomes become more uncertain and unpredictable—at least during the initial phases of regulatory expansion.

The new regulatory expansion not only represents a transformation in the form and substance of rules as the outcomes of politics, it also constitutes a new political terrain on which fierce and consequential struggles for power, wealth, and competitive advantage will be fought. As suggested above, regulation can serve as both a sword and shield—for the state, for constituencies and interests protected under law, and for platform firms themselves. State actors, political parties, managers and financiers of platform firms, and other powerful political economic

actors and groups will maneuver strategically against and with one another in regulatory politics and administrative rulemaking. Regulation may benefit some platforms over others and also non-platform competitors. The potentially beneficial and injurious effects of regulation are likely to induce ever-greater mobilization of businesses and lobbying groups with stakes in outcomes of these regulatory battles.

Given the enormity of the stakes, the new regulatory politics and expansion of regulatory intervention into the platform domain, we have already begun to see changing strategies and tactics by the most powerful platforms seeking to use regulation to their own advantage with respect to each other. For example, Google quickly moved to cooperate with the Australian government in the latter's move to force platforms to compensate media sources for platform links to their published material, and used this stance against Facebook's notorious—and successful—oppositional bullying of the government (Morrison (2021). Microsoft has supported similar regulatory proposals in the US as a way of attacking Google (Warren 2021; Soper 2021). The new regulatory politics of platforms will produce shifting alliances (often of odd bedfellows) and new conflicts among powerful firms that previously have been jointly opposed to governmental oversight and intervention into their affairs. This transformed political and legal terrain will drive the mobilization of new groups and political actors, along with their shifting configurations inside and outside of party politics and formal legal processes.

We are witnessing the initial stages of this new era of the platform economy and the new regulatory politics that is transforming it. The emerging political and policy dynamics will reshape the political economic and character of platforms, along with economic and legal relations among nations. Different countries have already begun to adopt divergent approaches to the regulation of platforms. The EU's proposed legal framework for platform regulation may



have some first-mover advantages, even as it is likely to embroil it in an intensifying international conflict with the US over the form and substance of such regulation. These conflicts may fuel tensions and trade-offs involving regulatory uniformity and divergence. These trade-offs pose larger questions of whether platform technologies and organizational forms, i.e., those most capable of spanning borders and taking on a truly global scale, will drive an increasing Balkanization of the digital realm that mirrors the political divisions and boundaries of territorial sovereignty (including “pooled sovereignty” in the case of the EU). It also is an emerging terrain of conflict over the relative power of platforms and states. The struggles over the institutional and substantive regulatory contours of this new terrain will constitute new actors, new interests, and new political economic alliances and coalitions that will shape and reflect who benefits from regulatory uniformity and fragmentation.

## **VI. Conclusion**

These are the early days of a great regulatory transformation of the platform economy. As such, it is an era fraught with conflicts, tensions, and profound uncertainties—as was the rise and crises of the industrial era. The regulatory expansion that is just beginning to emerge is displacing a neoliberal ideology that has been in deep crisis for at least a decade and in filling the vacuum of governance and legitimation that has formed at the core of contemporary capitalism. The regulation of platforms is an essential, if not primary, aspect of the re-embedding of platforms within social, political, and legal frameworks that make productive and sustainable economic relations possible. With the waning of the neoliberal era of the market, the expansion of socio-economic regulation is subordinating competition policy and law, while displacing private ordering. The reassertion of societal interests over the inexhaustible ambitions and

avarice of platform firms will effectively re-embed these firms and the platform markets they control within mutually constitutive social and political relations. The political settlements and juridical frameworks that emerge out of struggles to define the coming era of platform capitalism will vary across societies, polities, and governmental systems—just as industrial capitalism took different forms during the 20<sup>th</sup> Centuries. And despite the deep and inescapable uncertainty surrounding the long-term outcomes of these dynamics, all indications suggest that this process of state and regulatory expansion will not stop or slow any time soon.

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