TELECOMMUNICATIONS & TECHNOLOGY

What's Behind the War on Big Tech?

Rent seekers are trying to use government to hamper Google, Amazon, Apple, and others.

BY THOMAS A. LAMBERT

For the major digital platforms, a perfect storm is brewing. Policymakers across the ideological spectrum maintain that these Big Tech platforms—especially those operated by Google, Facebook, Amazon, and Apple—have grown too large and powerful.

Different groups emphasize different harms. Progressives complain that the firms exercise excessive political power, hurt small businesses and workers, threaten privacy, spread misinformation, and exacerbate wealth inequality. Conservatives contend that the firms are biased against their values and wrongly censor their speech. Both sides agree, though, that the government should step in. Thus, strange bedfellows like progressive U.S. Sen. Elizabeth Warren (D–MA) and her culturally conservative colleague Josh Hawley (R–MO) continually call for the major digital firms to be broken up and stringently regulated.

Anti–Big Tech fervor has moved beyond political posturing. In June, the House Judiciary Committee advanced four bills that would radically restructure the tech landscape. And in July, the U.S. Federal Trade Commission revoked its prior commitment to pursue only consumer welfare in policing "unfair methods of competition." That opens the door for the FTC to impose rules forbidding practices it deems unfair to small businesses, even if the practices benefit consumers. President Biden recently issued an executive order encouraging the FTC to use its now-expanded rulemaking power to rein in Big Tech.

The primary (though not the sole) concern of those calling for additional restrictions on these firms is their market power—i.e., their ability to impose contract terms (prices or non-price terms governing matters like user privacy, data use, or terms of service) that they could not profitably impose if they faced the threat of losing business to more accommodating rivals. Market power is a well-known market failure that may result when there is a lack of competition in a market. Because many digital markets feature economies of scale and network effects, successful firms often grow so large that they satisfy the bulk of market demand and thus face little rivalry.

The degree of market power enjoyed by the major digital platforms is a matter of dispute, but even if it is significant, a governmental fix is not automatically warranted. Policymakers should balance the welfare gains from an intervention (in terms of market failure losses averted) against any welfare losses it is likely to occasion. As scholars associated with the "public choice" school of economics have recognized, one set of predictable losses from government interventions arises because government's unique right to coerce—what sociologist Max Weber called its "monopoly on the legitimate use of force within a given territory"—may be exploited to secure private benefits.

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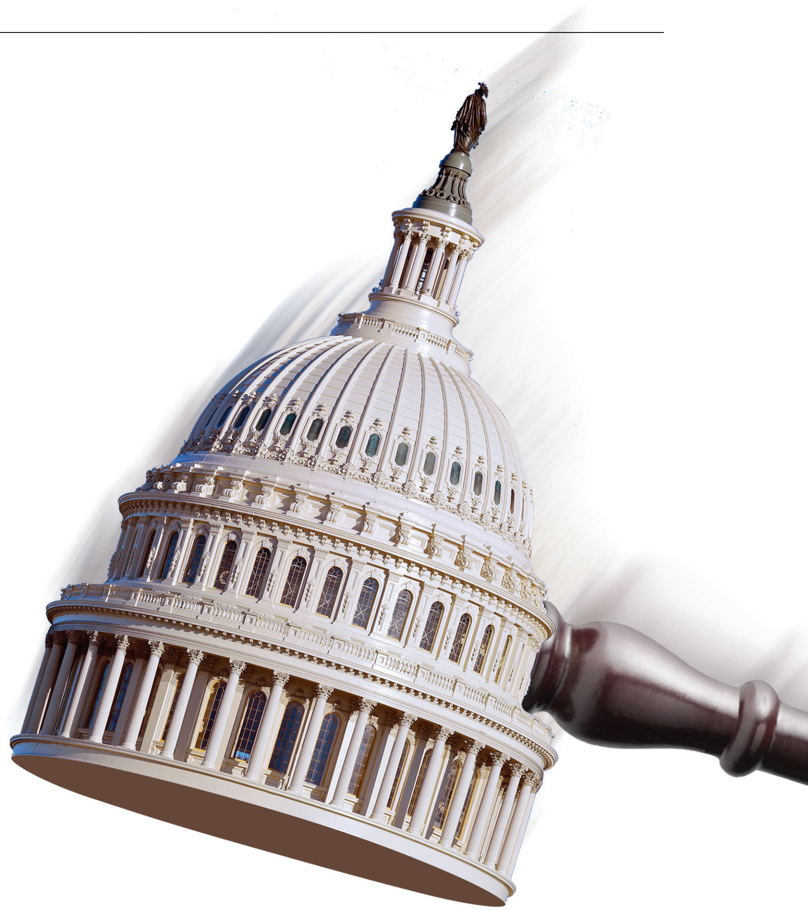
PUBLIC CHOICE AND RENT SEEKING

Public choice uses the tools of economics to analyze political behavior. Nobel laureate James Buchanan described it as "politics without romance." In the romantic vision of democratic politics, citizens inform themselves of political candidates' plans for exercising governmental power and then vote for those candidates whose plans they believe will be most beneficial. Those elected then enact legislation they believe will provide the greatest benefit to the citizenry as a whole. Unelected bureaucrats, who answer to an elected executive (who also seeks to maximize the citizenry's welfare), enforce the laws and implement the programs the legislature has enacted, with an eye toward maximizing their effectiveness for the good of society.

Rejecting the romantic vision of politics, public choice theory assumes that people act in the political arena as they do in other contexts: they pursue their own interests in a logical, internally consistent fashion. Citizens "vote their pocketbooks" and, given the low probability that any individual vote will sway an election outcome, they invest little in educating themselves on the candidates and issues at stake. People running for office take reasonable steps to secure their election, embracing positions that are popular with voters generally or are favored by, and salient to, individuals or groups that are especially likely to provide campaign financing. Non-elected bureaucrats make decisions that will expand their agency's turf and budget and enhance their own prestige, authority, income, and future job prospects.

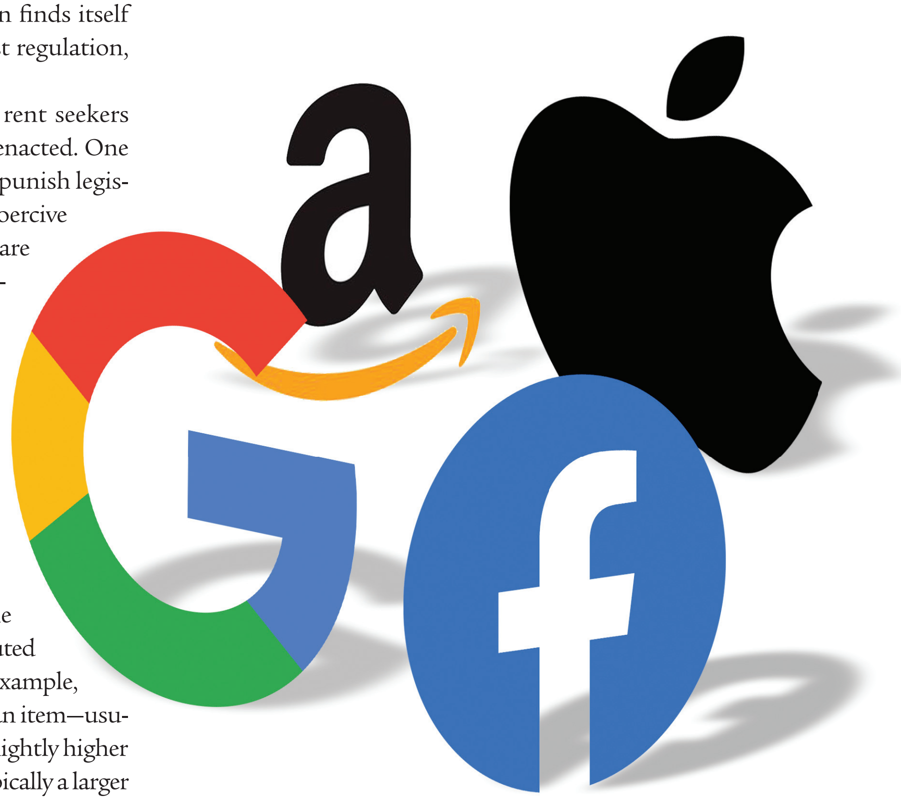
Public choice theory also makes a prediction about business organizations: that they will engage in "rent seeking." In economics, the term "rent" means the payment to a factor of production in excess of the amount required to keep it in its current use. Rent seeking refers more narrowly to efforts to capture above-normal returns, not by creating additional value or bargaining with one's transacting partner for a greater share of the surplus generated by a deal, but by harnessing the government's unique right to coerce.

Rent seeking reduces social welfare in several ways. First, it diverts resources away from the creation of wealth and toward its redistribution, as the resources a firm expends on persuading government officials to do its bidding are not available for creative activities like research and product development. Second, to the extent rent seeking reduces market competition (e.g., as rent seekers hobble their rivals with regulations or tariffs), it causes the sort of "deadweight loss" that results when there is insufficient competition to channel productive resources to their highest and best ends. Finally, when rent seeking drives rivals from the market, it squanders their non-recoverable investments. For example, if a firm has installed specialized equipment but then finds itself driven out of business by some sort of protectionist regulation, the value of its equipment is wasted.



Even though the policies and rules sought by rent seekers routinely reduce social welfare, they are frequently enacted. One reason for this is that voters, who have the power to punish legislators and bureaucrats that employ government's coercive power in a welfare-reducing manner, are often unaware of how those officials' decisions have harmed overall welfare—and the officials know it. Because any individual's vote is so unlikely to sway an election, the marginal benefit of additional information on how to vote is quite low, so voters reasonably expend little to become informed.

Voters' "rational ignorance" interacts with another dynamic that bolsters rent-seeking initiatives. The policies sought by rent seekers concentrate special benefits on their proponents, who therefore have an incentive to lobby for their adoption. At the same time, the costs of the initiatives are often distributed broadly throughout society as a whole. A tariff, for example, concentrates a benefit on the domestic producers of an item—usually a small group—but imposes costs in the form of slightly higher prices on all the domestic consumers of that item—typically a larger group. The total cost of the tariff may well exceed the benefit to



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the domestic firms it favors, but because each consumer bears just a tiny portion of that cost, no one is willing to incur the cost of counter-lobbying against the tariff.

Of course, lobbying for a special benefit at the expense of the general public is difficult. Consumers may withhold business from firms they think are abusing government power and, despite voters' rational ignorance, government officials will want to avoid any appearance that they are favoring the interests of a few over those of the public at large. Rent seekers may therefore seek to hide behind groups that share their policy goals—but for public-spirited, rather than self-interested, reasons. Economist Bruce Yandle has dubbed this dynamic the "bootleggers-and-Baptists" syndrome, in honor of the two groups that push hardest for liquor prohibition: Baptists, who make the public "pro-social" case for prohibition, and bootleggers, who promote prohibition behind the scenes to secure the private benefits of monopoly profits on alcohol sales. (See "Bootleggers and Baptists—The Education of a Regulatory Economist," May/June 1983.)

EXAMPLES OF RENT SEEKING IN DIGITAL MARKETS

The regulation of digital markets presents all sorts of opportunities for rent seeking, and examples of such behavior abound. Most involve an effort to attain some sort of subsidy or to raise rivals' costs.

Payment for news snippets / Recent campaigns by struggling news organizations fall into the subsidy-seeking category. Between 2008 and 2018, revenues at U.S. newspapers dropped 62%, with similar trends occurring across the globe. The primary culprit is competition created by the internet. Newspapers' advertising revenues plummeted as free services like Craigslist eroded their ability to charge monopoly prices for classified ads and as the proliferation of websites exponentially expanded the number of alternative ad spaces available to advertisers.

News organizations have therefore sought to harness the government's coercive power to increase their revenues. News organizations in Germany, France, and Spain successfully lobbied for copyright law amendments requiring Google and Facebook to pay licensing fees when they display excerpts or photographs from a publisher's news articles. In Germany, Google was able to avoid such fees by procuring liability releases from publishers, which found that traffic to their websites would plunge without Google's help in directing readers to them. But such a tack has not worked in Spain and France. The Spanish legislature foreclosed liability waivers by declaring that Spanish publishers' rights to fees are "inalienable," leading Google to remove its Google News service from its Spanish site. When Google stopped carrying snippets and photos of French publishers that refused liability waivers, the French competition authority entered an interim order requiring Google to continue displaying snippets in accordance with publishers' wishes. And in July 2021, the French government fined Google €500 million (approximately $593 million) for failing to negotiate in good faith with French publishers about the license fees Google must pay for carrying those required snippets.

News organizations have achieved even greater success in Australia. In late 2017, after an intense lobbying campaign by news publishers including Rupert Murdoch's News Corporation, the Australian government directed the Australian Competition and Consumer Commission (ACCC) to investigate whether multinational digital platforms—chiefly Google and Facebook—were abusing their market power. Following the ACCC Report, the Australian parliament enacted rules requiring digital platforms to share their advertising revenues with news publishers *and* to provide them with advance notice of any algorithm changes that could affect page rankings and displays.

Throughout their lobbying campaigns, news organizations have insisted that digital platforms are unfairly profiting from their content. But news publishers can use the Robots Exclusion Standard (Robots.txt) to prevent content scraping, and Google provides tools publishers may use to block snippets or control their length. Despite these capabilities, newspapers typically refrain from restricting the display of snippets for an obvious reason: they benefit from the traffic that digital platforms provide. Far from simply protecting their content, which they could easily do themselves, powerful legacy media companies have succeeded in convincing governments to force Google and Facebook to provide news publishers with free publicity, to pay the publishers when they do so, and—at least in Australia—to give the publishers information needed to secure a preferred place in search rankings.

The media companies insist that these mandates are appropriate because the platforms' ad tech services extract an excessive portion of revenues from advertisements on the publisher's websites. But the publishers need not utilize those services in selling display ads. They could sell their advertising space directly and pocket all the revenue, or they could utilize competing intermediaries, which exist at every stage of the digital advertising sales chain. News publishers that continue to use the digital platforms' ad tech services presumably do so to maximize their advertising revenues. They understand that Google's ad tech is extraordinarily efficient at allocating ad space to the advertisers willing to pay the most for it. Google, of course, demands compensation for that valuable ad-matching service, but it charges similar fees to all web publishers that use its services: blogs, affinity group webpages, medical informational portals, and digital news sites alike. When news organizations lobby for special rules for their websites, they are simply seeking to use government power to extract rents.

News organizations' success in procuring an effective subsidy is unsurprising in light of public choice theory. One would expect elected officials pursuing their own interests to support news outlets over digital platforms. The former control press coverage and therefore have great sway over voters, who are unlikely to expend significant resources to inform themselves on election matters. Digital platforms may have money to spend on campaigns and can publicize or attempt to hide news stories, but they do not actually create the stories that may affect votes.

News organizations have also enlisted a chorus of "Baptists" to put a pro-social spin on their rent-extraction campaign. Throughout newspaper publishers' campaign to force platforms to share advertising revenues and favor the publishers with advance notice of algorithm changes, various public interest groups offered their support by emphasizing the importance of professional journalism to democracy itself. Government officials who might normally be reluctant to take revenue from one set of private businesses and give it to another with greater political sway could therefore reassure themselves—and any skeptical voters—that they were simply taking the actions necessary to preserve democracy and promote the public good.

Free-riding by app developers / Efforts by producers of mobile software applications to force changes to Apple's and Google's app distribution policies constitute a second example of subsidy-seeking. Apple and Google produce the two leading operating systems for mobile devices like smartphones and tablets. Apple generates revenue from its operating system, iOS, by bundling it in the hardware products it sells (iPhones and iPads). Google licenses its Android operating system for free to third-party hardware producers, earning money not on hardware sales or software licenses but on advertising tied to Google services that are typically included on Android devices (Google Search, Chrome, etc.).

Both firms also earn money off the app stores included with their operating systems: Google Play and Apple's App Store. Those stores certify and distribute apps created by third parties, retaining a share—usually 30%—of the price that the app developer charges for the app or for digital goods purchased within the app (subscriptions, service enhancements, etc.). Apple and Google earn nothing from certifying and distributing free apps, which comprise 92% and 96%, respectively, of the apps distributed through their stores.

Distributing apps through app stores operated by the producer of a mobile operating system offers a number of benefits. It enhances user security and protects the functioning of the mobile device, as the operating system producer has both an opportunity to screen out harmful apps and, because the proliferation of malicious or poorly performing apps would impair the value of the operating system, an incentive to do so. The revenue-sharing system also increases the number of apps available to users by effectively subsidizing upstart apps: producers of free apps pay nothing for certification and distribution services, and those offering paid apps pay little until their app becomes popular. This implicit subsidy for new apps has lowered developers' costs of getting started and has spurred app development. In addition, the prevailing system of app distribution encourages improvements in mobile operating systems. Because Apple and Google can earn continual revenues from consumers' usage of their operating systems (through buying apps and making in-app purchases), they have a perpetual incentive to enhance the operating systems to increase user engagement.

Despite the benefits of the prevailing app distribution system, several leading app developers have recently sought governmental help to overturn it. The first prominent effort came from streaming music provider Spotify, which lodged a complaint in Europe. Spotify claimed that Apple was violating European Union competition law by not allowing app users to complete an in-app upgrade to Spotify Premium using a payment method that would circumvent Apple's revenue share and by forbidding Spotify from directing users outside the app to complete an upgrade. Apple customers have used the App Store to download Spotify's app or an update to it more than 300 million times, and because 55% of Spotify's listeners use its free service, most of those downloads have generated no revenue for Apple. Success by Spotify in its legal challenge would permit the company to take a free ride on Apple's efforts to develop a secure and attractive app ecosystem. Moreover, *any* developer of a paid app could avoid contributing to the App Store by charging nothing for the app itself, locking all its functionality, and directing users outside the app to make payment and thereby unlock the app.

In the United States, the leading challenge to the current app distribution system has come from Epic Games, maker of the popular *Fortnite* video game. Epic has sued both Apple and Google, claiming that they are violating the antitrust laws by prohibiting or dissuading users from downloading apps outside the platforms' app stores and by requiring that app purchases be made using the platforms' own payment systems. These policies, Epic complains, allow the platforms to collect an excessive share of the purchase prices app developers charge.

Under U.S. antitrust law, Epic's pending claims appear to be weak. The policies Epic attacks were put in place when Apple and Google had minuscule shares of the mobile operating systems market and are thus not the product of market power. In light of the efficiencies discussed above, they have led to an explosion in third-party apps for consumers: from 500 iOS apps and 50 Android apps at the launch of the app stores in 2008 to 2.2 million iOS apps and 3.48 million Android apps today.

Most importantly, the challenged policies do not *enhance* the market power of Apple and Google. If Epic succeeded in upending the policies that allow Apple and Google to collect a share of app developers' revenues, the platforms could easily resort to other means of extracting surplus from developers and users. As the owners of the operating systems on which apps run, they could simply charge for access to critical application programming interfaces (APIs) required to function on the platforms. Because the policies Epic complains of do not create market power that would not otherwise exist, the courts are ultimately unlikely to conclude that they violate U.S. antitrust law.

Victory in a court of law, though, may not be Epic's primary goal. The circumstances surrounding the filing of Epic's lawsuits suggest that the company is chiefly pursuing victory in the court of public opinion.

Epic's lawsuits were part of a tightly orchestrated publicity campaign. On August 13, 2020, the company breached its contracts with Apple and Google by submitting app updates that allowed users to bypass the platforms' in-app purchasing systems and thereby avoid revenue sharing. Apple and Google responded by exercising their contractual rights to remove the non-conforming apps from their stores. Within hours of the removal, Epic filed pre-drafted complaints—one 62 pages in length, the other 60—against the two companies. Epic then peppered social media with a sleek video mirroring the iconic television commercial Apple released in connection with its 1984 debut of the Macintosh home computer but replacing the purportedly monopolistic villain Apple had sought to displace—IBM—with Apple itself.

Why would Epic launch a lawsuit-based publicity campaign to induce Apple and Google to alter their app store policies when any changes would not reduce the platforms' market power but would simply induce them to extract surplus using alternative means? The likely reason is that Epic believes *it* would be better off under a system in which the platforms charge for API access. Under the current system, paid apps that achieve great success effectively subsidize upstarts, niche apps, and apps that are advertiser-supported. Epic may not like that outcome, but the system has the advantage of getting developers of new and small apps on board, expanding the offerings in each platform's app store, and thereby building the installed base of users from which Epic and other app developers benefit.

Apple and Google have many ways to monetize control over their mobile operating systems. Given the intense competition between the two platforms, each has an incentive to choose monetization strategies that maximize the availability of high-quality third-party apps so as to grow their user bases. Epic's legally deficient lawsuits represent an effort to put public pressure on Apple and Google to revamp their app store policies, not in a manner that would reduce their market power, but in a way that would advantage Epic at the expense of other app developers and the mobile app ecosystem itself. In short, Epic is rent seeking.

Privacy, artificial intelligence, and content moderation rules / Recent lobbying efforts by Google and Facebook fall within the second category of rent seeking: raising rivals' costs.

The EU's landmark General Data Protection Regulation (GDPR), implemented in May 2018, imposed extensive requirements on digital platforms that collect or process information about their users. Given the high cost of complying with those requirements, one might expect that GDPR would have impaired the European operations of Google and Facebook, both of which process vast troves of personal data.

In actuality, GDPR has been a boon to the two companies. An early study compared the tracking reach of digital advertising firms ("ad tech vendors") from one month before GDPR's implementation to one month after. It found, unsurprisingly, that web tracking had decreased in the EU during the period, but the bulk of the loss in web-tracking, which is crucial for targeted advertising, was suffered by smaller ad tech vendors. Whereas the website tracking reach of the top 50 vendors besides Google and Facebook fell by 20%, Facebook's website reach fell by only 6.66% and Google's actually grew slightly (by 0.93%). The study authors thus concluded that "smaller advertisers lose" and that "Google is the biggest beneficiary of the GDPR."

In June 2019, the *Wall Street Journal* reported on the first full year of GDPR and confirmed that the law appears to have benefited Google and Facebook, with both companies earning a greater share of European digital ad spending following GDPR's implementation. Industry experts interviewed by the *Journal* suggested two reasons for this relatively good fortune. First, Google and Facebook have far more extensive resources for compliance, and firms prefer to concentrate their ad budgets with companies whom they trust not to violate the rules. In addition, because GDPR makes it harder for third parties to collect the personal information that is so valuable for targeting ads, it benefits digital firms that have direct relationships with users and can more easily procure consent to use their data. With their many user-facing services that connect them directly to data subjects, Google and Facebook are much less reliant on third-party data.

Given the competitive benefit GDPR has conferred on them, Google and Facebook are now actively promoting similar regulatory regimes that could entrench their dominance. Google's CEO, for example, recently penned a *Financial Times* op-ed arguing that governments should impose broad artificial intelligence (AI) regulations mirroring the AI principles Google already implements. Facebook has pursued a similar approach with content moderation, proposing that European regulators mandate several actions it already takes. These initiatives offer Google and Facebook a competitive benefit they did not obtain from GDPR: whereas with that rule they had to incur new compliance costs along with their rivals, implementation of these new proposals would allow them to continue unperturbed while their rivals scramble to comply.

Section 230 / A second example of efforts to raise rivals' costs involves the push by a diverse coalition of firms to chip away at legal protections provided by Section 230 of the Communications Decency Act. Paragraph (c)(1) of Section 230 states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Paragraph (c)(2) then provides, "No provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be … objectionable, whether or not such material is constitutionally protected."

Enacted in 1996, those two provisions collectively enabled the modern internet. By freeing digital platforms from liability for user-generated content, Paragraph (c)(1) allowed the internet to be interactive; by insulating platforms from liability arising from good-faith content moderation, Paragraph (c)(2) enabled platforms to prevent their sites from becoming flooded with objectionable content that would drive away users.

In recent years, a number of diverse companies have pressed legislators to cut back on Section 230's protections. What those seemingly disparate firms have in common is that (1) each does not itself face potential liability for user-generated content, but (2) each competes with firms that do.

For example, neither IBM—primarily a provider of computer hardware and software, AI products, and business and cloud computing services—nor Oracle—primarily a provider of enterprise software and cloud computing services—provides a significant platform for user-generated content. But both companies compete in cloud computing with Google and Amazon, each of which hosts a vast amount of user-generated content (e.g., through Google's YouTube and Amazon's user-streaming service Twitch). In 2017, IBM and Oracle teamed up to lobby for passage of the "Stop Enabling Sex Traffickers Act" (SESTA) and the "Fight Online Sex Trafficking Act" (FOSTA), which together amended Section 230 to allow digital platforms to be liable under certain circumstances for user-generated content that facilitates sex-trafficking.

Sex-trafficking is a terrible thing, of course, and IBM and Oracle may have been seeking to both reduce its incidence and win public favor by taking a stance against it. But thousands of other companies had those same motivations to lobby for SESTA/FOSTA, yet did not do so. The extraordinary efforts of IBM and Oracle perhaps stemmed from the fact that any weakening of Section 230's protections increases the liability risk for Google and Amazon and makes each a less formidable competitor. IBM and Oracle may also have reasoned that once the door was opened to allowing platform liability for some user-generated content, it would be easier to push for additional exceptions to the liability shield.

IBM has made such a push. In a June 2019 publication entitled *A Precision Regulation Approach to Stopping Illegal Activities Online*, IBM proposed to amend Section 230 so that a digital platform would be protected from liability for user-generated content only if it could show that it took "reasonable care" to prevent its platform from being used to further liability-creating conduct. Such an amendment would make it difficult to secure dismissal of claims based on user-generated content at the complaint stage and would likely generate meritless "strike suits" filed for the purpose of extracting a settlement. A reasonable care requirement might also induce platforms to install AI-based filtering technology such as IBM's Watson Tone Analyzer, an AI solution that assesses what content intends, not just what it says, and has been lauded as "an important tool for sites trying to balance freedom of speech with protection of users and removal of illegal or harmful content."

IBM and Oracle were not the only companies to lobby for SESTA/FOSTA. They were joined by entertainment giants Walt Disney Company and 21st Century Fox, both of which wrote to key U.S. senators in support of the legislation and lobbied to prevent the exportation of Section 230's protections to foreign nations via trade agreements.

The ultimate goal of the entertainment conglomerates appears to be two-pronged: One is simply to weaken platforms with significant user-generated content, such as Facebook, Google/YouTube, and Amazon/Twitch. Given that such content competes for consumers' attention against the entertainment offerings of major film studios, anything that impairs the platforms hosting user-generated content tends to benefit traditional entertainment media.

A second apparent objective is to force the technology platforms to do more to protect the film studios' copyrights. On that front, Section 230 is not directly relevant; the provision expressly has no effect on "any law pertaining to intellectual property" and therefore provides no protection to a digital platform accused of hosting copyrighted material. When it comes to users' posting of copyrighted materials, the legal provision that protects platforms from liability is Section 512 of the Digital Millennium Copyright Act (DMCA), which provides a safe harbor for digital platforms that engage in good faith anti-piracy efforts and honor takedown notices from the music and film industries. Ginning up opposition to Section 230, however, is likely to be an effective strategy for cutting back on Section 512 of the DMCA. Because the two provisions provide similar protections for digital platforms, policymakers tend to view them—and would likely deal with them—as a package. And since Section 230 insulates platforms from liability for a broader scope of user-generated content, it is easier to find politically appealing groups—from child protection advocates, to anti-hate groups, to traditional-values conservatives—that would like to see its protections weakened. In short, there are more "Baptists" to assist with a challenge to Section 230, which can then be broadened to take on Section 512 of the DMCA.

Hotel chains have also joined the opposition to Section 230. In 2016, the American Hotel and Lodging Association (AHLA) reported to its members on a detailed plan to impair the business of internet-based short-term home rental platforms like Airbnb. In the AHLA's private report, a copy of which was obtained by the *New York Times*, the association touted its successes in procuring a number of state and local ordinances restricting short-term home rentals and announced its plans to seek a weakening of Section 230's protections.

The hotel group's attack on Section 230 is an effort to saddle Airbnb and similar sites with liability for property owners' violations of local ordinances regulating short-term rentals. As AHLA members know, it would be extremely costly for home-sharing sites to assure that property owners are complying with thousands of local ordinances. Eliminating Section 230's protections would therefore increase hotel competitors' compliance costs as well as their likely liability.

The hotel chains' lobbying efforts appear to be paying off. In September 2019, U.S. Rep. Ed Case (D–HI) introduced the Protecting Local Authority and Neighborhoods (PLAN) Act, which would amend Section 230 to permit civil actions against Airbnb and other rental sites based on user-generated content. Case previously served on the board of the AHLA.

Astroturfing / Instigating legal challenges can be a particularly effective means of raising rivals' costs. Accordingly, firms competing in digital markets have sometimes created and funded groups that purport to represent the public interest but are really focused on agitating for lawsuits against group members' competitors.

A prominent example of this is FairSearch. Founded in October 2010 to oppose Google's acquisition of travel software firm ITA, FairSearch's original members were travel-focused search engines like Expedia and TripAdvisor. In December 2010, FairSearch picked up a formidable Google foe, Microsoft, whose Bing search engine is Google's leading competitor in general search. FairSearch then began a relentless campaign to encourage antitrust enforcement against Google.

In 2013, FairSearch initiated a European complaint against Google for tying its mobile search and browser technologies to Google Play and for the purportedly predatory act of licensing Android at below-cost rates. The European Commission eventually fined Google €4.34 billion for, among other things, "requir[ing] manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google's app store (the Play Store)." Operating under the guise of FairSearch, Microsoft was able to obscure its role in instigating an action against its rival for behavior strikingly similar to its own past conduct.

Microsoft withdrew from FairSearch in December 2015, but FairSearch continues to agitate for legal action against Google. Purporting to represent "a group of businesses and organizations united to promote economic growth, innovation and choice across the Internet ecosystem," it lists at least nine companies as members. According to its official filings with Belgian authorities, however, FairSearch is now controlled entirely by executives from two companies: Oracle and Napsers, a South African company holding large stakes in Chinese technology firm Tencent. None of FairSearch's other members have the right to vote on the group's actions. While neither Oracle nor Napsers has a direct stake in the mobile markets at issue in the EU's Android investigation, the two companies compete with Google in other markets and benefit when it suffers. Moreover, by becoming complainants in an EU antitrust case, the companies, through FairSearch, are allowed access to otherwise confidential information related to ongoing inquiries.

As an organization that appears to represent a coalition of smaller players but is really controlled by a couple of giants, FairSearch is engaged in "astroturfing": creating the false appearance of a grassroots campaign. A similar astroturfing organization is the Free and Fair Markets Initiative (FFMI), which describes itself as "a nonprofit watchdog committed to scrutinizing Amazon's harmful practices and promoting a fair, modern marketplace that works for all Americans." The FFMI has aggressively lobbied for legislation restricting Amazon and for investigations into its practices, leading to increasing scrutiny from the U.S. Department of Justice, FTC, EU, and numerous state attorneys general.

Claiming to represent "concerned consumers, small business owners, and taxpayers," the FFMI has publicly listed among its supporters a labor union, a Boston management professor, and a California businessman. According to the *Wall Street Journal*, however, neither the labor union nor the professor consented to be listed as members, and the California businessman died months before his name was removed from the group's website.

The FFMI's true principals are several giant firms that stand to benefit if Amazon falters: Simon Property Group, the largest shopping mall operator in the United States; Walmart, the largest retailer in the United States and the world's second largest retailer after Amazon; and Oracle, which competes with Amazon in cloud computing and has fiercely battled with it over a $10 billion Pentagon contract. Each of the three companies was reportedly asked to make payments to strategic communications firm Marathon Strategies to support the FFMI's work.

AN AMENABLE ENVIRONMENT

At the current time, political actors' pursuit of self-interest seems likely to result in implementation of many of the policies digital rent seekers are demanding. Elected officials are likely to favor even poorly designed restrictions on digital platforms because doing so allows them to take credit for "cracking down on Big Tech," a cause that is popular—albeit for different reasons—with both progressives and conservatives.

Enforcement officials' self-interest may similarly lead them to favor restrictions on and enforcement action against the major technology platforms. The greater the number and complexity of the restrictions it enforces, the greater the prestige—and often the budget—of an enforcement agency. And given the political salience of Big Tech, enforcement action against the leading technology platforms is likely to attract the attention of legislative appropriators. Enforcers with political ambitions seem particularly likely to take on Big Tech, as doing so may boost their electoral prospects. Empirical evidence shows that state attorneys general who actively participate in multi-state lawsuits like those currently pending against Google and Facebook are more likely to seek their state's governorship or a seat in the U.S. Senate.

When it comes to regulation of and enforcement against the major digital platforms, the groups that normally rein in improvident decisions by government officials may be ineffective. Members of the news media may harbor their own biases against big technology platforms, which they perceive as having damaged the news business by usurping consumer attention and advertising revenue. Academics stand to gain favorable publicity for taking aggressively pro-enforcement/regulation stances, as evidenced by recent fawning press reports on scholars pushing for action against the largest technology platforms. And, as usual, most voters remain rationally ignorant; they are unlikely to learn how seemingly small and benign-sounding legal changes—such as elimination of Section 230 protections, the imposition of data-sharing requirements, various privacy mandates, and so forth—could have deleterious consequences. In short, public choice theory suggests that the current political winds are favorable for rent-seeking endeavors in digital markets. *R*