Resuscitating E-Commerce's Transnational Promise with Out-of-Court Processes

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Abstract

E-commerce is increasingly taking a central role in conducting commercial transactions. This burgeoning industry has shaped how, when, and even why consumers transact. While catalyzed by the pandemic, increased use of e-commerce platforms is a multi-decade historical trend. Yet regulators throughout much of the world have been slow in how they regulate these platforms. In recognition of the growing importance of digital transactions, regulators have increasingly explored what should be the appropriate amount of oversight for platforms that have relied on substantial self-regulation. Regulation has increased the difficulty for private and public enforcement of antitrust laws, compromising a variety of different e-commerce stakeholders and drawing a contrast with the visions of early technologists who aspired for an online marketplace that is untethered to physical locations. A central argument in this paper is that slow, unresponsive regulation and monopolistic practices from different e-commerce platforms have culminated to compromise the transnational promise of e-commerce. The opportunity for e-commerce lies in norm-derived inter-platform community regulation that proactively complements cautious government regulation.

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I. INTRODUCTION

E-commerce is increasingly playing a central role in commercial transactions. This industry has informed noteworthy changes in how,[1]

1. *See, e.g.*, Jen King, *Guide to Mobile Commerce and Its Business Applications*, EMARKETER (Jan. 24, 2024), https://www.emarketer.com/insights/mobile-commerce-shopping-trends-stats/ (the value of e-commerce transactions conducted via cell phones surpassed $400 billion in 2022 and is expected to surpass $500 billion by 2024); *see also* Stephanie Chevalier, *Value of Social Commerce Sales Worldwide from 2022 to 2030*, STATISTA (Nov. 29, 2023), https://www.statista.com/statistics/1251145/social-commerce-sales-worldwide/ (global sales using social media platforms reached nearly $1 trillion in 2022).

when,[2] and even why[3] parties transact with others. E-commerce's transnational promise to empower individuals anywhere at any time to transact with anyone has contributed to the industry's ubiquity. As e-commerce has become more ubiquitous, the policies of e-commerce platforms have greater consequences for online communities and for different stakeholder groups. In thinking of e-commerce as a nexus of power, where different stakeholders con-verge to advance their interests, it is the platform's policies that inform the extent stakeholders can realize these interests. Moreover, one platform's policy change will often have some degree of cross-platform consequence. Yet the absence of responsive regulation to problematic platform policies has contributed to the undermining of e-commerce's digital infrastructure. Both private and public antitrust enforcement have failed to respond to changing market dynamics, while platforms justify their changed policies as procompetitive based on antiquated antitrust notions of competition. This article argues that limited antitrust engagement in e-commerce is directly connected with emboldened platforms implementing policies that undermine e-commerce's transnational promise. The field of online dispute resolution ("ODR"),[4] which has an extensive history in addressing intra-platform disputes, presents an opportunity for responding to e-commerce policies that have inter-platform consequences. This approach can provide online communities with a tool for holding e-commerce platforms accountable for norm-violating actions while complementing state regulatory initiatives that struggle to respond to the fluid nature of community in digital spaces and that have been slower to respond to changes in e-commerce. Section II of this article provides an overview

2. Brad Ward, *When Are People Most Likely to Buy Online?*, SALECYCLE (Feb. 6, 2023), https://www.salecycle.com/blog/stats/when-are-people-most-likely-to-buy-online/ (showing a high volume of online sales occurring after many brick-and-mortar stores have closed).

3. *See* Jacinda Santora, *17 Key Influencer Marketing Statistics to Fuel Your Strategy*, INFLUENCER MKTG. HUB (Feb. 6, 2024) (discussing the growth and influence of the influencer market). One reason for this exponential growth is that e-commerce customers are influenced by the products influencers are using. *Id.* One survey discussed showed that 80% of survey respondents say they work with influencers. *Id.*

4. Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 329 (2016) (defining ODR as "the application of information and communications technology to the prevention, management, and resolution of disputes").

of the current e-commerce landscape, highlighting specific e-commerce policies that have been problematic for e-commerce stakeholders such as merchants, advertisers, and publishers. Section III discusses how antitrust enforcement has fallen short in adapting to changing market dynamics. Enforcement has placed a myopic prioritization on short-term consumer welfare while overlooking long-term harm and the circumstances for non-consumer stakeholders who play a key role in e-commerce's digital infrastructure. Section IV argues for the need to identify e-commerce norms and enforce those norms with non-state action using ODR that can be dynamic and more responsive to the unique character of online spaces.

II. WAIT AND SEE UNTIL DOMINANT PLATFORMS EMERGE

Throughout much of e-commerce's nascent history, domestic and foreign regulators took much of a wait-and-see approach as regulators sought to better understand the new industry's impact.[5] The regulatory laissez-faire approach has precedent under a private legal ordering framework, as new technologies' legal, economic, and social consequences re-quire time to materialize.[6] Though understandable given the uncertainties in e-commerce, this approach has allowed individual platforms to create somewhat dynamic and beneficial intra-platform self-regulation under the guise of "trust and safety."[7] However, select platforms have implemented policies taking advantage of slow and incremental government regulation, engaging in anticompetitive behavior to gain greater market share and, consequentially, undermining e-commerce's digital infrastructure.

5. *See, e.g.*, AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 120 (2021) (discussing the low rates of antitrust enforcement in the technology sector during the first two decades of the 21st century).

6. *See, e.g.*, Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 934 (2001) (arguing that it is "misguided" for the FCC's "hands-off policy . . . to be motivated by this prevailing ideological vogue" permitting cable companies to bundle high speed cable modems with Internet service).

7. From eBay onwards, e-commerce platforms have developed the field of online dispute resolution to promote trust and safety for platform users. *See* AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION 33 (2017).

There lies an opportunity for inter-platform community regulation that can complement government regulation in a dynamic manner.

A. Early Instances of Wait and See

Throughout e-commerce's emergence, incremental regulation has had consequences for how e-commerce platforms develop as well as the relationships platforms have with stakeholders.

Regulators were preoccupied with maintaining a balance between preventing platforms from being used for fraudulent conduct on the one hand without unnecessarily intervening in online markets in a manner that would compromise the potential transformative effects e-commerce could have on global transactions.[8] This meant that e-commerce platforms were given flexibility in developing self-regulatory initiatives for a wide variety of issues that did not pertain to fraud, as the FTC's stated goal was "to encourage and facilitate effective self-regulation as the preferred approach to protecting consumer privacy online."[9] These self-regulatory initiatives were primarily based on intra-platform disputes, those arising within a given platform, rather than developing protocols for inter-platform disputes, those with consequences across platforms.

Today, this private legal ordering framework[10] has become ubiquitous, as each e-commerce platform has its own ODR protocol. As will be discussed in Section IV, platform-specific self- regulation typically overlooked how community-based norms are developing across platforms and, consequentially, how inter-platform norms[11] can be used for dynamic inter-platform community regulation. This section discusses why cautious government regulation of e-commerce platforms, though helpful, is often incomplete. Importantly, this section

8. *See* FED. TRADE COMM'N, THE FTC'S FIRST FIVE YEARS: PROTECTING CONSUMERS ONLINE 19–21 (1999) (discussing initiatives between 1995 and 1999 taken by the FTC to address fraudulent activity while "support[ing] the development of e-commerce").

9. *See* FED. TRADE COMM'N, SELF-REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS 3 (1999).

10. Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 319 (2002) (defining private legal ordering as "[t]he sharing of regulatory authority with private actors").

11. One way of conceptualizing an e-commerce norm is as a regular pattern of online conduct that promotes the use of e-commerce.

raises the need to consider a broader group of stakeholders based on affiliation with a particular community. To illustrate this principle, case studies of attempted cautious regulation of e-commerce platforms are discussed, most notably with Amazon and Alphabet's Google. As has become a general principle in regulating e-commerce, the regulatory initiatives were slow and cautious[12] in responding to harmful behavior while undervaluing the experiences key stakeholders had in a particular community.

B. Proactive Regulation of E-Commerce Platforms Has Historically Been Rare and Challenging

As a digital space created by the internet, the legal and social implications of e-commerce platforms have been difficult to predict. Just as YouTube's video-sharing platform,[13] Google's search engine and Twitter each emerged with some amount of serendipity,[14] so too have the myriad of use cases for e-commerce emerged with limited foresight. The unpredictability in how internet tools, particularly e-commerce, will be used in the future is one factor that has made cautious regulation commonplace.[15] Cautious regulation allows

12. *See* John E. Lopatka & William H. Page, *Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion*, 7 SUP. CT. ECON. REV. 157, 159–60 (1999) (arguing that the Department of Justice's attempted antitrust enforcement against Microsoft illustrates how regulators struggle to keep pace with advances in technology that occur at a "dizzying pace").

13. *See* Stuart Dredge, *YouTube Was Meant to Be a Video-Dating Website*, THE GUARDIAN (Mar. 16, 2016, 5:31 AM), https://www.theguardian.com/technology/2016/mar/16/youtube-past-video-dating-website (according to YouTube co-founder Steve Chen, YouTube was initially created to be a dating site for people to upload videos).

14. MATT RIDLEY, HOW INNOVATION WORKS: AND WHY IT FLOURISHES IN FREEDOM 300–04 (2020) (discussing how innovation with a variety of different technologies have been informed by serendipity, ranging from Google's search engine to Twitter and genetic fingerprinting amongst others).

15. Former FTC Chairman Robert Pitofsky captured this sentiment in 1999, stating that "[w]e are at the dawn of the most impressive new sector of the economy that this country has ever seen. It is dynamic. It is fast changing. It is remarkable—the extent to which people are becoming committed to doing commerce on the Internet. In a circumstance like that, you want to stay flexible about the nature of regulation that you impose." *Electronic Commerce: The Current Status of Privacy Protections for Online Consumers: Hearing Before the Subcomm. on Telecomms., Trade, and*

government actors to better understand precisely how e-commerce platforms can engage in problematic behaviors, rather than proactively regulating a field that is nonlinear without having observable examples of misconduct.[16] Regulators adopting a cautious posture feared regulatory leakage, observing that regulation of online spaces that are necessarily not bound by physical territoriality would necessarily have consequences for other jurisdictions.[17] Moreover, antitrust law has historically discouraged proactive regulatory intervention in a new market based on a theory that a company will have future monopoly power.[18] Unlike in mature industries where there is greater ease to anticipate the future consequences of material changes,[19] nascent industries like the technology sector can be more difficult to predict for regulatory purposes.[20] Recognition of the nonlinear nature of

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Consumer Prot. of the H. Comm. on Com., 106th Cong. (1999) (statement of FTC Chairman Robert Pitofsky).

16. Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 338 (2000) ("[R]esearchers who have studied the issue have come to wide agreement that technological and scientific innovation and absorption is essentially impossible to predict, because it is not linear but rather is full of 'leaps ahead, feedback loops, and sudden and unexpected lacunae.'").

17. Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1096 (1996) (discussing the implications of regulatory leakage when applied to the internet's diffused nature).

18. *See* Dave Michaels & Jan Wolfe, *FTC Loses Antitrust Challenge to Facebook Parent Meta*, WALL ST. J. (Feb. 1, 2023, 12:28 PM), https://www.wsj.com/articles/ftc-loses-antitrust-challenge-to-facebook-parent-meta-11675272525 (discussing a federal judge's rejection of attempted FTC antitrust enforcement "based on an unusual theory of competitive harm focusing on potential future competition in a nascent industry").

19. *See e.g.*, Am. Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (reasoning that, in the established tobacco industry, regulation is justified when "[p]revention of all potential competition is the natural program for maintaining a monopoly . . . rather than any program of actual exclusion"); *see also* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 197 (2010) (reasoning that, in the established NFL business, antitrust enforcement is justified when there is monopolistic conduct that deprives "the marketplace of independent centers of decisionmaking . . . and therefore of actual or potential competition" (internal citations omitted)).

20. The main exception in the technology sector was enforcement action against Microsoft, where the D.C. Court of Appeals gave support to a more active regulatory action in the emerging internet browser industry. United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) ("[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven,

innovation in digital spaces is why both regulators and scholars have recognized the importance of self-regulation.[21] However, it is widely acknowledged that after harmful or unlawful practices have been observed, regulators have an important role to play in developing responsive regulation. The regulatory stakes are higher when there has been an identified harm, as an insufficient state response may suggest that a non-state response is needed or that there is regulatory capture. In rare instances, an intermediary's problematic conduct has been public knowledge, yet government regulation has been slow to respond.[22] Senator Amy Klobuchar has articulated this regulatory challenge, stating that there have been "lengthy periods where antitrust laws stood largely dormant, failing to adapt to the changing monopoly dynamics of the times."[23] The contemporary struggle, for e-commerce users and regulators alike, is that benefits from the internet's decentralization and increasing ubiquity are being offset by e-commerce platform policies that centralize decision-making and undermine accountability. While cautious regulation can be beneficial, the challenges in regulating large e-commerce platforms, such as Amazon and Google, demonstrate why inter-platform community regulation is increasingly important.

competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts.").

21. At the dawn of the internet age, the Federal Trade Commission was steadfast that "self-regulation is the least intrusive and most efficient means to ensure fair information practices, given the rapidly evolving nature of the Internet and computer technology." FED. TRADE COMM'N, *supra* note 9, at 6.

22. *See, e.g.*, Aditya Kalra, *Amazon Documents Reveal Company's Secret Strategy to Dodge India's Regulators*, REUTERS (Feb. 17, 2021), https://www.reuters.com/investigates/special-report/amazon-india-operation/ ("The documents lay bare that for years, Amazon has been giving preferential treatment to a small group of sellers on its India platform, publicly misrepresented its ties with the sellers and used them to circumvent increasingly tough regulatory restrictions [in India].").

23. KLOBUCHAR, *supra* note 5, at 121.

C. Amazon's Entrenchment in the Midst of Wait-and-See Regulation

Arguably no company can rival the polarity in opinions between regulators and customers as seen with Amazon.[24] Amazon has developed a variety of different business practices that receive positive customer support[25] while also raising consternation for regulators who see the emergence of a digital giant with dominant market power. Amazon has been the leading e-commerce platform in delivery,[26] generating efficiencies first with two-day delivery then same-day delivery,[27] and developing the infrastructure for drone-based delivery.[28] From one perspective, Amazon has also generated cost savings for customers using its platform, leveraging its size and breadth as an e-commerce giant to mandate that merchants list prices that are not more expensive than any other platform through which the merchants sell.[29] Yet taking a holistic approach to marketplace dynamics raises a variety of norm-violating conduct in which the company has engaged.

There are three categories of conduct where outdated regulations amid a rapidly shifting digital market have allowed Amazon to strengthen market power in a manner that is problematic

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24. Note, for example, that Amazon has been ranked as one of the most admired global brands for more than a decade while also frequently appearing before legislators for social concerns. *See World's Most Admired Companies*, FORTUNE, https://fortune.com/ranking/worlds-most-admired-companies/ (last visited Mar. 14, 2024).

25. *See, e.g.*, Rupinder P. Jindal et al., *Omnichannel Battle Between Amazon and Walmart: Is the Focus on Delivery the Best Strategy?*, 122 J. BUS. RSCH. 270, 271 (2021) (noting that the vast majority of Amazon's e-commerce platform customers indicate fast, free shipping is a leading benefit to the marketplace); Pamela N. Danziger, *Amazon's Customer Loyalty Is Astounding*, FORBES (Jan. 10, 2018), https://www.forbes.com/sites/pamdanziger/2018/01/10/amazons-customer-loyalty-is-astounding/?sh=6ac699a311fe (discussing high rates of customer satisfaction for Amazon customers' experience).

26. *But see* Jindal et al., *supra* note 25, at 272 (discussing increased competition from brick-and-mortar retailers expanding their online and delivery presence to compete with Amazon's shipping).

27. *See* Stacy Voccia et al., *The Same-Day Delivery Problem for Online Purchases*, 53 TRANSP. SCI. 167, 167 (2019).

28. *See* Jean-Paul Rodrigue, *The Distribution Network of Amazon and the Footprint of Freight Digitalization*, 88 J. TRANSP. GEOGRAPHY 1, 8 (2020).

29. *See* Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 141 (3d Cir. 2019).

for the market structure of e-commerce: (1) merchants contemplating whether to use Fulfillment-by-Amazon ("FBA"); (2) mandating that merchants list prices lower on their platform than any other platform, thus creating an artificial price floor; and (3) double-dipping by hosting a two-sided marketplace while competing with merchants through Amazon Basics. Amazon uses a theory of pro-competitive benefits provided for customers to justify anti-competitive policies for non-consumer stakeholders. Each of these practices harm e-commerce's digital infrastructure while also further entrenching Amazon's market power. As will be discussed in Section IV, dynamic inter-platform community regulation that recognizes key e-commerce norms can and should be explored as a way to respond more quickly to actors, like Amazon, who engage in practices that undermine e-commerce's digital infrastructure. Amazon's practices have developed in the midst of public antitrust regulation that focuses myopically on consumer welfare and Supreme Court precedent that restricts the parties who have legal standing in antitrust litigation. The response to novel e-commerce practices has been a regulatory wait-and-see approach that is slow to appreciate how interconnected consumer and non-consumer stakeholders are in e-commerce, in contrast to their brick-and-mortar equivalents. This has resulted in Amazon engaging in harmful practices that strengthen its market dominance with little regulatory response.

1. Fulfillment-by-Amazon

Founded in 2006, Amazon envisioned FBA as a resource that would strengthen logistics operations for smaller merchants by giving them "access to Amazon's order fulfillment, customer service, customer shipping offers, and underlying website technology to improve the experience they offer their customers."[30] FTC Chairwoman Lina Khan has previously discussed how Amazon

30. *Amazon Launches New Services to Help Small and Medium-Sized Businesses Enhance Their Customer Offerings by Accessing Amazon's Order Fulfillment, Customer Service, and Website Functionality*, AMAZON: PRESS CENTER (Sept. 19, 2006), https://press.aboutamazon.com/2006/9/amazon-launches-new-services-to-help-small-and-medium-sized-businesses-enhance-their-customer-offerings-by-accessing-amazons-order-fulfillment-customer-service-and-website-functionality.

leverages its dominance in logistics to reduce the viable delivery alternatives available to independent merchants.[31] Problematically, it has been well-documented that merchants who do not pay to receive Amazon's FBA have their products listed lower in search results than those merchants who contract with FBA, even if the non-FBA product is lower priced or of better quality.[32] This illustrates why a sufficient degree of economic impartiality is valuable: when affiliation with Amazon through FBA influences how products are displayed, consumers can be presented options that are higher priced, lower quality, or both. In using economic impartiality as a source to alter intermediary behavior, out-of-court processes can disrupt current e-commerce trends, as seen with Amazon, where product curation is influenced based on status with the intermediary. Before becoming FTC Chairwoman, Khan observed how Amazon's use of FBA tying created antitrust concerns.[33] It is noteworthy that Khan as FTC Chair has not successfully challenged Amazon for this practice.[34] After Khan first articulated this concern in 2017, it took more than five years for any jurisdiction[35] to successfully challenge Amazon's tying practice.[36]

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31. Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 778–80 (2017).

32. *See* Consolidated Amended Class Action Complaint at 6–7, 38–41, Hogan v. Amazon.com, Inc., No. 2:21-cv-996-RSM, 2022 WL 1489407 (W.D. Wash. Feb. 2, 2022).

33. Khan, *supra* note 31, at 779 ("Amazon is positioned to use its dominance across online retail and delivery in ways that involve tying, are exclusionary, and create entry barriers.").

34. Though this is likely because Khan has had to focus on other intermediaries' conduct that raises antitrust concerns in an e-commerce industry that increasingly introduces novel anticompetitive considerations. *See id.* at 794, 803.

35. While Italy was the first jurisdiction to successfully take action against Amazon for this tying arrangement, a variety of other jurisdictions had also investigated Amazon for the same practice without any penalties. *See, e.g.*, Margrethe Vestager, Executive Vice-President, Eur. Comm'n, Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Second Investigation into Its E-commerce Business Practices (Nov. 10, 2020), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_2082 (discussing opening investigations into whether FBA results in "lock[ing] deeper into Amazon's own ecosystem an increasing number of sellers").

36. *See* James Vincent, *Amazon Fined $1.3 Billion for Abusing Market Position in Italy*, THE VERGE (Dec. 9, 2021, 4:56 AM),

During this time, Amazon's tying arrangement not only became entrenched, but also wider in breadth.[37] These actions have undermined important e-commerce norms, and inter-platform community regulation can and should be considered as a tool that curbs future action.

2. Amazon's Artificial Price Floor

Amazon has also undermined e-commerce norms connected to merchant autonomy for price listing, even as antitrust scrutiny has been slow to respond. Under the "Price Parity Provision"[38] and "Fair Pricing Policy" in the Business Solutions Agreement, Amazon implemented practices where merchants are compelled to list their products on the Amazon platform that are lower than the merchant's price on any other e-commerce platform. This raises fundamental concerns for the market structure of e-commerce. While lower prices on Amazon may be good for customers using Amazon's platform in the short term, the practice reduces price competition across platforms over the long term. Regulators have observed that this raises the prospect of an artificial price floor, harming both Amazon customers and the structural

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https://www.theverge.com/2021/12/9/22825759/amazon-antitrust-fine-italy-1-3-billion.

37. Indeed, from Amazon's perspective, this tying arrangement is beneficial to merchants. In response to proposed legislation designed to disaggregate the tying of FBA, Amazon has previously stated that what merchants "find most valuable in working with us is the broad distribution and traffic from hundreds of millions of consumers they get by listing their products in our store—the very benefit they stand to lose with this proposed legislation." Brian Huseman, *Antitrust Legislation and the Unintended Negative Consequences for American Consumers and Small Businesses*, AMAZON (June 1, 2022), https://www.aboutamazon.com/news/policy-news-views/antitrust-legislation-and-the-unintended-negative-consequences-for-american-consumers-and-small-businesses.

38. *See* Zak Stambor, *Amazon Quietly Ends Its Third-Party Pricing Parity Policy*, DIGIT. COM. 360 (Mar. 11, 2019), https://www.digitalcommerce360.com/2019/03/12/amazon-quietly-ends-its-third-party-pricing-parity-policy/ (describing price parity provisions as a historical practice "to ensure that consumers . . . [are not] able to find lower prices for marketplace sellers' items on the sellers' websites or other marketplaces."). *But see* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2177 (2018) (discussing how other online marketplaces have similar provisions).

integrity of e-commerce's infrastructure.[39] For its part, Amazon has argued that changing their existing price listing practices would lead to higher prices and, implicitly, Amazon alluded to the ineffectiveness of current antitrust law to curb their conduct.[40] Amazon advanced this argument even though investigations from British and German regulators led to Amazon terminating this practice in these jurisdictions, evincing regulatory fragmentation between jurisdictions and augmenting the argument that Amazon could have changed this practice in the U.S. without harming consumers.[41] California's complaint introduces the importance of considering market structure when assessing an e-commerce intermediary's actions.[42] As such, market structure dynamics should also be a consideration for out-of-court ODR processes since an intermediary's policies impacting consumer and non-consumer stakeholders can have consequences across platforms. California's complaint also alludes to consideration of a wider group of stakeholders besides merely consumer welfare.[43] In generating and enforcing e-commerce norms, greater attention must be provided to how merchants and consumers on other platforms are impacted by a sole intermediary's actions. As a variation of traditional predatory pricing, Amazon's policy sacrifices some amount of profits to increase the likelihood that competing platforms have fewer options available, while increasing the prospects of eventual capitulation so

39. *See, e.g.*, Complaint at 57, California v. Amazon.com, Inc., No. CGC-22-601826 (Cal. Super. Ct. Sept. 14, 2022) [hereinafter California Complaint] ("As a result of Amazon's price parity agreements and enforcement, sellers maintain higher prices on their own websites, maintain higher prices on other marketplaces and, in the case of brands that manufacture their own products, charge higher wholesale prices to other retailers and set higher price floors for resale.").

40. *See* Paresh Dave & Diane Bartz, *California Alleges Amazon Stifled Price Competition in Lawsuit*, REUTERS (Sept. 15, 2022, 10:55 AM), https://www.reuters.com/legal/california-files-lawsuit-against-amazoncom-allegedly-blocking-price-competition-2022-09-14/ (reporting that Amazon stated the relief the California attorney general "seeks would force Amazon to feature higher prices to customers, oddly going against core objectives of antitrust law").

41. *See* Complaint at 3, District of Columbia v. Amazon.com, Inc. No. 2021 CA 001775 B (D.C. Super. Ct. 2021).

42. *See* California Complaint, *supra* note 39, at 77.

43. *See id.* at 4–5 (raising concerns around how Amazon's actions impact a variety of different stakeholders, including e-commerce competitors, third-party sellers, and wholesale suppliers).

that recoupment is within the realm of possibilities. The fluid nature of e-commerce means that non-consumer stakeholders, including merchants and advertisers, would have fewer viable alternatives besides Amazon, thus reducing their bargaining power.[44] As with Amazon's other anti-competitive practices, this mandated pricing arrangement has been a multi-year practice and has only come under regulatory scrutiny in recent years. As this practice continues to be entrenched, e-commerce norms continue to be undermined and cautious government regulation continues to be slow in response. Here, too, articulating the importance of merchant autonomy to set prices can strengthen the transnational hope of e-commerce while using ODR processes to enforce norm violations.

Recent regulatory scrutiny into Amazon's FBA practice and "Price Parity Provision" rightly adopts a more holistic approach in considering marketplace dynamics that is not exclusively focused on consumer welfare. However, for decades, public antitrust enforcement has empowered these problematic e-commerce practices because they can be justified as promoting consumer welfare. For instance, Amazon's justification that their FBA tying arrangement improves the customer experience for consumers[45] overlaps with—as will be discussed in Section III—Bork's consumer welfare prescription that has influenced public antitrust enforcement for multiple decades and has only recently been challenged by the Wholistic Antitrust School.[46] While regulators are now recognizing that the artificial price floor created by Amazon's Price Parity Provision can undermine marketplace dynamics over the long term, Amazon has a compelling argument from the Borkian paradigm that short-term lower prices on Amazon's platform are categorically beneficial for Amazon consumers and are therefore procompetitive. Yet this paradigm, perhaps beneficial in a brick-and-mortar context, also overlooks the uniqueness of e-commerce: the same individual can easily be an advertiser on one platform or a merchant on another platform while being a consumer on yet another platform. The line between who qualifies as a consumer is much more fluid in online spaces than with physical counterparts. State

44. *See* Khan, *supra* note 31, at 773–74.

45. Huseman, *supra* note 37.

46. *See* discussion *infra* section III.B; Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

and non-state processes that overlook the fluid nature of online actors will likely provide insufficient solutions to problematic intermediary conduct. What matters, therefore, is how an e-commerce platform's policies impact the broader community and how stakeholders in the community interact with one another. With regulation overlooking the uniqueness of e-commerce, Amazon has used the consumer welfare paradigm to justify becoming an active marketplace participant, undermining the norm of platforms serving as neutral intermediaries.

3. Hosting and Competing in a Two-Sided Marketplace

Perhaps the most troubling Amazon practice for the sake of market structure is competing in a two-sided marketplace that they also host. Of all Amazon's anticompetitive practices, this is also the one that has attracted regulatory concerns for the longest period of time. In proposed legislation, the American Innovation and Choice Online Act (the "AICO") has articulated an important norm against e-commerce intermediaries self-preferencing their goods on platforms they host.[47] Though a positive development, as is common with cautious government regulation, the AICO has been slow to be implemented, with congressional gridlock extending its time as a bill. This has not stopped Amazon from undermining what has been an e-commerce norm for the economic impartiality of an intermediary. Consider the rarity of other e-commerce intermediaries competing at scale on a platform that they also host as Amazon does. With the main counterexamples of Apple and Google's app store, few other e-commerce intermediaries are active marketplace participants on their own platforms.[48] The norm for intermediary economic impartiality is critical for e-commerce's digital infrastructure because the nature of a digital trail means that stakeholders with privileged access to data have unique competition benefits. In this situation, Amazon can use non-public data collected from independent merchants, aggregate this data, and ultimately compete at an unfair advantage with independent

47. American Innovation and Choice Online Act, H.R. 3816, 117th Cong. § 2(a) (2021).

48. *See* Feng Zhu, *When Tech Companies Compete on Their Own Platforms*, HARV. BUS. REV. (June 21, 2019), https://hbr.org/2019/06/when-tech-companies-compete-on-their-own-platforms.

merchants.[49] Regulators should also be concerned because Amazon is well situated to pass on the costs of supra-competitive prices to merchants using the FBA program or withholding FBA benefits to increase consumer demand for their own products.

After being implemented for multiple years, government scrutiny has recently led the company's executives to contemplate ending the use of Amazon's private labels, though no affirmative acts have been taken to alter this practice.[50] The European Commission, the EU's leading competition authority, has elevated the importance of this norm in pursuing regulatory action.[51] Of note, in contemplating how Amazon's double-dip practice impacts merchants, the European Commission takes a more holistic analysis for market structure beyond prioritizing consumer welfare.[52] This multistakeholder recognition is a valuable tool for advancing effective inter-platform community regulation that is dynamic and faster in responding to norm violations. As will be discussed in Section III(a), Supreme Court precedent[53] would make it difficult for harmed merchants to challenge Amazon's double-dipping through private antitrust litigation. For private antitrust

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49. The European Commission's Digital Markets Act explicitly recognizes this concern, stating that "a gatekeeper can take advantage of its dual role to use data, generated or provided by its business . . . for the purpose of its own services or products." Council Regulation 2022/1925, Digital Markets Act, 2022 O.J. (L 265) 12. The DMA continues and concludes that "[t]o prevent gatekeepers from unfairly benefitting from their dual role, it is necessary to ensure that they do not use any aggregated or non-aggregated data . . . that is not publicly available to provide similar services to those of their business users. That obligation should apply to the gatekeeper as a whole . . . ." *Id.*

50. *See* Jason Del Rey, *Amazon Executives Have Discussed Ditching Amazon Basics to Appease Regulators*, VOX (July 15, 2022, 7:55 AM), https://www.vox.com/recode/2022/7/15/23219277/amazon-basics-private-label-antitrust-concessions (noting that since 2021 "several top Amazon executives . . . expressed a willingness to make this different but significant change if it meant avoiding potentially harsh remedies resulting from government investigations").

51. Press Release, Eur. Comm'n, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-commerce Business Practices (Nov. 10, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

52. *Id.* (Amazon uses non-public seller data "to calibrate Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers").

53. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 735 (1977).

enforcement, the judiciary has chosen to withhold legal standing for parties who are not involved in direct transactions with the alleged antitrust violator.[54] A merchant who is paradoxically both benefiting from Amazon's ecosystem yet also competing with Amazon's private label—despite being exposed to Amazon's anticompetitive conduct—would face greater hurdles to establish legal standing as they are not buying from Amazon. The *Illinois Brick* Court articulated that "antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the *direct purchasers* rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it."[55]

Merchants availing themselves of Amazon's e-commerce platform are increasingly viewing the company as indispensable, leading to weaker bargaining power. This is well-illustrated in how Amazon treats merchants differently based on whether they contract with FBA. In addition to the increased costs of using FBA, merchants who do not use the program have greater difficulty qualifying for Prime offerings and are therefore likely to be demoted when customers search for products.[56] A class action composed of merchants filed an antitrust suit against Amazon precisely for this tying—an action the class describes as key to "Amazon's reign of terror over sellers."[57] Perhaps in contradiction to Amazon's low price policy, consumers can have greater difficulty in finding products sold by those merchants who do not use FBA.[58] A ProPublica report found that merchants selling products without FBA were demoted vis-à-vis FBA products "in more

54. *See infra* note 101 and accompanying text.

55. *Ill. Brick*, 431 U.S. at 735 (emphasis added).

56. *See* Consolidated Amended Class Action Complaint, *supra* note 32, at 6–7, 38–41; Sara Morrison, *Amazon's Strategy to Squeeze Marketplace Sellers and Maximize Its Own Profits Is Evolving*, VOX (Dec. 1, 2021, 8:00 AM), https://www.vox.com/recode/22810795/amazon- marketplace-prime-report.

57. Consolidated Amended Class Action Complaint, *supra* note 32, at 46 (original quotation capitalized).

58. *See* Julia Angwin & Surya Mattu, *Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't*, PROPUBLICA (Sept. 20, 2016, 8:00 AM), https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt ("About three-quarters of the time, Amazon placed its own products and those of companies that pay for its services in [a better] position even when there were substantially cheaper offers available from others.").

than 80 percent of cases."[59] Concerns raised in the class action that "onerous contract terms imposed on Sellers by Amazon quash any incentive to challenge Amazon's anticompetitive actions"[60] bear a striking resemblance to concerns in the early 1940s that contracts of adhesion would enable businesses "to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms" under the guise of freedom of contract.[61] In buying FBA services from Amazon, merchants on the platform are able to satisfy *Illinois Brick's* high legal threshold for standing. Yet stakeholders advertising products on behalf of merchants in the class action are unlikely to satisfy the *Illinois Brick* standing test and, despite playing an integral role in the relevant market, will have limited recourse in court proceedings.

However, this Amazon practice has persisted for multiple years, and the litigation aimed at permanently dismantling this tying arrangement may take additional years. This presents an opportunity for inter-platform regulation through ODR enforcement to assess whether e-commerce norms have been violated and what can be done to prevent future reoccurrence. Historical antitrust regulation has empowered Amazon to implement anticompetitive policies. Yet comparably problematic conduct from Google illustrates that government regulatory enforcement limitations are widespread and would benefit from out-of-court community enforcement.[62]

D. Google's Blossoming Walled Garden

A central pillar to e-commerce's digital infrastructure is advertising, as this influences the ease with which consumers find products and how merchants are able to expand the reach of their

59. *Id.*

60. Consolidated Amended Class Action Complaint, *supra* note 32, at 45–46.

61. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

62. Note that government actors have historically also recognized the complexities in state regulation and have invited out-of-court processes. *See, e.g.*, FED. TRADE COMM'N, ANTICIPATING THE 21ST CENTURY: CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE, VOLUME I, at 6–7 (1996).

businesses.[63] Like Amazon's improvements to e-commerce, Google has revolutionized the digital advertising industry. Google Analytics provides advertisers with a granular understanding of how successful their advertising is at converting consumers. In addition, integration with YouTube allows advertisers to review comments and understand how groups are interacting with their products. Being a one-stop shop allows for valuable efficiency and simplicity. That requires stakeholders to ignore how the walled garden—restrictions that a platform creates in accessing operational communications or other benefits beyond the platform's control while presenting benefits that incentivize users to accept such restrictions[64]—is used to justify conditions with harmful distributional consequences. Yet specific policies from Google illustrate how e-commerce intermediaries with sufficient market share in digital advertising can have concerning distributional consequences for a variety of different stakeholders, particularly advertisers and merchants. Google captures roughly 28% of digital ad revenue in America.[65] Traditional antitrust regulation has not considered this amount sufficient for a company to exert market power.[66] However, Google's market share of sub-markets in digital

63. Towards the end of the 20th century, long before online advertising was central to companies' business model, consumers recognized that online spaces empower companies to "make use of more personal details about people, [which contributes to] more individualized service than before." Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2405 (1996).

64. *See* Salil K. Mehra, *Paradise Is a Walled Garden? Trust, Antitrust, and User Dynamism*, 18 GEO. MASON L. REV. 889, 894 (2011) (defining "walled garden").

65. *Share of Ad-Selling Companies in Digital Advertising Revenue in the United States from 2020 to 2025*, STATISTA, https://www.statista.com/statistics/242549/digital-ad-market-share-of-major-ad-selling-companies-in-the-us-by-revenue/ (last visited Mar. 27, 2024).

66. United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (explaining the Learned Hand test for determining the presence of a monopoly: A company with market share greater than ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not"); *see also* Statement of Fed. Trade Comm'n Concerning Google/DoubleClick 8 (Dec. 20, 2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf (approving Google's acquisition of DoubleClick even in the presence of high rates of market concentration in third party digital ad serving markets

advertising may draw greater scrutiny.[67] Whether a duopoly between Alphabet and Meta, capturing a combined 48% of digital ad revenue, should be considered worthy of antitrust intervention is an open debate.[68] What matters, however, is how particular Google's policies threaten e-commerce norms, leading to a greater need for dynamic inter-platform regulation to create a healthier marketplace equilibrium.

Within e-commerce's sub-industry of digital advertising, Google plays a critical role at each corner. From surveying internet users' interests through Google's search engine (including YouTube, which Google owns),[69] to owning the leading digital advertising exchange that connects publishers with advertisers, and hypernudging with personalized data to ensure that advertising is properly tailored to potential customers,[70] Google has an outsized influence at every

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and DoubleClick having up to 60% market share); *see also, e.g.*, California Complaint, *supra* note 39, at 57.

67. As of 2015, Google's DoubleClick for Publishers ("DFP") had 90% market share of the publisher ad server market. Complaint at 7, U.S. Dep't of Just. v. Google, LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2022).

68. *See, e.g.*, Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google*, OMIDYAR NETWORK (May 2020), https://omidyar.com/wp-content/uploads/2020/09/Roadmap-for-a-Case-Against-Google.pdf; *cf* Sara Fischer, *Slow Fade for Google and Meta's Ad Dominance*, AXIOS (Dec. 20, 2022), https://www.axios.com/2022/12/20/google-meta-duopoly-online-advertising (describing growing competition for e-commerce advertising). *But see* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 983 (9th Cir. 2023) (noting that possession of market power is analyzed based on the defendant's facts and circumstances, not using a bright-line rule).

69. *See* COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 10 (2019), https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf ("Google has generated around 90% or more of UK search traffic each year over the last ten years and generated over 90% of UK search advertising revenues in 2019."); *see also* Tiago Bianchi, *Market Share of Leading Desktop Search Engines Worldwide from January 2015 to January 2024*, STATISTA (Feb. 12, 2024), https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/ (showing that Google consistently has roughly 82% of global market share in online search).

70. To understand hypernudging in this context, it is first important to understand nudging as "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentive." RICHARD THALER & CASS R. SUNSTEIN, NUDGE: THE FINAL EDITION 8 (Penguin Books 2021) (2008). In the digital advertising realm,

corner.[71] Yet again, slow-moving government regulation has been inattentive to digital markets and the unique role intermediaries can play in influencing outcomes for stakeholders. This regulatory dilemma also presents an opportunity for inter-platform community regulation. In particular, e-commerce norms of economic impartiality and interoperability are threatened by Google's practices in digital advertising. No other digital advertising platform has engaged in interlocking digital advertising services on a scale comparable to Google. The absence of similar practices has allowed for the industry's growth and strengthened the broader e-commerce industry. Google engages in two practices that undermine e-commerce norms that government regulation has been slow to address. First, Google has restricted the use of alternate advertising models, particularly with header bidding. Second, Google has engaged in manipulation of digital ad auctions. In both scenarios, a multi-stakeholder approach that elevates the role of a wider group—including publishers, advertisers, and customers—can allow for ODR enforcement of these norms.

1. Header Bidding as a Tool to Limit Access to Alternative Advertising Models

Google has sought to restrict access to alternate digital advertising models, most notably by undermining header bidding, an advertiser-centric model that provides publishers access to multiple digital advertising exchanges.[72] Header bidding promoted a

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hypernudging is the use of "[b]ig data driven nudging . . . providing the data subject with a highly personalized choice environment." Karen Yeung, *'Hypernudge': Big Data as a Mode of Regulation by Design*, 20 INFO. COMMC'N & SOC'Y. 118, 122 (2017).

71. When considering the consequences of these three factors combined, it becomes more worrying that "by shaping users' perception of (market) realities, hypernudging can be used to subvert autonomous choice and manipulate users into outcomes inconsistent with their true preferences." *See* Viktorija Morozovaite, *Two Sides of the Digital Advertising Coin: Putting Hypernudging into Perspective*, 5 MKT. & COMPETITION L. REV. 105, 107 (2021). In the absence of interplatform ODR and responsive government regulation, Google's lack of accountability compounds concerns associated with hypernudging. *See id.*

72. Header bidding consists of inserting specific lines of HTML code in the header section of a website. U.S. Dep't of Just. v. Google, LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2022). The code allows publishers to have access to an auction

competitive market structure by providing viable digital advertising alternatives and interoperability, as publishers and advertisers had ease of access to multiple exchanges.[73] By providing publishers with greater ad exchange options, header bidding also gave publishers a larger share of revenue. According to Google, header bidding increased some publishers' revenue between thirty to seventy percent when compared to non-header bidding systems.[74] In addition to benefits for publishers, header bidding also benefited advertisers who now could choose between different exchanges that charged lower exchange rates.[75] As a result, advertisers could avoid paying Google's higher exchange fees. Amazon, increasingly a rival to Google's digital ad dominance, would champion header bidding by providing publishers with pre-built code to streamline the header bidding process.[76]

Internal Google documents expressed considerable concern that header bidding's ability to promote interoperability for multiple stakeholders in digital advertising raised the risk that Google "could lose our must-call status and be disintermediated."[77] Variations of this "must-call" status have historically drawn the scrutiny of pro-competition regulators[78] and ought to be a central concern for inter-platform regulation. An intermediary that is successful at eliminating viable alternatives, particularly without providing unique benefits to stakeholders, while undermining interoperability creates structural imbalances with stakeholders that complicate the ability for disintermediation. Though regulatory concerns of intermediaries with a must-call status predated the Chicago School,[79] the latter would likely

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with digital advertising exchanges. *Id.* After the auction, the highest bid is sent to the publisher's ad server. *Id.* at 72–73; *see also* Ricardo Bilton, *WTF Is Header Bidding?*, DIGIDAY (Aug. 18, 2015), https://digiday.com/media/wtf-header-bidding/.

73. Third Amended Complaint at 122, Texas v. Google, LLC, No. 1:21-md-03010-PKC (S.D.N.Y. Jan. 14, 2022) [hereinafter Texas Complaint].

74. *Id.* at 123–24.

75. *Id.* at 124.

76. *Id.* at 123.

77. *Id.* at 125.

78. Former Judge and antitrust regulator Thurman Arnold accurately recognized this concern with 20th-century infrastructure monopolies for their ability to serve as "economic toll bridges" built through "deliberate agreements in restraint of trade." THURMAN ARNOLD, THE BOTTLENECKS OF BUSINESS 219 (1940).

79. Emerging in the 1970s, this school of antitrust analysis argued that antitrust regulation was only needed when the alleged monopolist was increasing prices in the

argue that a must-call status is not harmful unless prices of products are increasing and being passed on to consumers. When Google's offer to coopt Amazon was rejected,[80] in contrast to Google's successful collusion with Meta's Facebook in Jedi Blue,[81] Google took actions to undermine e-commerce's norm around accessibility.

Google implemented a right-of-last-offer ("ROLO") where advertisers on Google's ad exchange have priority to match the highest bid from the initial header bidding auction.[82] At times, advertisers could still win a publisher's inventory through Google's exchange even if another exchange has a higher bid.[83] This has a striking similarity to Amazon providing preferential curation treatment to merchants using FBA, as both Google and Amazon are using mere affiliation with a stakeholder to disadvantage other stakeholders. The concern is not merely the preferential treatment but rather the spillover effects for the industry. Like Amazon customers who are presented with products that are higher priced and/or of lower quality solely because a merchant has FBA status, advertisers without the highest bid can win a digital ad auction solely due to their affiliation with Google's terms, resulting in lower revenue for publishers. In other instances, Google could charge publishers an extra fee for content sold on an exchange competing with Google.[84] Following the Chicago School analysis, an extra fee for

absence of viable competitors. *See* Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979) (describing that "the proper lens for viewing antitrust problems is price theory"); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 718–19 (2017) (describing the 1970s and 1980s as an important period when the Chicago School gained widespread acceptance).

80. Complaint at 85–86, U.S. Dep't of Just. v. Google, LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2022). (Google allegedly asked Amazon "what it would take for Amazon to stop investing in its header bidding product" and in response, Amazon continued to expand its pre-built code for publishers).

81. Texas Complaint, *supra* note 73, at 12 (In exchange for Facebook not contributing to the growth of the header bidding ecosystem, Google would give Facebook "information, speed, and other advantages" under Google's digital ad auctions); *see also* Foo Yun Chee & Paul Sandle, *Google and Facebook 'Jedi Blue' Ad Deal Probed by EU, Britain*, REUTERS (Mar. 11, 2022, 1:16 PM), https://www.reuters.com/technology/eu-opens-google-facebook-advertising-deal-investigation-2022-03-11/.

82. Texas Complaint, *supra* note 73, at 129–30 (discussing Google's "last look advantage").

83. *Id.* at 127–28.

84. *Id.* at 127–29.

publishers need not raise antitrust concerns until and unless consumers are presented with higher prices related to publisher fees. Yet the harm of reduced choice for publishers and advertisers persists. Lowering fees for publishers and advertisers through the enablement of alternative digital advertising models allows stakeholders to capture more value, fostering a more vibrant ecosystem for products reaching the market. This could provide increased value to consumers, or they may be indifferent to the effects of increased digital advertising competition. The clear impact is that Google's must-call status would be disintermediated and less value would be extracted from publishers and advertisers. Like merchants and consumers, advertisers and publishers play a valuable role in online communities. Providing an out-of-court forum, such as with ODR, allows stakeholders to represent the harm they face and propose policy changes to prevent norm violations, thereby enhancing the value of e-commerce's digital infrastructure. Yet in undermining norms around accessibility, antitrust regulation continues to allow Google to extract excessive fees from publishers while constraining advertisers' viable ad exchange alternatives.

2. Manipulation of Digital Ad Auctions

Google has manipulated digital ad auctions in a manner that is harmful to both advertisers and publishers while government regulation has been slow to respond. Through a program internally described as Project Bernanke, Google informed advertisers that their auction would be a second-price auction,[85] while in practice, the auction is a third-price auction.[86] Due to Google's auction manipulations, publishers would receive a lower amount: rather than receiving the second bid price amount, publishers instead received the lower third bid price.[87] For the advertiser winning the bid, Google still charged them the

85. Second-price auctions allow the auction's winner to pay the second highest bid amount.

86. Texas Complaint, *supra* note 73, at 103–04; *see also* John Ebbert, *Google's Scott Spencer on DoubleClick Ad Exchange Auction and Data Management*, ADEXCHANGER (Feb. 9, 2010, 11:39 AM), https://www.adexchanger.com/ad-exchange- news/googles-scott-spencer-on-doubleclick-ad-exchange-auction-and-data-management/ (describing how Google uses second-price auctions and their benefits).

87. Texas Complaint, *supra* note 73, at 106.

second bid price. Thus, advertisers have had to pay an elevated price while publishers have received lower amounts than what is owed to them. Perhaps causing the most harm, Google would collect the difference between the second and third highest bid amount into a "global pool," using this amount to inflate bids from advertisers using Google Ads in order to ensure advertisers not using Google Ads lose.[88] In addition to these structural advantages, Scholar Srinivasan has previously argued that Google's advertising exchanges enjoy informational advantages that benefit only those bidders using Google's buying tools, further distorting the advertising marketplace.[89] Google failed to disclose these auction manipulation tools to publishers or advertisers.[90] This collective practice of material misrepresentations for auctions presents an opportunity for ODR enforcement that can engage with multiple groups of stakeholders, empowering them to share grievances and seek policy changes in out-of-court online processes.[91] This becomes especially crucial when considering the potential vulnerability of advertisers and publishers in litigation. While they may have a valid claim under contract law for Google's misrepresentation of material facts in the auction, the next section describes why non-consumers in e-commerce have had limited protection from antitrust regulators.

III. THE STATE'S REGULATORY CONSTRAINTS IN E-COMMERCE

Inter-platform community regulation can be beneficial because States have limitations in regulating digital communities that are not bound by physical space. This is not to argue, however, that the State should not attempt to regulate digital communities. The effectiveness

88. *Id.* at 107.

89. Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV. 55, 98–101 (2020).

90. Texas Complaint, *supra* note 73, at 109.

91. Srinivasan has previously argued that one way to manage Google's conflict of interest in the digital advertising market is through expanded disclosure rules akin to the equities trading market. Specifically, Srinivasan recommends that Google "be prohibited from abusing their access to third parties' sensitive information, be required to put up ethical walls, and be prohibited from routing trading activity to Google's exchange and properties in a discriminatory manner." Srinivasan, *supra* note 89, at 163.

of State regulation in e-commerce largely depends on the extent State actors consider how a gatekeeper's policies impact distributional considerations between marketplace actors.[92] While beneficial at times, focusing exclusively on state regulation disregards valuable complementary community regulation that can proactively strengthen digital infrastructure. This is one reason why the European Commission in 1998, coincidentally at the dawn of e-commerce, stated that out-of-court settlements designed to improve consumer access to justice were "fully complementary" to traditional adjudication as opposed to being mere alternatives.[93] An inter-platform self-regulatory approach is valuable because State regulation has recently struggled to engage with intermediaries' norm-violating conduct. This is because current regulation has been cautious in nature and therefore slow to respond to the particularities of e-commerce.[94] Moreover, the nature of state regulation has transnational consequences, with unexpected regulatory leakage,[95] for stakeholders beyond the state's traditional jurisdiction.[96] Such territoriality challenge is one reason why ODR has

92. *See, e.g.*, Emanuela Carbonara, *Law and Social Norms*, *in* 1 THE OXFORD HANDBOOK OF LAW AND ECONOMICS 467 (Francesco Parisi ed., 2017) (arguing that "regulations correct failures in social norms or worsen them depending on the politics of regulation—who has power, and who benefits from efficiency and fairness").

93. *Communication from the Commission on "the Out-of-Court Settlement of Consumer Disputes" and Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes*, at 5, COM (1998) 198 final (Mar. 30, 1998).

94. *See* Council Regulation 2022/1925, *supra* note 49, at 2. (recognizing the current regulation in the EU "does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms.")

95. Burk, *supra* note 17, at 1096.

96. Heterogeneous antitrust enforcement between jurisdictions further illustrates the complexity. Microsoft's attempted acquisition of Activision can be approved in many jurisdictions. Yet, because online gaming is not tethered to a physical location, one major jurisdiction preventing the acquisition can cause complications for other jurisdictions' approval of the merger. Specifically, stakeholders in the online gaming industry who are physically based in jurisdictions where the merger was approved—such as within the European Union—can be impacted by the UK's decision to reject the merger. *See* Foo Yun Chee, *Microsoft Wins EU Antitrust Approval for Activision Deal Vetoed by UK*, REUTERS (May 16, 2023, 5:50 AM), https://www.reuters.com/markets/deals/eu-antitrust-regulators-clear-69-bln-microsoft-activision-deal-2023-05-15/.

been so successful with intra-platform disputes and should be viewed with greater recognition for intra-platform disputes. The limitations in regulating e-commerce compounds when considering that state actors have adopted an antitrust framework with origins from the 1960s that creates a myopic focus on short-term consumer welfare for public antitrust enforcement, overlooking a variety of important stakeholders who contribute to e-commerce's marketplace dynamics. Supreme Court precedent has also narrowed the criteria for which parties qualify for legal standing to pursue private antitrust enforcement, thus eroding the class action as a tool to hold e-commerce platforms accountable.

A. Limitations in Private Antitrust Enforcement

State regulatory initiatives have struggled to respond to anticompetitive practices in e- commerce. When there has been a response, regulation has been slow, at times taking multiple years[97] while e-commerce intermediaries continue to flex their digital muscles. Senator Klobuchar has previously shown in detail that antitrust enforcement has decreased substantially, or has been non-existent, in the first two decades of the 21st century.[98] This has been particularly concerning since reduction in antitrust enforcement overlaps with the growth of e-commerce. Of note, the scope of who has standing to pursue private action has been inflexibly narrow even as a broader group of stakeholders are impacted by an e-commerce intermediary's decision.

Legal standing for who can pursue private antitrust action has excluded a wide variety of stakeholders who are directly impacted by problematic decisions from e-commerce intermediaries. One cause is the legacy of *Illinois Brick Company v. Illinois*, where the Supreme

97. This is not to say time-consuming antitrust enforcement is necessarily bad. Antitrust scholar Tim Wu has previously drawn a causal relationship between the IBM antitrust lawsuit that lasted more than a decade, costing potentially hundreds of millions of dollars in legal fees, and outcomes that benefited non-consumer stakeholders even though the Justice Department ultimately reached an out of court settlement with IBM. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 110–13 (2018). Of note, according to Wu, the IBM PC that was developed during the lawsuit had a more open design. This new design reduced tying between IBM's software and hardware, contributing to the growth of independent software with a wider breadth of participating stakeholders. *Id.* at 111–12.

98. KLOBUCHAR, *supra* note 5, at 259–60.

Court held that only direct purchasers have standing to sue in private antitrust actions.[99] A direct purchaser is an entity who buys the relevant product directly from the manufacturer.[100] *Illinois Brick* introduced the "bright-line rule" that standing requires the absence of intermediaries with the Defendant.[101] While indirect purchasers transact with intermediaries besides the Defendant, direct purchasers transact in the absence of intermediaries in the distribution chain.[102] Despite recognizing "the longstanding policy of encouraging vigorous private enforcement of antitrust laws,"[103] the Court's decision will reduce the vigor in private antitrust enforcement as fewer stakeholders will have standing to join class actions in antitrust enforcement actions. The direct-indirect purchaser binary was created even though, as the *Illinois Brick* dissent pointed, direct purchasers can still be "middlemen" to other suppliers. The consequence is that consumers, who are often given a privileged status for antitrust protection, can be considered indirect purchasers, thus "precluded from recovering damages from manufacturers" while "direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers."[104] What matters for e-commerce is the structural dynamics of the community: community stakeholders should have input as to the extent and how one party's actions undermines the broader community even if the judiciary does not grant them legal standing.

It is important to note that legislators were disturbed with the Court's ruling in *Illinois Brick*, recognizing how such an inflexible standard would be harmful for market dynamics. Senator Kennedy introduced legislation six days after *Illinois Brick* in order to dismantle the Court's direct-indirect purchaser binary and allow indirect purchasers to have the same amount of legal standing as direct purchasers in private antitrust enforcement.[105] Showing the bipartisan,

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99. Ill. Brick Co. v. Illinois, 431 U.S. 720, 745–47 (1977).

100. *See* Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 207 (1990).

101. *See, e.g.*, Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019) ("[I]ndirect purchasers who are two or more steps removed from the [antitrust] violator in a distribution chain may not sue.").

102. *Id.* at 1521.

103. *Ill. Brick*, 431 U.S. at 745.

104. *Id.* at 749 (Brennan, J., dissenting).

105. *See* Antitrust Enforcement Act, S. 1874, 95th Cong. (1977).

multigenerational opposition to *Illinois Brick*, more than four decades after Senator Kennedy introduced legislation to overturn the case, Senator Mike Lee would propose the Tougher Enforcement Against Monopolists Act (the "TEAM" Act) seeking the same goal.[106] *Illinois Brick* created a distinction without a difference, overlooking how an intermediary's monopolistic practices can create harm for an indirect purchaser who must internalize the harm while a direct purchaser can be well situated to distribute the harm to other stakeholders. In the e-commerce context, *Illinois Brick* presents clear challenges as the distinction between an indirect purchaser and a direct purchaser can be superfluous. A customer on one platform can easily be a merchant or advertiser on another platform. Considering community norms and how one stakeholder's action threatens those norms can provide more responsive non-government regulation. In empowering a wider group of stakeholders to engage in inter-platform community regulation, a greater priority can be placed on deterring harmful policies that e-commerce platforms implement.[107] As recognized by Justice Brennan, *Illinois Brick* represents a pivot away from antitrust regulation as deterring harmful behavior in favor of regulation privileging only a subset of the community while overlooking the broader community context.[108]

An important consequence of *Illinois Brick* is that in the e-commerce context, intermediaries enjoyed many years of heightened protection as consumers were characterized as indirect purchasers lacking standing to sue the intermediary.[109] Such a narrow paradigm

106. Tougher Enforcement Against Monopolists Act, S. 2039, 117th Cong. § 501 (2021).

107. One motivation for community-based approaches to deter harmful e-commerce policies overlaps with those listed in Senator Kennedy's bill to overturn *Illinois Brick*. Of note, consumers "will not always be damaged or, if damaged, not to the extent of the overcharge." S. 1874. Consumers may even benefit when non-consumer stakeholders are exposed to a platform's norm-violating policies, perhaps as is the case with Amazon's FBA tying arrangement. Senator Kennedy's bill also states that "[w]hen a party has a right of action but is only hurt theoretically because of a Supreme Court irrebuttable presumption, these hurdles may deter many meritorious suits." *Id.*

108. *See Ill. Brick*, 431 U.S. at 764–65 (Brennan, J., dissenting). .

109. This was based on the *Illinois Brick* principle that "antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the

meant that, even when harmed, a smaller group of stakeholders could hold intermediaries accountable. Merchants, buyers, and advertisers engaging on other e-commerce platforms were even more removed from litigation standing. E-commerce accentuates the concern in Brennan's dissent that consumers can be indirect purchasers lacking standing while a reseller can still receive recognition as a direct purchaser. For instance, consider how e-commerce can empower a Serbian to purchase Ethiopian leather and repurpose the leather with a flavor of Serbian kolo imagery that is sold to Chicagoans via Etsy who then resell the leather on Amazon to Peruvian leather collectors. While Amazon's anticompetitive conduct can adversely impact multiple stakeholders, *Illinois Brick* would isolate Amazon as a mere intermediary and place greater pressure on stakeholders who are unable to change Amazon's policies. That *Illinois Brick* has endured such strong bipartisan opposition,[110] even as online spaces problematize the direct-indirect purchaser dichotomy, suggests the limitations to legislation responding to rapidly changing market dynamics and that the prospects of community regulation should be considered with greater gravity.

It was only in 2019, in *Apple v. Pepper*, that the Supreme Court modified *Illinois Brick* to recognize that Apple's App Store customers have legal standing to sue Apple for charging supra-competitive prices, rather than narrowing standing to permit customers to sue only the app

overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 735 (majority opinion). E-commerce companies were mere intermediaries providing a marketplace for merchants and consumers to transact, so consumers were direct purchasers from the merchants and not the e-commerce company. *See id.*

110. In addition to Senators Kennedy and Lee aligning in opposition to *Illinois Brick*, consider also that the liberal-leaning Antitrust Modernization Commission and President Trump's Department of Justice both agreed on the need to overrule the case. *Compare* ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 18 (2007), *with* Makan Delrahim, Assistant Attorney General, U.S. Dep't of Just., Final Address at Duke University Virtual Event: "A Whole New World": An Antitrust Entreaty for a Digital Age (Jan. 19, 2021), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-final-address (identifying the same tension Senator Kennedy identified a near half century earlier that the consequence of *Illinois Brick* is "to handcuff most victims of anticompetitive conduct with no path for recovery, while providing other plaintiffs with an unfair windfall").

developers who produce individual apps.[111] Yet *Pepper* maintains the direct-indirect purchaser duality, as the Court reasoned that iPhone owners buy the iPhone directly from Apple, purchase apps directly from Apple, and pay supra-competitive prices to Apple, all in the absence of an intermediary.[112] While this introduces the possibility that other e-commerce platforms can be sued by their customers, the Supreme Court overlooks how e-commerce intermediaries' decisions, unlike with physical markets, can have direct consequences for a variety of stakeholders. In the leather transaction example mentioned previously, e-commerce empowers these transnational, multi-platform transactions to seamlessly occur within a matter of days, while the brick-and-mortar equivalent can be expected to take months. Rather than isolating actors engaging in norm-violations, the realization of e-commerce's transnational promise depends on frameworks that support stakeholders to both transact and curtail norm-violations, particularly with e-commerce platforms that influence how other community actors relate with one another.

Maintaining the direct-indirect purchaser duality framework from *Illinois Brick* reduces the amount of accountability e-commerce platforms have. For instance, an app producer who is a fanatic of Star Wars may produce Star Wars themed games on Google's app store with strong interest in producing a similar game on Apple's app store. This individual may not be a purchaser of any Star Wars themed apps, thus lacking standing under *Pepper*, even though they are an active member of the Star Wars online community. Apple's pricing policy also has consequences for whether this app producer decides to publish the game on Apple's app store. Not granting standing to this individual and similarly situated parties can undermine the growth of the broader Star Wars online community. More importantly, the direct-indirect purchaser duality overlooks how digital communities exist while narrowing the scope of who can hold an e-commerce intermediary accountable. The *Pepper* decision is grounded in "ensur[ing] an effective and efficient litigation scheme in antitrust cases."[113] Narrowing the group of stakeholders who qualify for legal standing may indeed promote administrability and relieve the judiciary from

111. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019).

112. *Id.* at 1521.

113. *Id.* at 1522.

engaging in "complicated damages calculations" in private antitrust litigation.[114] ODR community enforcement can provide a forum for e-commerce stakeholders lacking legal standing yet with demonstratable harm by an e-commerce platform that, if overlooked, could undermine e-commerce's digital infrastructure. Thus, the legacy of *Illinois Brick* and *Pepper* is a judiciary with a narrow interpretation of who qualifies as a legitimate community member for legal standing in private antitrust action. However, public antitrust enforcement, which has the capability to be more expansive, has instead seen a worrying trend that overlooks how e- commerce platforms' anti-competitive conduct can harm stakeholders.

B. Limitations to Public Antitrust Regulation

As e-commerce intermediaries have grown and engaged in conduct harmful to the interests of a multiplicity of stakeholders, government regulators have been hesitant to modify historical legal standards to meet the conditions of digital communities. Antitrust regulation has spent decades myopically fixated on the welfare of the end consumer while overlooking how intermediaries can harm other stakeholders vital to online communities. Robert Bork, one of the earliest progenitors of this rigid consumer welfare standard articulated this perspective: "Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction."[115] Bork and collaborators in the Chicago School would alter antitrust regulation into a tool that ignored the considerations of stakeholders who were not consumers. This lost sight of important antitrust history where regulators and legislators were concerned with non-consumer stakeholders.[116] For instance, in preventing price discrimination against stakeholders who were not the

114. *Id.* at 1524.

115. Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966).

116. *See* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 23 (1989) (discussing how the Sherman Act's legislative history showed a focus on competition, including the dynamics between consumers and a monopolist's competitors).

end consumer, the Robinson Patman Act of 1936 sought to protect small businesses and wholesalers from being excluded in the supply chain.[117] John Sherman, the progenitor of the landmark Sherman Act of 1890, was clear-eyed that market dynamics, and not exclusively consumer welfare, was the priority of antitrust regulation.[118] Some courts would not lose sight of antitrust law as a tool that protects competition, as opposed to fixating solely on consumer welfare.[119] Of note, the transition towards the Chicago School standard of consumer welfare has been striking, with Justice Department enforcement vanishing during the first two decades of the 21st century.[120] The Chicago School would advocate, and persuade, antitrust regulators to "begin with the strongest presumption that the existing structure is the efficient structure."[121] The absence of Justice Department enforcement overlaps strikingly with the growth of e-commerce and increasingly harmful conduct by e-commerce intermediaries who each seem well prepared to justify their actions as benefitting consumer welfare, even if outcomes may not be in consumers' best interest.[122]

Landmark cases, all emphasizing the consumer welfare standard, would restrict the government's ability to orient towards a more holistic approach in antitrust regulation, a standard that could be more representative of how digital communities interact. In *Reiter v. Sonotone Corporation*, the Supreme Court emphasized that consumers

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117. *See* 15 U.S.C. § 13(a).

118. Sherman stated that no problem "is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition." 21 CONG. REC. 2460 (1890).

119. *See, e.g.*, Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427 (9th Cir. 1993).

120. *See* Fiona M. Scott Morton, *Modern U.S. Antitrust Theory and Evidence amid Rising Concerns of Market Power and Its Effects*, WASH. CTR. FOR EQUITABLE GROWTH (May 29, 2019), https://equitablegrowth.org/research- paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/?longform=true (Figure 1).

121. F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 37 (Robert Pitofsky ed., 2008).

122. *See* Khan, *supra* note 31, at 739 (discussing how concentrated markets threaten "product quality, variety, and innovation").

forced to pay higher prices due to a company's antitrust violations were precisely who Congress sought to protect.[123] In citing Bork's Antitrust Paradox, the Court would declare that "Congress designed the Sherman Act as a 'consumer welfare prescription,'" implicitly undervaluing non-consumer stakeholders as Bork advocated.[124] In an attempt to reorient the Sherman Act towards the Chicago School's consumer welfare standard, the Court cited the Act's legislative history that stated the legislation provided a remedy for "[t]he people of the United States as individuals"[125] then added the independent clause "especially consumers," which was not part of the legislative history.[126] The consumer welfare standard has not only narrowed which stakeholders antitrust regulation can protect, it has also contributed to e-commerce intermediaries engaging in conduct that undermines digital infrastructure.

The Wholistic Antitrust School has emerged with the goal of resurfacing the multiplicity of values antitrust is designed to promote. Led by scholar and FTC Chairwoman Lina Khan, the Wholistic School questions the Chicago School's approach to assume that the existing structure is the most efficient structure.[127] The Wholistic School seeks to reintroduce antitrust's multiplicity of values by considering market process and structure.[128] Rather, there is a recognition that maintaining antitrust policy from the past four decades would further degrade marketplace dynamics and the conditions of non-consumer stakeholders. It is unsurprising, therefore, that there has been a surge in antitrust litigation, both at the federal and state level, since 2020.[129]

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123. *See* 442 U.S. 330, 342–43 (1979) (discussing that legislative history reveals Congress's intent to protect consumers under the Sherman Act).

124. *Id.* at 343.

125. *Id.* (citing 21 CONG. REC. 1767–68 (1890) (remarks of Sen. James Z. George)).

126. *Id.*

127. *See* Khan, *supra* note 31, at 737.

128. *Id.*

129. *See* Anirban Sen & Diane Bartz, *Dealmakers Grapple with Unprecedented U.S. Challenge to Mergers*, REUTERS (Dec. 27, 2022, 2:27 PM), https://www.reuters.com/markets/deals/dealmakers-grapple-with-unprecedented-us-challenge-mergers-2022-12-27/ (noting that "more mergers are entangled in U.S. antitrust litigation now than at any point" in recent history); Jan Wolfe, *Big Tech Braces for Wave of Antitrust Rulings in 2024*, WALL ST. J. (Jan. 1, 2024, 10:01 AM),

It is important to note that the Wholistic School has also influenced different regions in deciding how competition in e-commerce is conceptualized. The EU has recently enacted the Digital Markets Act (the "DMA"), which imposes special requirements on select online platforms known as "Very Large Online Platforms" ("VLOPs"). This legislation develops special requirements for digital gatekeepers[130] and their practices that "prevent competition, leading to less innovation, lower quality and higher prices."[131] Though the language of the DMA implies a certain orientation towards the consumer welfare standard, there is a noteworthy recognition of non-consumer stakeholders. The DMA seeks to address "non-transparent and opaque" gatekeeper policies that regulate advertisers and publishers.[132] Among other obligations protecting non-consumer stakeholders, the DMA seeks to "require gatekeepers to provide advertisers and publishers to whom they supply online advertising services, when requested, with free of charge information that allows both sides to understand the price paid for each of the different online advertising services."[133] Despite the benefits from this Wholistic School paradigm, one limitation to the DMA is that it is underinclusive. By focusing on VLOPs that are among the largest for both users and revenue, the DMA misses that protections are needed on a systemic basis beyond the largest platforms. Considering that all the gatekeepers are non-European tech companies, it has both been acknowledged by European legislators and criticized by others that European protectionism underlies this important initiative.[134]

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https://www.wsj.com/tech/big-tech-braces-for-wave-of-antitrust-rulings-in-2024-860f0149.

130. To qualify as a gatekeeper, an online platform, including "online intermediation services," must generate a sufficiently large revenue in the EU and have a substantial volume of users. *See* Council Regulation 2022/1925, *supra* note 49, at 4, 10.

131. Press Release, Eur. Comm'n, Digital Markets Act: Rules for Digital Gatekeepers to Ensure Open Markets Enter into Force (Oct. 31, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423.

132. Council Regulation 2022/1925, *supra* note 49, at 11.

133. *Id.*

134. *See, e.g.*, Dita Charanzová, *Turning Europe's Internet into a 'Walled Garden' Is the Wrong Path to Take*, FIN. TIMES (Feb. 17, 2021), https://www.ft.com/content/d861af6a-eb92-4415-881a-be798f018401 (According to the Vice President of the EU's Parliament: "Nevertheless, we must state the truth:

The Wholistic Antitrust School, therefore, comes short in one important way: territoriality. Advertisers, publishers, merchants, and many other stakeholders are not fixed to a particular territorial jurisdiction when compared to stakeholders in landmark 20th-century antitrust enforcement. Consider antitrust enforcement against Standard Oil in response to their underpricing and anticompetitive agreements through many segments of the petroleum industry.[135] The anticompetitive conduct and general business activity were connected to a physical location, creating ease in analyzing marketplace dynamics. Relying exclusively on a territorial framework for e-commerce would overlook the many nuances present in online spaces. While analyzing the extent price changes are impacting consumers remains straightforward for both brick-and-mortar and online transactions, analyzing the broader marketplace dynamics is more difficult in online contexts. Burk was among the early scholars who identified that the internet empowers online communities to transact irrespective of territoriality.[136] Stakeholders in digital spaces can exist physically in different jurisdictions while influencing conduct and engaging in business transactions in other jurisdictions. With the greater use of virtual private networks ("VPNs"), there is less reliability in knowing the physical location of stakeholders. While there are benefits to considering a multiplicity of stakeholders, an emphasis on territoriality can make engaging with a wider group of stakeholders complex. In taking into greater consideration marketplace dynamics, the Wholistic School proponents will need to modify their emphasis on territoriality to better respond to the particularities of online communities where shared interests inform group interactions and individual actions impact a physical space without purposeful availment.

Both schools of antitrust enforcement, by being connected to state enforcement, do not provide a *complete* solution to address

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these proposals target US companies. The businesses are both loved and hated, but no one can deny they are vital to the European economy and the lives of millions in the bloc.").

135. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 42–43 (1911) (discussing a bill aimed at limiting the monopoly power of Standard Oil).

136. Burk, *supra* note 17, at 1100 (discussing how "private and commercial traffic is becoming a dominant force in the development and growth of the 'electronic frontier'").

stakeholders who are territory agnostic. A rights-based approach that expands legal standing to be extraterritorial may not be the solution either. Expanding antitrust standing to be extraterritorial increases the likelihood of administrability challenges.[137] Rather, an interest-based framework that is embedded in community-based norms presents novel approaches for enforcement that can operate parallel to a rights-based territorial informed system. The field of restorative justice has long prioritized the interests of the broader community when seeking to address individual harm, rather than focusing exclusively on legal rights.[138] Recognizing the interdependent nature of how individuals exist in a network, it is the pursuit of community restoration that allows an individual harm to have a multi-stakeholder response. From the restorative justice perspective, just as "crime—and wrongdoing in general—. . . represents a wound in the community, a tear in the web of relationships,"[139] so too does a violation of e-commerce norms represent harm to the relevant community and a threat to e-commerce's digital infrastructure. This approach can empower platforms to not only change policies violating e-commerce norms but also to consult with a variety of stakeholders to determine how policies can strengthen norms. Both for private and public antitrust enforcement, the perspectives of non-consumer stakeholders have been overlooked even as they have an important role to play in promoting healthy e-commerce dynamics. Without publishers and advertisers, for instance, consumers would be less aware of different products while e-commerce platforms would have less engagement. Additionally, e-

137. United States antitrust enforcement actions against foreign producers can be legitimate domestically while being illegitimate abroad without the foreign jurisdiction's cooperation. Unlike with trade disputes, where the World Trade Organization ("WTO") adjudicates disputes between nation-states with conflicting regulatory frameworks, there is no such WTO equivalent for antitrust policy. Eleanor M. Fox, *Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy*, 48 ANTITRUST BULL. 355, 364–66 (2003). Moreover, countries do not have antitrust policies that target restraints of competition for conduct occurring in another country that targets foreign consumers. *Id.*

138. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 26 (2002) (arguing that communities "should be considered stakeholders as secondary victims" and that communities are well-situated to address root causes of harm while strengthening community dynamics).

139. *Id.* at 29.

commerce's digital infrastructure is undermined when merchants, the stakeholders providing consumers with goods, fear retaliation and "a reign of terror" from an e-commerce intermediary.[140] It is by engaging with multiple stakeholders, particularly non-consumers, that there can be greater accountability in e-commerce marketplace dynamics. As discussed in the next section, embracing community regulation can allow for a broader group of stakeholders to inform how marketplace dynamics are structured without escalating to litigation.

IV. THE NORMS OF CYBERSPACE

The digital infrastructure of commerce on the internet is increasingly threatened by intermediaries developing rules that harm the welfare of key internet stakeholders. While leading intermediaries have cemented monopolistic practices, we have also witnessed limitations of regulation for a quickly changing industry and instances where technology can be wielded in potentially anticompetitive ways with little recourse available to harmed groups.[141] Regulation of this industry has proven to be slow and, sometimes, based on state interests while overlooking the transnational promise of e-commerce. The cost of this is high. Long-term consumer welfare can be threatened, such as with Amazon's artificial price floor. Non-consumer stakeholders can be placed at a structural disadvantage, such as with advertisers and publishers prevented from having access to header bidding due to Google's digital advertising manipulation. Yet very little has been done to develop coherent, inter-platform community regulation initiatives. Meanwhile, the field of ODR has quickly expanded, serving as a quasi-enforcement tool for a variety of different areas of law. In being closely connected with the growth of e-commerce, ODR should be considered as a tool to revitalize the e-commerce sector.

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140. Merchants are particularly mindful of the lack of bargaining power they hold with leading platforms. *See* Karen Weise, *Prime Power: How Amazon Squeezes the Businesses Behind Its Store*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/19/technology/amazon-sellers.html. One merchant stated that "[e]very year [Amazon's] been a ratchet tighter . . . . Now you are one event away from not functioning." *Id.* Another merchant describing negotiating with an Amazon representative after a policy change said that "[i]t was like talking to a brick wall . . . . They want to be able to control everything." *Id.*

141. *See* discussion *supra* Section II (explaining how companies use anti-competitive practices in the digital context).

A. Identifying and Generating Norms

When identifying e-commerce norms, it is first helpful to understand e-commerce as a nexus of power where a variety of stakeholders, ranging from competing intermediary platforms to advertisers, merchants, and consumers, among others, all interact with each other and make decisions with direct and indirect consequences for each other. Historically, scholars have recognized how power manifests with individual platforms without sufficiently recognizing the interconnected dynamics between different platforms.[142] In e-commerce, intra-platform dynamics between stakeholders necessarily have direct inter-platform consequences. Because of the interest-based nature of communities in digital spaces, these consequences can either strengthen or undermine e-commerce norms.

E-commerce norms are not strongly tied to geography or territoriality. In recognizing why a rigid territorial analysis can be problematic for digital spaces, Paul Berman introduced the "Cosmopolitan" framework, where communities in digital spaces are "articulated moments in networks of social relations and understandings."[143] That is, a Cosmopolitan framework recognizes that communities in digital spaces are not informed primarily by a "geographically determined territory circumscribed by fixed boundaries."[144] Fixating exclusively on territoriality would overlook the fact that individuals transacting on digital spaces do so based on interests informed by convenience, oftentimes irrespective of geographic constraints. The locus for where and how individuals transact in digital spaces is fluid, rather than "motionless demarcations frozen in time and space."[145] The implication of a Cosmopolitan framework is that norms are generated from a space untethered from physical spaces yet connected with the interests that create the

142. *See e.g.*, Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "Ebay Law"*, 15 OHIO ST. J. ON DISP. RESOL. 705, 732 (2000) (discussing, from an intra-platform perspective, the implications of viewing platforms as "environments in which there is law, authority, and power, and in which there are also disputes").

143. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 322 (2002) (quoting DOREEN MASSEY, SPACE, PLACE, AND GENDER 154 (1994)).

144. *Id.*

145. *Id.*

underlying community. As a result, ODR adjudicators need not be in the same physical jurisdiction where an e-commerce platform is domiciled or incorporated.[146] Rather, community affiliation with a particular e-commerce transaction or ecosystem should be elevated as a relevant demarcation. Yet the Cosmopolitan framework does not call for unhinged extraterritoriality. By considering how digital spaces have impacted the notion of community, the Cosmopolitan framework also recognizes "the extreme emotional ties people still feel to distinct transnational or local communities."[147] Extraterritoriality without limits would overlook how the notion of 'self' and 'community' are inextricably connected to social and cultural influences that are both territorial and extraterritorial.[148] ODR system designers and practitioners addressing inter-platform disputes will need to be mindful of how territorial cultures are impacting communities that are forming in online spaces.

The fear from the Cosmopolitan perspective is that overlooking how community exists differently in digital spaces would "foreclose a richer understanding of location and identity that would account for the relationships of subjects to multiple collectivities."[149] For instance, a Colombian textile merchant on Amazon.com could be an advertiser targeting middle-aged salsa dancing enthusiasts in America's East Coast on Google's ad marketplace while serving as a moderator of a salsa subreddit. Community norms of how salsa is expressed and discussed on Reddit would likely inform the merchant's advertising campaign on Google and possibly vice versa. Berman's Cosmopolitan framework is relevant for e-commerce norms because it allows greater emphasis to be placed on how digital communities and norms are influenced based on interests, rather than fixating solely on physical location. Adopting this interest-based analysis allows for a more relevant and context-specific identification of norms generated from e-commerce communities.

In recognizing that digital communities are informed by interests, the Cosmopolitan framework allows for a shift from a rights-

146. Katsh & Rule, *supra* note 4, at 332 (discussing how early ODR systems were designed as "not only extrajudicial but in a realm where physical constraints could be overcome").

147. Berman, *supra* note 143, at 491–92.

148. *Id.* at 492.

149. *Id.* at 490.

based framework to an interest-based system of enforcement. A community member who feels that norms have been violated by another community member need not articulate a legal right. Section III has previously shown how the current state of antitrust law has been excessively narrow for who has legal standing and the types of rights that are enforceable. Instead, norms are tied to the interests of a particular space. Mediators and restorative justice practitioners often orient their work toward participants' interests rather than their legal rights. Building on the previous salsa example, Google's ad marketplace can bring salsa advertisers and consumers of salsa dance products together. Google's practices that undermined header bidding may not provide legal rights for salsa advertisers to bring a private antitrust action under *Illinois Brick* and *Apple*. As such, advertisers may not find much value in centering their arguments on legal rights. However, norms of interoperability, trust, and safety can be particularly relevant to the community. Advertisers, merchants, and consumers interacting with salsa may all have ideas on strengthening the community's interests connected to these norms. Advertisers may even have ideas for promoting the interests of merchants, and consumers may have ideas for promoting the interests of advertisers in a way that is Pareto superior. Mediators and restorative justice participants, among others, have often shown how shifting from rights to interests allows for greater value creation in a way that strengthens the underlying community.[150] As ODR has expanded and antitrust regulation has shown limitations with e-commerce, inviting this inter-platform, interest-based process can allow for more responsive community regulation.

A Cosmopolitan ethos can be helpful in orienting the conversation about e-commerce norms. This paper does not seek to develop an exhaustive list of e-commerce norms; rather, by positing that norms are both identifiable and enforceable, there can be a more coherent approach for developing out-of-court e-commerce accountability. Particularly relevant e-commerce norms are (1) interoperability, (2) competition producing viable alternatives, and (3)

150. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996) (describing how mediators who focus on the parties' interests empowers the parties to "work with their counterparts" and "develop better solutions than any the mediator might create").

dispute resolution processes that promote user trust and safety. Interoperability has played a key role in e-commerce's history and presents value for strengthening e-commerce's transnational promise. One core definition of interoperability is "the ability to transfer and render useful data and other information across systems, applications, or components."[151] Within this definition, there are technological, data, human, and institutional layers interacting to promote ease of exchange.[152] While interoperability depends on the context of a given industry,[153] Palfrey and Gasser provide the example of merchants "being able to sell their content securely through a variety of online channels" or "having personal information seamlessly and securely transferred as needed to a variety of merchants and service providers."[154]

Throughout much of e-commerce's history, merchants have been able to transact on different platforms with ease. This has promoted the industry's growth as consumers have choice in where to buy from and merchants can expand their digital reach. As e-commerce's transnational promise is based on the ease with which parties can transact with one another, a lack of interoperability can undermine this promise. E-commerce platforms' policies influence what and how products are sold on the various platforms. Yet some policies can have harmful inter-platform consequences, thus undermining the extent a platform can be interoperable. This is evidenced by Amazon's "Fair Pricing Policy," where Amazon's policy impacts the prices set on non-Amazon platforms. Merchants, for instance, who refuse to submit to Amazon's policy lose access to the 'Add to Cart' or 'Buy Box' features on Amazon, features that increase the ease consumers have with purchasing products.[155] In essence, merchants are forced to choose between promoting interoperability or reducing their revenue on Amazon and allowing competitors who conform to Amazon's policies to gain greater market share. It should be no surprise that Palfrey and Gasser view interoperability as a norm

151. JOHN PALFREY & URS GASSER, INTEROP: THE PROMISE AND PERILS OF HIGHLY INTERCONNECTED SYSTEMS 5 (2012).

152. *Id.* at 6.

153. Note that Palfrey & Gasser observe that there can be risks to excessive interoperability. *See generally id.* So goes the adage, *meden agan* or *àṣejù*.

154. *Id.* at 7.

155. California Complaint, *supra* note 39, at 57.

that "fosters innovation and competition, enhances diversity, gives consumers choice, and can lead to unexpected benefits over time."[156] E-commerce intermediaries have not historically locked merchants into a single platform, nor have users been faced with high switching costs that would make moving between platforms challenging. The consequences for consumers and non-consumer stakeholders can be significant. If leaving Apple's App Store is sufficiently difficult for app developers or if advertisers have a dearth of alternate digital advertising models besides Google, then Google and Apple stakeholders are more likely to accept the status quo even when doing so is against individual and community interests. Though valuable as an e-commerce norm, there is an important overlap with antitrust jurisprudence that considers whether switching costs are significant for consumers. The concern is that significant switching costs can contribute to stakeholders accepting supra-competitive prices or lower-quality experiences while maintaining the power asymmetries between stakeholder and seller.[157]

The consequences for out-of-court processes can be all the more impactful because the power asymmetries can dissuade an e-commerce intermediary from participating unless the prospect of litigation is presented. Antitrust principles provide an additional source for generating norms in e-commerce. The priority that the Wholistic Antitrust School places on market structure dynamics, as opposed to focusing exclusively on consumer welfare, provides useful guidance for understanding inter-platform power dynamics. Both in the physical and digital world, ensuring customers and users have a viable alternative[158] in a given sector has been sacrosanct.[159] To ensure market participants have viable alternatives, antitrust articulates a norm

156. PALFREY & GASSER, *supra* note 151, at 8.

157. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 476 (1992) (discussing the consequences for "locked-in" customers).

158. But note that focusing exclusively consumer position can be problematic for online communities. *See* discussion *supra* Section II.

159. The main disagreement is whether consumer choice should be the exclusive goal of antitrust or whether the movement should consider broader market dynamics. There is no disagreement that consumer choice should at least be a consideration for antitrust enforcement. *See, e.g.*, Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 505 (2001) ("[T]he antitrust statutes can all best be explained in terms of protecting the supply of choices in the market.").

around competition.[160] As stated by FTC Chairwoman Lina Khan, a lack of competition has been connected to a "concentration of economic power that also consolidates political power."[161] In the e-commerce industry, this concentration of power presents risks not only for future innovation but importantly produces harmful externalities for e-commerce's current digital infrastructure. Khan's concern for market dynamics in e-commerce allows for both State regulation and inter-platform community regulation to elevate the significance of non-consumer stakeholders. Merchants, for instance, play an indispensable role even as antitrust regulation under the Amazon model has overlooked how merchants implicate market dynamics. An emphasis should be placed on online market structure to ensure that stakeholders interacting with an intermediary are not exploited. Key stakeholders under this market structure analysis should be dynamic, taking into consideration the context and particularities of digital communities interacting with the intermediary. For merchant-to-consumer transactions, stakeholders can include merchants, prospective customers, producers of the sold product, non-merchant advertisers, and advertising publishers. An intermediary who uses private data to compete on their own platform to the detriment of other merchants presents concerns around this norm regarding competition. In practice, Etsy workers who also sell their own products on the platform should not receive preferential treatment when compared to platform merchants who are not Etsy workers. An intermediary who forecloses the ability for stakeholders to participate in other platforms raises competition concerns.

Trust and safety also have sufficient relevancy to be considered valuable e-commerce norms. The combination of these norms was essential to e-commerce's initial use among wary users. In the absence of trust and safety, intermediaries and stakeholders interacting with e-commerce become susceptible to fraud and unresolvable disputes.[162] This is particularly problematic in a marketplace where it is common

160. *See, e.g.*, 15 U.S.C. § 13(a) (noting that antitrust law is concerned with price discrimination that "may be substantially to lessen competition or tend to create a monopoly in any line of commerce").

161. Khan, *supra* note 31, at 740.

162. eBay, for instance, viewed fraud prevention and dispute resolution as sufficiently connected for the same Trust and Safety Department to address these issues. *See* SCHMITZ & RULE, *supra* note 7, at 33.

for "most consumers [to] remain inert and uninformed regarding their contract rights."[163] Far from supplanting government initiatives, ODR's ability to promote trust and safety in e-commerce has historically complemented government initiatives.[164] In implementing ratings and reviews, intra-platform ODR has promoted trust and safety that is difficult to replicate in physical transactions. In contrast to brick-and-mortar spaces where consumers have a lack of information and experience power asymmetries,[165] e-commerce platforms use ratings and reviews to signal which merchants and customers are trustworthy and under what circumstances they have been untrustworthy. To an extent, ratings and reviews have directly undermined power asymmetries favoring merchants. In online spaces, it is common to see merchants responding to negative feedback with an explanation of how they will rectify the problem or why they are not at fault, an interaction seldom seen with historical brick-and-mortar transactions. In the e-commerce context, ongoing policies from e-commerce platforms illustrate that the squeaky-wheel conundrum[166] extends beyond online consumers to a variety of different disempowered stakeholders.

Economic impartiality, where e-commerce companies are sufficiently disinterested in transactions occurring on their platform, should also be considered an e-commerce norm. The relevancy of impartiality as a norm is not just because of the substantial historical precedent where e-commerce companies are not active marketplace actors on their own platforms. This norm is also important because

163. Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 309 (2012) (discussing empirical data showing how information asymmetries and financial limitations contribute to disempowered consumers).

164. For instance, while governments were investigating fraudulent activity during e-commerce's emergence, so too were early e-commerce companies developing online protocols to prevent fraud on their platforms. *See* Oladeji M. Tiamiyu, *The Impending Battle for the Soul of ODR*, 23 CARDOZO J. CONFLICT RESOL. 75, 81 (2022).

165. Contracting in the midst of these informational and power asymmetries has been aptly described as "effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals." Kessler, *supra* note 61, at 640.

166. *See* Schmitz, *supra* note 163, at 280 (arguing that many consumers are "silent [and] usually do not learn about or receive the same benefits" as "'squeaky wheels'—who are proactive in pursuing their needs and complaints").

recent conduct illustrates the harmful consequences when an e-commerce company is economically partial. Through the Amazon basics program, Amazon can use proprietary data to identify which products are most popular among consumers and then enter the product category. In hosting the online marketplace, the company can outcompete merchants on neither quality nor price, but merely through self-preferencing algorithms that can skew search results in their own favor. As the use of data and algorithms gains greater primacy in e-commerce, state and out-of-court regulatory initiatives will need to play a greater role in enforcing platform impartiality. This is one reason why the proposed AICO classifies as unlawful discriminatory conduct when a platform preferences their "own products, services, or lines of business over those of another business user" or "disadvantages the products, services, or lines of business of another business user relative to the covered platform operator's own products, services, or lines of business."[167] While Amazon exemplifies the risks when this norm is violated, it is important to note that in the absence of accountability mechanisms, other e-commerce platforms have substantial incentives to implement policies that undermine economic impartiality. In the sub-sector of app stores, the Department of Justice has considered pursuing antitrust enforcement under similar grounds, as Google and Apple have preferred their own app products allegedly at the expense of other app developers who use their platforms.[168] Moreover, a lack of impartiality has emboldened app store intermediaries to create walled gardens that extract large sums from app developers.[169] Under Apple's Developer Program Licensing Agreement, for instance, Apple can extract thirty percent of revenue

167. American Innovation and Choice Online Act, H.R. 3816, 117th Cong. § 2(a) (2021).

168. *See* Aaron Tilley et al., *U.S. Escalates Apple Probe, Looks to Involve Antitrust Chief*, WALL ST. J. (Feb. 15, 2023, 3:18 PM), https://www.wsj.com/articles/u-s-escalates-apple-probe-looks-to-involve-antitrust-chief-2fa86ddf.

169. Note that there are a variety of different lawsuits, some unsuccessful and others pending, challenging either Apple or Google for anticompetitive conduct. *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Sues Apple for Monopolizing Smartphone Markets (Mar. 21, 2024), https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets.

app developers generate, in addition to a $99 flat fee.[170] This compounds the issue previously raised around interoperability and high switching costs, as the problem is not merely an intermediary being emboldened to charge supra-competitive prices.

In the absence of impartiality, an e-commerce company can be incentivized to influence an online process in a manner harmful to consumers and non-consumer stakeholders. This can be seen with algorithms that preference a platform's own products, as seen with Amazon Basics, or with Google's digital advertising that provides ROLOs to advertisers using the company's ad exchange to the detriment of advertisers using header bidding. When economic impartiality is compromised, consumers are worse off because these algorithms, among other tools, can increase the difficulty in finding products and services that are better quality or lower priced. Meanwhile, in Amazon's case, merchants are forced to compete against a competitor who owns the platform, uses proprietary data to gain insights into consumer preferences, and unilaterally controls how products are presented to consumers. When stakeholders are not given the opportunity to challenge a norm like economic impartiality in out-of-court processes, it is easy for the platform to maintain the pre-existing power asymmetries and entrench a norm that disempowers counterparties. Harmful ongoing platform policies illustrate that the burden to demonstrate trustworthiness is shifting from merchants and toward platforms. Despite implementing policies detrimental to non-consumer stakeholders, for instance, Amazon has previously used contracts of adhesion and mandatory arbitration to limit their level of

170. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 968 (9th Cir. 2023) (discussing the trade-offs between the large ongoing fees and the benefits of having access to Apple's large customer base)

accountability[171] to consumers and non-consumer stakeholders alike.[172] Contracts of adhesion can be one signal that market power is being exercised by showing a "special ability . . . to force [a contracting partner] to do something that he would not do in a competitive market."[173]

Attention should be placed on inter-platform structures that can promote transparency and accountability, both of which are inseparable from trust and safety. The modern struggle in e-commerce is that distinct stakeholder groups remain inert while platforms employ tools that limit recourse and accountability. For instance, one merchant under oath before Congress said that "[i]t would be commercial suicide to be in Amazon's crosshairs . . . . If Amazon saw us criticizing, I have no doubt they would remove our access and destroy our business."[174] While the brick-and-mortar squeaky wheel can be successful in actively pursuing their needs and complaints, the power asymmetries with e-commerce platforms show that those stakeholders who are not inert can fear experiencing or actually experience direct negative

171. To avoid a simplistic narrative, Amazon does seek input from non-consumer stakeholders. There are, however, limited tools that incentivize Amazon and other gatekeepers to implement policies informed by this input, strengthening the need for inter-platform ODR. To illustrate this lack of accountability, Amazon previously sought input from Bernie Thompson, a former Microsoft software developer and a leading e-commerce merchant, who described his "nightmare" scenario—Amazon removing his highest-rated product with positive customer reviews. Weise, *supra* note 140. Shortly after his presentation, Amazon conjured his nightmare scenario with limited recourse. *Id.*

172. The Online Merchants Guild has previously stated that "[t]hrough arbitration, Amazon knows it holds all the cards, and in many ways has the final say whenever there is a dispute." STAFF OF SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 229 (COMM. PRINT 2020) [hereinafter DIGITAL MARKETS INVESTIGATION] (internal citation omitted). The result is limited use of arbitration and, consequentially, limited recourse: "Between 2014 and 2019, even as the number of Amazon sellers continued to grow by hundreds of thousands per year, only 163 sellers and 16 vendors initiated arbitration proceedings." *Id.*

173. *Epic Games, Inc.*, 67 F.4th at 982 (alterations in original) (quoting Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–14 (1984), *overruled on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc. 547 U.S. 28 (2006)).

174. DIGITAL MARKETS INVESTIGATION, *supra* note 172, at 59 (alterations in original) (internal citation omitted).

consequences, as seen with Amazon. Rather than promoting trust, stakeholders interacting with e-commerce platforms are increasingly incentivized to be distrustful and inert in pursuing their interests. It is the absence of accountability that compounds the modern struggle. Yet, ODR tools that have been successful in promoting intra-platform trust and safety have been surprisingly absent from inter-platform considerations, despite the clear need for their development. ODR tools, such as upgraded ratings and review systems, can provide an outlet for stakeholders to express the shortcomings in a platform's policies while also providing notice to prospective users of that platform. With Google's misrepresentation in digital ad auction, publishers and advertisers need not be destined to remain inert. Even if the policy continues in the short run, ODR tools such as a ratings and review system could empower these stakeholders to inform others in a way that creates accountability and ultimately restores trust in the marketplace. The greatest antidote to stakeholder inertia is information and communication.

B. ODR's Role in Enforcing Norms

When developing a regulatory framework, particularly with non-state oversight,[175] the question of enforcement should attract considerable attention. Even when norms strengthen marketplace dynamics in the abstract, the inability to enforce those norms can make a system impractical. ODR has served as a valuable enforcement tool for individual e-commerce platforms and, increasingly, for state actors.[176] As aspects of the digital infrastructure of e-commerce are compromised and government regulation shows its limitations, the next era of ODR can and should be one that reinvigorates trust and safety on an inter-platform basis. This can occur within a context where federal and state regulatory institutions have, in recent history,

175. Even for nation-states, the question of enforcement can be complex. Challenges to enforcing *Brown v. Board of Education* led to a political flashpoint with the Little Rock Nine, attracting considerable domestic and international attention. *See* Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. Cal. L. Rev. 1641, 1679-1683 (1997).

176. *See, e.g.*, DUNCAN CLARK, ALIBABA: THE HOUSE THAT JACK MA BUILT 6 (2016) (discussing the importance of thousands of *xiaoer*, Alibaba's client service managers, who are deployed to mediate disputes between customers and merchants).

recognized the complexities of regulating digital markets and looked for non-governmental partners.[177] Just as a judge mindful of fitting the forum to the fuss[178] can direct parties to a mediator for out-of-court settlement, ODR enforcement can complement the judiciary by providing a forum that is responsive to the nature of how communities exist in online spaces. Courts have had a "longstanding policy of encouraging vigorous private enforcement of . . . antitrust laws,"[179] and in recent history, ODR has sought to expand private dispute resolution that can complement court action. What is needed in resuscitating the promise of e-commerce is not only broadening who qualifies as "private attorneys general," as the Wholistic Antitrust School suggests,[180] but also private mediators and facilitators who can strengthen in-court and out-of-court private enforcement of antitrust. Using ODR for inter-platform regulatory initiatives is helpful because ODR (1) matches the nature of e-commerce transactions based on a lack of territoriality and efficiency; (2) is responsive to e-commerce's community participation ethos; (3) addresses the low amount-in-controversy collective action problem; and (4) has been developed to address structural risks to trust and safety.

A core concern for early internet scholars was how to enforce norms in cyberspace when nation-state "[l]aw-making sovereignty . . . is defined . . . by control over a physical territory"[181] while e-commerce's full promise "ignore[s] the existence of [geographical] boundaries altogether."[182] The answer to this territoriality challenge

177. *See* FED. TRADE COMM'N, ANTICIPATING THE 21ST CENTURY: CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE, VOLUME I, at 6–7 (1996).

178. Frank Sander articulated this principle in recognition that the context and particularities of disputes should influence the form of dispute resolution process that is used, as opposed to applying a homogenous process for a broad category of disputes. Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 66 (1994). *But see* Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1627 (1997) (arguing that Maurice Rosenberg was the first to coin this term, though the ADR field has focused more on Sander's use of the term).

179. Ill. Brick Co. v. Illinois, 431 U.S. 720, 745 (1977).

180. *Id.* at 746.

181. David Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 158 (1996).

182. *Id.* at 159.

has been for e-commerce platforms to develop independent ODR systems to resolve intra-platform conflicts.[183] As e-commerce has allowed parties to transact with one another regardless of their physical presence, so too has ODR untethered dispute resolution processes from physical presence.[184] Just as e-commerce has reduced logistical barriers in order to enable individuals to transact with greater ease,[185] so too has ODR's lack of territoriality allowed a wider group of dispute resolution practitioners to respond to disputes with greater efficiency.[186] ODR has responded to intra-platform disputes in a manner that does not preclude stakeholders from pursuing litigation or arbitration. Instead, intra-platform ODR has complemented other adjudicatory processes as disputants can choose which processes meet the needs of their dispute.[187] For instance, an individual merchant wanting to maintain positive platform ratings, but who is accused of delivering the wrong product, can pursue recourse through a platform's ODR protocol while in other instances a platform receiving complaints of counterfeit goods can pursue litigation to address systemic concerns.[188] Today, platforms commonly have their own internal protocol for how to resolve platform-specific disputes irrespective of an individual's location. Thinking of enforcement as untethered from physical location allows for a more representative form of

183. *See, e.g.*, Katsh et al., *supra* note 142, at 709 (discussing eBay's first pilot ODR program).

184. *See id.* at 732–33.

185. *E.g.*, Amazon logistical successes such as same-day delivery and drones.

186. By way of analogy, one scholar has compared ODR's potential impact on the justice system with electric vehicles relative to the internal combustion engine. Norman W. Spaulding, *Online Dispute Resolution and the End of Adversarial Justice?*, *in* LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE 284 (David Freeman Engstrom ed., 2023).

187. *See generally* Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 42 (2002) (discussing process pluralism).

188. *See, e.g.*, Arjun Kharpal, *Alibaba Sues Sellers of Counterfeit Goods for the First Time After It Was Blacklisted by the US*, CNBC (Jan. 4, 2017, 8:11 AM), https://www.cnbc.com/2017/01/04/alibaba-sues-sellers-of-counterfeit-goods-for-the-first-time-after-it-was-blacklisted-by-the-us.html#:~:text=Tech%20Transformers-,Alibaba%20sues%20sellers%20of%20counterfeit%20goods%20for%20the%20first%20time,was%20blacklisted%20by%20the%20US&text=is%20taking%20the%20fight%20to,government%20for%20hosting%20fake%20items.

accountability. Yet actions from one platform can have consequences for stakeholders on other platforms and for the e-commerce industry broadly. Having an enforcement mechanism, like ODR, that is territory-agnostic, can be a powerful tool for inter-platform community regulation as it complements state regulatory initiatives.

Continuing with the salsa dance example,[189] Amazon compelling a merchant to sell salsa memorabilia for a lower price on its platform than any other will have immediate consequences for a variety of different stakeholders. Other platforms may likely fear that fewer consumers will utilize their platform if Amazon is guaranteed to have lower prices. Salsa merchants, assuming that the majority of consumers care only about the lowest prices, may withhold offerings from other e-commerce platforms. Salsa advertisers who are indifferent to what the platform is so long as the platform attracts the most salsa enthusiasts may reallocate their advertisement budget to Amazon and away from other e-commerce platforms. Each of these stakeholders is just as likely to be within the U.S. as they are to be in Colombia, Cabo Verde, or a different jurisdiction. Reminiscent of the Cosmopolitan ethos, territoriality's "motionless demarcations frozen in time and space" loses sight of how this community interacts.[190] Among what unites them is their enthusiasm for salsa and wanting to experience competition in the salsa memorabilia market that gives each group some degree of optionality. ODR systems allow for a greater degree of community engagement without requiring physical demarcations.

Reducing an emphasis on territoriality allows for community participation to play a more central role in ODR's enforcement capacity. Indeed, e-commerce's lack of territoriality has both implicitly and explicitly influenced stakeholders to develop novel conceptions of community based on shared interests. Community participation has been recognized as among the earliest sources of enforcement power in e-commerce.[191] This recognition came at the turn of the 20th century when platforms were less intertwined, and trust and safety considerations were viewed from an intra-platform perspective. Yet

189. *See* discussion *supra* Section IV.A.

190. *See supra* note 145 and accompanying text.

191. *See, e.g.*, Katsh et al., *supra* note 142, at 727 ("The disputants' relationship to this marketplace can . . . often serve as a substitute for the coercive power of the state.").

with the growth of e-commerce, inter-platform connections increasingly form the basis of online communities. E-commerce communities form based on shared interests rather than being digitally isolated within a specific platform. For the purposes of community regulation, ODR can be responsive to the modern nature of communities, bringing together oversight actors based on participation in a particular community irrespective of their digital or physical location. Despite the excessively narrow standing rule developed in *Illinois Brick*, even that Court recognized that "the purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."[192] Over the years, examples abound of how a platform's decision can have direct consequences for stakeholders interacting with other e-commerce platforms. For instance, with Amazon instituting a constructive price floor for products, merchants on their platform and other platforms reduce or eliminate discounting entirely.[193] Community members, including merchants and customers on other platforms, who interact frequently with a category of products can be detrimentally impacted by Amazon's pricing decision. Based on their community participation, allowing stakeholders to question whether an e-commerce norm has been undermined using an ODR process can strengthen trust in marketplace dynamics.

As a field, ODR emerged from a context where e-commerce platforms were grappling with disputes involving a small amount in controversy.[194] There was a recognition that e-commerce relies upon different stakeholders having access to efficient and accessible dispute-resolution processes. Though individually small, the collective value of intra-platform disputes presented a systemic challenge for platform system designers. The inter-platform need for ODR is similar. Modern e-commerce disputes that raise concerns for inter-platform norms often involve a small amount in controversy while presenting systemic challenges for a wider community. Amazon's merchant-mandated

192. Ill. Brick Co. v. Illinois, 431 U.S. 720, 755 (1977) (quoting Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968)).

193. California Complaint, *supra* note 39, at 5.

194. *See, e.g.*, Louis F. Del Duca et al., *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. ON ARB. & MEDIATION 204, 210–14 (2014).

pricing practice previously discussed in Section II, subsection C, may impact individual merchants and individual transactions by only a few dollars. By consequence, the time and financial motivation for an individual merchant to pursue legal action can be hard to justify when the individual amount-in-controversy is low. Collectively, however, Amazon's practice can have financial consequences exceeding millions of dollars for stakeholders across multiple platforms. Similar to how ODR addressed the collective-action problem for intra-platform disputes,[195] the field can also play a valuable role for inter-platform disputes. Giving an online forum for different stakeholders to articulate norm violations can empower stakeholders who may not have legal standing or who are concerned with the time and resources courts require. Meanwhile, platforms can see ODR community regulation as an opportunity to strengthen trust in their platforms while being responsive to the perspective of different stakeholders. These are some of the variables that contributed to the creation of ODR for intra-platform dispute resolution.

An additional benefit of using ODR is that the field has historically developed a trust and safety framework that is directly relevant to inter-platform self-regulatory initiatives. In the early moments of e-commerce, intermediaries recognized the hesitation merchants and buyers could have when counterparties were not easily identifiable.[196] E-commerce platforms needed numerous stakeholders, not exclusively consumers, to trust that internal protocols could sufficiently address disputes that arose. To foster trust, platforms created somewhat streamlined processes that allowed individual stakeholders to raise concerns, sometimes with a third-party neutral and other times with an automated process more akin to a "fourth party." eBay identified that users who were able to efficiently resolve their disputes using their ODR platform would increase their transactional activity on the platform, likely because reliability in the dispute

195. Katsh et al., *supra* note 142, at 727 (discussing initial benefits for individual platforms to have their own ODR system).

196. But note that from the beginning of e-commerce, stakeholders also had concerns about how platforms would be accountable. It is estimated that platforms lost more than $2 billion in revenue in 1999 due to a lack of trust about how platforms would use their personal data. FED. TRADE COMM'N, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE: A REPORT TO CONGRESS 2 (2000).

resolution process fostered trust for the platform's digital infrastructure.[197] Developing streamlined processes for stakeholders to raise concerns regarding norms across platforms would provide valuable oversight of platforms.

Intermediaries were also historically intentional in exploring methods that promoted clarity and transparency to reduce the likelihood of a future dispute arising. While ubiquitous today, the creation of rating and review systems had a profound impact in early e-commerce days, demonstrating the credibility and trustworthiness of users. The success of these systems depended on the extent the threat of social sanctions would alter behaviors.[198] Decreasing the incentive for a merchant to deliver non-conforming goods, for instance, depended on whether the threat of a bad review would reduce the likelihood that future consumers transact with the merchant acting in bad faith. If the threat of social sanction was weak, leading to future consumers ignoring the ratings and review system, then a bad actor merchant could deliver non-conforming goods with greater frequency. Fortunately, e-commerce platforms have had considerable success with ratings and reviews, allowing users and platforms to take corrective action when a merchant or consumer is receiving frequent bad reviews. Applying a modified trust and safety framework that provides accountability when a platform violates community norms would promote accountability in a concrete way. Some ODR scholars discussing enforcement of ODR decisions have even called for the creation of "trustmarks," where stakeholders and the general public could see whether parties in a dispute have complied with ODR decisions based on the existence of trustmarks.[199] State actors encouraged these self-regulatory initiatives, recognizing that the principles being developed and monitoring practices were valuable without requiring government intervention.[200]

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197. Pablo Cortés & Fernando Esteban de la Rosa, *Building a Global Redress System for Low-Value Cross-Border Disputes*, 62 INT'L & COMPAR. L. Q. 407, 422 (2013).

198. *See* Carbonara, *supra* note 92, at 468. Carbonara describes the fear of social sanction as one of the leading reasons why individuals conform to a norm, even though social norms may "require some individuals to bear costs or forgo benefits." *Id.* In this sense, social sanction can and should deprive e-commerce platforms of certain benefits obtained through policies that undermine e-commerce norms. *Id.*

199. *Id.*

200. *See* FED. TRADE COMM'N, *supra* note 196, at 1–5 (2000).

Online privacy seal programs were implemented early with e-commerce as a form of community regulation to address concerns that platforms were not being sufficiently diligent in implementing standard data privacy practices.[201] Similarly, an e-commerce platform violating community norms could have a trustmark withheld, while granted only upon altering platform policies that were found to be in violation of community norms. This would provide a clear, public signal regarding the extent the platform can be considered a trustworthy digital *locus* and marketplace.[202] As such, platform signaling can be seen as advancing an ethical consumption framework that prioritizes consumption as "an economic space where consumers buy products that have added social or environmental value above other competing purchase options."[203] Ranging from the fair-trade movement to the Better Business Bureau and Trustmark, there are a variety of non-governmental approaches that can provide support for enforcing ODR decisions. Today, the opportunity for ODR is to promote trust and safety on a systemic basis for e-commerce's digital infrastructure. Recognizing that trust and safety have inter-platform considerations, similar to what the Wholistic Antitrust School has argued, allows for ODR to engage with more systemic considerations.

C. ODR Guidance for Inter-Platform Processes

Taking guidance from intra-platform ODR processes can also provide guidance for ODR's evolution into inter-platform processes. The United Nations Commission on International Trade Law ("UNCITRAL") has previously provided guidance on standardization initiatives in ODR.[204] Sixty UNCITRAL member states and other non-

201. *Id.* at 6–7. This form of community regulation was viewed positively from government agencies as an "efficient way to alert consumers to [platforms'] information practices." *Id.* at 6.

202. This is similar to the fair-trade movement's use of labeling as both place greater priority on ethical, mindful consumption in order to escape myopic focus on cost savings and elevate what some describe as the "economics of virtue." *See* Alex Nicholls, *Fair Trade: Towards an Economics of Virtue*, 92 J. BUS. ETHICS 241, 249–50 (2010).

203. *Id.* at 246.

204. U.N. Comm'n on Int'l Trade L., UNCITRAL Technical Notes on Online Dispute Resolution, U.N. Doc. 71/138 (2017), https://uncitral.un.org/sites/uncitral.un.org/files/media-

member states developed non-binding recommendations for ODR in response to "the sharp increase of online cross-border transactions and the parallel need for mechanisms for resolving disputes arising from such transactions."[205] UNCITRAL provides two stages where a claimant can interact directly with a respondent. First with direct negotiations then, if unsuccessful, through facilitated settlements. For inter-platform community regulation, ODR could provide stakeholders adversely impacted by an e-commerce platform's policies with a forum to have multi-party negotiations directly with platform representatives. This process could also provide the online community, irrespective of their physical location, with more insights into how different stakeholders are impacted by a platform's decision-making. Stakeholders who may not have legal standing to commence private antitrust enforcement would have an opportunity to be heard through an out-of-court ODR process. Platforms that want to improve their policies and promote vibrant online communities would also benefit from complaints raised in negotiations. If multi-party negotiations are unsuccessful, UNCITRAL calls for facilitated settlements with "a neutral [who] is appointed and communicates with the parties to try to achieve a settlement."[206] Considering the complexities of how an e-commerce platform's policies can impact different stakeholders, there could be multiple neutrals involved in the facilitation process. eBay's Community Court has previously recruited neutrals who are stakeholders in an online community yet not involved in particular transactions as they would have heightened awareness for what is reasonable and care about the longevity of the community.[207] Through direct negotiations between affected community members with careful attention to digital norms that have evolved in recent history, ODR as an enforcement mechanism can resuscitate e-commerce's transnational promise.

Much of the commentary related to UNCITRAL's ODR proposals have focused on intra-platform disputes, specifically the

documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf. [hereinafter UNCITRAL Technical Notes]

205. *Id.* at iii.

206. *Id.* at 6.

207. Colin Rule & Chittu Nagarajan, *Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of Online Dispute Resolution*, ACRESOLUTION, Winter 2010, at 6.

classical low-value, high-volume disputes involving merchants and consumers.[208] To be sure, UNCITRAL's last ODR proposals came in 2016,[209] a time when there was less awareness about how an e-commerce platform's policies can have harmful cross-platform consequences. As such, the United Nations previously focused on intra-platform disputes involving business-to-business and business-to-customer transactions.[210] ODR literature is steeped with scholars focused on addressing intra-platform disputes. Yet recent years have shown how an e-commerce platform's policy change can have inter-platform consequences for a variety of different stakeholders. So much so that federal agencies and a bipartisan coalition of state attorney generals, long steeped in myopic focus on a narrow interpretation of consumer welfare, have been willing to adopt a holistic approach to analyze marketplace dynamics in e-commerce.

For out-of-court ODR processes, the same concerns that motivated the United Nations and e-commerce platforms to design intra-platform dispute resolution mechanisms can be applied to inter-platform contexts. Amazon's "Fair Pricing Policy," as state attorney generals have argued, creates an artificial price floor that impacts merchants and consumers interacting on Amazon and non-Amazon e-commerce platforms.[211] For an individual merchant, the mandated policy can be low value because the difference can be only a few dollars. Moreover, the policy is high volume by definition because it impacts a substantial number of merchants transacting in large quantities of goods. Yet mobilizing harmed stakeholders who are geographically diffused for a matter that costs them a small amount of money has inherent challenges. Mobilizing harmed stakeholders is even more challenging when there are current power asymmetries between non-consumer stakeholders and e-commerce platforms, providing incentives for stakeholders to acquiesce. Platform stakeholders have described "platforms as having arbitrary and

208. *See, e.g.*, U. N. Comm'n on Int'l Trade L., Working Grp. III, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions, Submission by Colombia and the United States of America, Note by the Secretariat, U.N. Doc. A/AC.105/1067, at 5 (Nov. 30, 2015).

209. *Online Dispute Resolution*, U.N. COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/onlinedispute (last visited Mar. 21, 2024).

210. UNCITRAL Technical Notes, *supra* note 202, at 3.

211. California Complaint, *supra* note 39, at 57

unaccountable power" where "[a] single tweak of an algorithm, intentional or not, could cause significant costs if not financial disaster—*with little recourse*."[212] Inter-platform community regulation that reaches resolutions for low-value, high-volume disputes applies with inter-platform community regulation.

V. CONCLUSION

Online communities are dynamic and fluid. There continue to be disputes involving e-commerce platforms that slip through the regulatory cracks. This leakage could be because stakeholders do not have legal standing or because state enforcement prioritizes consumer welfare to the exclusion of other important stakeholders. Yet there are more practical considerations that also made ODR valuable for intra-platform disputes. The time and costs of litigation may be prohibitive for geographically diffused stakeholders. From another perspective, some litigants may have the time and financial flexibility to pursue these unique e-commerce claims even as most parties who are harmed can be overlooked.[213] As previously discussed, Google's manipulation of digital ad auctions may cost advertisers and publishers a few dollars per transaction. Amazon's market dominance empowers them to have unique, data-based insights into their customers while engaging in merchants on their platform and other platforms.[214] Stakeholders in online marketplaces can be diffused across different continents, so determining other parties' physical identities may be sufficiently challenging to justify ignoring the initial norm violation. Meanwhile, relying on government regulation can be slow; by the time regulatory action commences, an e-commerce company's norm violation may already be entrenched or have eliminated viable competitors. The key to e-commerce's longevity will be to find mechanisms that enable online marketplace stakeholders to hold e-commerce intermediaries accountable proactively. ODR can be responsive as a forum that

212. DIGITAL MARKETS INVESTIGATION, *supra* note 172, at 59 (emphasis added).

213. *See* Schmitz, *supra* note 163, at 307–08 (discussing how the informed 'squeaky wheels'—the minority of groups possessing informational and financial resources—can enforce contractual violations while the underinformed majority are subjected to harmful marketplace dynamics).

214. *See* Jindal et al., *supra* note 25, at 271.

recognizes the dynamic nature of online communities while also evading territorial complexity.