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ABSTRACT

Big Tech (Amazon, Apple, Facebook, and Google) is under regulatory assault. Cases have been brought against each of these companies in multiple countries around the world, but there is an emerging consensus that more needs to be done – most likely in the form of ex ante regulation that prescribes rules of conduct for dominant information platforms. The European Union and the United Kingdom are well on the way to establishing such frameworks, and the United States appears poised to undertake similar measures in the coming years. Most of the debate has focused on the case for ex ante regulation of Big Tech, with much less attention to the complexities of developing and implementing such regulation.

This is not the first time that regulators have sought to use ex ante regulation to govern a technologically dynamic sector of the economy. In 2003, the U.S. Federal Trade Commission (FTC) promulgated its Do-Not-Call (DNC) Rule, which allows individuals to block unsolicited commercial telephone calls by enrolling in a national registry. The DNC Rule provides a useful case study of the complexities of developing and implementing ex ante regulation of a dynamic industry in the face of substantial legal, technological, and political risks. We identify a series of lessons for those now seeking to use similar strategies to regulate Big Tech.

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LESSONS FROM DO NOT CALL

I. INTRODUCTION

Until quite recently, Big Tech (i.e., Amazon, Apple, Facebook, and Google) was popular. These companies came from humble beginnings, but each became paragons of the new Internet-based economy.[2] Waves of adulation from academics, journalists, and elected officials swept over the firms and their founders.[3]

In recent years, apprehension and hostility have replaced awe and admiration. Big Tech is under regulatory assault; governments around the world have brought cases against all of these companies, alleging a wide array of misdeeds, ranging from "abuse of dominance" to privacy violations, disseminating hate speech and misinformation, and promoting insurrection.[4] Demands for further government intervention are pervasive -- reflecting the perception that truly effective regulatory control requires new or upgraded enforcers and policy instruments. Many of the resulting reform measures rely on the use of ex ante rulemaking to prescribe conduct rules for dominant information services platforms. The European Union and the United Kingdom are in the midst of establishing such ex ante regulatory mechanisms, and the United States seems poised to follow suit.

To date, most of the debate has focused on the case for (and against) regulating Big Tech, with much less attention to the complexities of developing and implementing ex ante regulation.[5] But there is an extensive

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[2] Amazon and Apple were started in garages. Facebook and Google took shape in university dorm rooms.

[3] *See* section II, *infra.*

[4] Id.

[5] We address the complexities of implementation in a series of articles, including: David A. Hyman & William E. Kovacic, *State Enforcement in a Polycentric World,* 2019 B.Y.U. L. Rev. 1447; David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What*, 29 Ford. Intell. Prop. Media & Ent. L.J. 1117 (2018); David A. Hyman & William E. Kovacic, *Consume or Invest? What Do/Should Agency Leaders Maximize,* 91 Wash. L. Rev. 295 (2016); William E. Kovacic & David A. Hyman, *Regulatory Leveraging: Problem of Solution?* 23 Geo. Mason. L. Rev. 1163 (2016); David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics,* 83 Geo. Wash. L. Rev. 1948 (2015); David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law,* 81 Fordham L. Rev. 2163 (2013); David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance,* 82 Geo. Wash. L. Rev. 1446 (2014); David A. Hyman & William E. Kovacic, *Competition Agency Design: What's On the Menu,* 8 EUROPEAN COMPETITION L. J. 527 (2012)

list of questions that must be asked and answered correctly if ex ante regulation is to fulfill its promise. For starters, which of the problems with Big Tech that people are complaining about are (and are not) solvable with ex ante regulation? How can regulators acquire the knowledge needed to diagnose these problems correctly and devise appropriate cures? How does the certainty of continuing commercial dynamism affect regulatory design and implementation? What information should be gathered to evaluate whether the regulations are working as intended? How should the regulators go about minimizing the sum of decision costs and error costs, and how should they make trade-offs between these two types of costs?

History provides a useful touchstone for evaluating answers to these questions. Almost twenty years ago, the FTC issued the Telemarketing Sales Rule, generally known as the "Do-Not-Call Rule" (DNC Rule).[6] The DNC Rule allows individuals to block unsolicited commercial telephone calls by enrolling in a national registry administered by the FTC. Drawing on public records and our own recollections,[7] we provide insight into how a relatively small federal agency enjoyed considerable success in protecting the nation's "dinner hour" from unwanted calls.[8] The FTC's experiences while developing and implementing the DNC Rule provide a useful case study of the challenges that are likely to be encountered when agencies seek to regulate Big Tech through ex ante rulemaking.

In Part II, we describe the still-evolving campaign to regulate Big Tech. In Part III, we trace the history of the DNC Rule. In Part IV, we highlight six challenges the FTC had to navigate in designing and launching the DNC Rule. In Part V, we focus on three post-launch implementation challenges. In Part VI we draw six lessons for the campaign to regulate Big Tech with ex ante rulemaking. Part VII identifies barriers to incorporating these lessons into the regulatory process. Part VIII concludes.

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[6] Telemarketing Sales Rule: Final Rule, 16 C.F.R. 310 (2003).

[7] Our interest in the DNC Rule is not merely academic or professional. Both of us were present in the General Counsel's Office of the FTC when the agency created the DNC Rule. We observed firsthand the difficulties associated with attempting to cross the distance between the formulation of a good idea and its successful implementation in practice.

[8] *A Conversation with Tim Muris and Bob Pitofsky*, FTC 90th Anniversary Celebration at 174, https://www.ftc.gov/sites/default/files/documents/public_events/ftc-90th-anniversary-symposium/040922transcript003.pdf ("Someone wrote my obituary while I was chairman and said that they were going to put on my gravestone that I had protected the dinner hour, which is fine. I don't mind that, although I don't think much about what's going to be on my tombstone. Obviously in the general world, my tenure will be most known for Do Not Call.")

II. REGULATING BIG TECH: FROM HANDS-OFF TO EX ANTE RULEMAKING

In roughly twenty years, the focal points of modern debates about Big Tech (Amazon, Apple, Google, and Facebook) achieved extraordinary commercial success and became objects of admiration.[9] From the early 2010s forward, this began to change with the emergence of a massive new literature, in scholarly circles and popular commentary, that decried a failure of antitrust and other government policies to arrest dangerous increases in economic concentration.[10] Though not the only targets of criticism, Big Tech has served as an exemplar of what had gone wrong.[11]

Modern discussions about Big Tech and competition policy have featured three competing visions for competition policy.[12] One vision favors the use of existing policy tools to undertake a major expansion of antitrust enforcement, including stronger controls upon mergers and dominant firm

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[9] Amazon was formed in 1994, Google in 1998, and Facebook in 2004. Apple was established in 1976 but recast itself in the early 2000s with the introduction of portable devices (the IPod, IPad, and IPhone).

[10] The avalanche of literature includes Josh Hawley, THE TYRANNY OF BIG TECH (2021); Amy Klobuchar, Antitrust (2021); David Dayen, MONOPOLIZED – LIFE IN THE AGE OF CORPORATE POWER (2020) ; Thom Hartmann, THE HIDDEN HISTORY OF MONOPOLIES – HOW BIG BUSINESS DESTROYED THE AMERICAN DREAM (2020); Sally Hubbard, MONOPOLIES SUCK – 7 WAYS BIG CORPORATIONS RULE YOUR LIFE AND HOW TO TAKE BACK CONTROL (2020); Barry C. Lynn, LIBERTY FROM ALL MASTERS – THE NEW AMERICAN AUTOCRACY VS. THE WILL OF THE PEOPLE (2020); Michelle Meagher, COMPETITION IS KILLING US (2020); Robert Reich, THE SYSTEM—WHO RIGGED IT, HOW WE CAN FIX IT (2020); Binyamin Applebaum, THE ECONOMISTS' HOUR—HOW THE FALSE PROPHETS OF FREE MARKETS FRACTURED OUR SOCIETY (2019); Maurice E. Stucke & Ariel Ezrachi, COMPETITION OVERDOSE—HOW FREE MARKET MYTHOLOGY TRANSFORMED US CITIZEN KINGS TO MARKET SERVANTS (2019); Thomas Philippon, THE GREAT REVERSAL – HOW AMERICA GAVE UP ON FREE MARKETS (2019); Zephyr Teachout, BREAK 'EM UP – RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020); Matt Stoller, GOLIATH – THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2019)); Rana Foroohar, DON'T BE EVIL – THE CASE AGAINST BIG TECH (2019); Jonathan Tepper & Denise Hearn, THE MYTH OF CAPITALISM – MONOPOLIES AND THE DEATH OF COMPETITION (2019); Tim Wu, THE CURSE OF BIGNESS – ANTITRUST IN THE NEW GILDED AGE (2018) .

[11] See generally Subcomm. on Antitrust, Commercial & Administrative Law, House Comm. on the Judiciary, Majority Staff Report, *Investigation of Competition in Digital Markets* (2020) (hereinafter *House Judiciary Subcommittee Staff Majority Report*) (calling for an overhaul of the U.S. antitrust system, including new efforts to control large information systems technology giants).

[12] These visions are described in William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?* 35 ANTITRUST 46 (No. 3, Summer 2021) (hereinafter *Modern Transformation*).

conduct.[13] The "expansionist" vision operates within a traditional antitrust goals framework (which seeks to maximize consumer welfare), but argues for more aggressive use of existing enforcement tools by antitrust agencies, and believe several restrictive precedents should be overturned, based on recent developments in economics.[14]

The second vision involves a top-to-bottom transformation of U.S. competition policy. Often described as "New Brandeisians,"[15] transformation advocates call for a "root and branch reconstruction"[16] that would re-orient doctrine and policy based on an egalitarian vision of citizen welfare, and strive to eliminate monopoly power wherever it is found. Transformation advocates reject the consumer welfare-driven framework that has dominated antitrust since the 1980s, and argue for an approach similar the one embraced by the Supreme Court in *Brown Shoe v. United States*.[17] Members of this second group now occupy key positions in the federal government.[18]

A third vision opposes both the Expansionists and the New Brandeisians.[19] This "traditionalist" vision endorses the retreat from expansive applications of antitrust law that prevailed from the late 1930s through the early 1970s and welcomes the judiciary's adoption and application of an efficiency-oriented consumer welfare standard.[20] They defend a federal enforcement agenda that focuses mainly upon cartel agreements, large horizontal mergers, and government policies that impede new entry into markets. Any changes to current legal doctrine and contemporary enforcement policy must be justified by empirically tested economic concepts, rather than by armchair theorizing.

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[13] Jonathan B. Baker, THE ANTITRUST PARADIGM (2019); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33 (No 3, Summer 2021).

[14] Id.

[15] Lina M. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUROPEAN COMPETITION L. & PRACTICE 131 (2018).

[16] Sandeep Vaheesan, *How Robert Bork Fathered the Gilded Age*, PROMARKET BLOG (Sept. 5, 2019) ("Antitrust needs root and branch reconstruction"), at https://promarketblog.org/how-robert-bork-fathered-the-new-gilded-age/.

[17] 370 U.S. 294, 315-23, 322 n.38 (1962).

[18] Lina Khan is the chair of the FTC, Tim Wu is on the Council of Economic Advisors, and Jonathan Kanter is the Assistant Attorney General (Antitrust) for the Department of Justice. Pointing to their previous advocacy of strong regulatory intervention, Amazon, Facebook, and Google have sought, so far without success, to recuse Khan and Kanter from involvement in cases being brought against them. Laurence H. Tribe, *Google's Calls for DOJ Antitrust Head Jonathan Kanter's Recusal Are Baseless,* ProMarket, Feb. 1, 2022, https://promarket.org/2022/02/01/google-antitrust-kanter-doj-recusal-baseless-tribe/.

[19] Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L. J. 293 (2019).

[20] Id.

As Big Tech's star has fallen, both the expansionists and New Brandeisians have urged Congress to create new mechanisms to control large information services platforms. The most important of these measures would create new ex ante regulatory mechanisms that rely upon prescriptive rules to regulate large technology enterprises.[21] The enthusiasm for rulemaking reflects the view that the traditional antitrust litigation is a clumsy, time-consuming, and often ineffective device for addressing broader problems of market concentration.[22] Traditional antitrust litigation arguably has limited ability to incorporate policy considerations treated more directly in other policy domains such as privacy.[23] And, traditional antitrust often moves at a glacial pace – especially when cases challenge the conduct of large, dominant enterprises that can afford the best lawyers money can buy. Of course, this problem is not new. As long-time antitrust litigator Bruce Bromley noted in 1958, "I quickly realized in my early days at the bar that I could take the simplest antitrust case . . . and protract it for the defense almost to infinity."[24]

Even if the duration of antitrust litigation falls somewhat short of infinity, the time lag from case filing to final resolution is still quite striking. The Department of Justice (DOJ) monopolization case that was filed against Google in the Fall of 2020 in the U.S. District Court for the District of Columbia is currently scheduled to go to trial in September 2023.[25] When one adds in the high likelihood of an appeal to the D.C. Circuit, followed by an appeal to the U.S. Supreme Court, final resolution of the case is unlikely before 2026 at the earliest. In like fashion, the European Commission's monopolization cases against Google began over a decade ago and remain in litigation.[26] The EC's monopolization proceedings against Intel, commenced fifteen years ago, plod ahead in the European Union's courts, with another major decision issued in January 2022. [27]

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[21] House Subcommittee *Majority Staff Report*, supra, at 392-421; Stigler Center Committee on Digital Platforms, *Digital Platforms: Final Report* (2019).

[22] Id.

[23] Laura Alexander, *Privacy and Antitrust at the Crossroads of Big Tech* (American Antitrust Institute, Dec. 2021).

[24] Bruce Bromley, *Judicial Control of Antitrust Cases,* 23 F.R.D. 417, 417 (1958).

[25] United States v. Google LLC, Case 1:20-cv-03010 (D.D.C. Oct. 20, 2020) (original complaint); United States v. Google LLC, Scheduling and Case Management Order, Case 1:20-cv-03010 (D.D.C. Dec. 21, 2020).

[26] Google and Alphabet v. Commission (Google Shopping), Case T-612/17 (Nov. 10, 2021) (judgment of the General Court of the European Union).

[27] Intel Corp v. European Commission, Case T-286-09 BENV (Jan. 26, 2022) (judgment of the General Court of the European Union).

In contrast, many commentators believe that rulemaking offers a faster and more comprehensive solution.[28] Some proposals target particular (allegedly objectionable) practices,[29] while others seek more sweeping reforms, including no-fault liability for monopolization,[30] prohibitions on some or all acquisitions,[31] limitations on entry into certain markets,[32] and compelled divestiture and break-ups.[33]

The proposals for more extensive ex ante regulation of large information services platforms are not just academic theorizing. Multiple jurisdictions have taken steps in this direction.[34] In the United States, legislation pending before Congress would bar certain information services platforms from discriminating against firms that use their platforms.[35] The legislation authorizes the DOJ and the FTC to designate which online platforms will be subject to the non-discrimination mandate, and further authorizes both agencies to issue appropriate guidelines.[36] A recent executive order makes it clear that the Biden Administration is committed to the use of rulemaking authority to promote competition.[37]

In Europe the parliament of the European Union (EU) recently approved the Digital Markets Act (DMA) which establishes a new regulatory framework for certain "gatekeeper" information services platforms.[38] The measure borrows heavily from concepts developed in EU competition law and forbids a wide range of practices including certain forms of discrimination against third parties that use the platform.[39] The

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[28] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 CHI. L. REV. 357 (2020).

[29] Yale Tobin Center for Economic Policy, Digital Regulation Project, International coherence in digital platform regulation: an economic perspective in the US and EU proposals (Policy Discussion Paper No. 5; Aug. 6, 2021).

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] Andrew I. Gavil et al., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 67-69 (4th ed. 2022).

[35] "American Innovation and Online Choice Act, S2992. The companion bill in the House of Representatives is H.R. 3816.

[36] Id.

[37] Executive Order 14036, Promoting Competition in the American Economy (July 9, 2021), at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[38] Colin Wall & Eugenia Lostri, The European Union's Digital Markets Act: A Primer (Center for Strategic & International Studies: Feb. 8, 2022), at https://www.csis.org/analysis/european-unions-digital-markets-act-primer.

[39] Id.

DMA is expected to take effect by the end of 2022.[40] Finally, the United Kingdom is developing the foundations for a Digital Markets Unit (DMU) which will be located within its existing antitrust enforcement agency (i.e., the Competition and Markets Authority, or CMA).[41] Under the DMU regime, the CMA will develop a regulatory code for each information services platform deemed to hold a "strategic market position."[42] The precise form and timing for the roll-out of the new regime await action by the UK Parliament, which is considering where to situate the DMU proposal in its legislative agenda.[43]

We now turn to the DNC Rule, and then consider its implications for ex ante regulation of Big Tech.

II. THE DNC RULE: HISTORY AND DESIGN DETAILS

Privacy is a relatively recent addition to the FTC's policy portfolio. Congress established the FTC in 1914, but the chief foundations of the FTC's modern privacy program were created in the 1960s and early 1970s through legislation such as the Fair Credit Reporting Act.[44] In 1994, Congress expanded the Commission's authority with the Telemarketing and Consumer Fraud and Abuse Prevention Act.

By the end of the 1990s, the FTC had accumulated substantial experience with telemarketing cases. For example, the Commission had prosecuted numerous cases involving 1-900 telemarketing fraud. During the same time frame, the frequency and intrusiveness of telemarketing sales calls was dramatically increasing. A particular source of irritation was the tendency of telemarketers to place calls to households in the evening during the dinner hour.

The stimulus for the DNC Rule was the appointment of Timothy Muris as FTC Chair in 2001. Muris and Howard Beales, the Director of the FTC's Bureau of Consumer Protection, spent the second half of 2001 planning how to consolidate and extend the work the agency had carried out in the 1990s. The concept of a DNC Rule emerged from these deliberations.[45] Agency staff were well aware that many citizens objected to unwanted

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[40] Id.

[41] Competition & Markets Authority, Online Platforms and Digital Advertising – Market Study Final Report (July 1, 2020); Tobin Center, supra.

[42] Id.

[43] Gavil et al., *supra* note 34, at 68.

[44] The leading account of the history of the FTC's privacy programs is CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY (2016).

[45] Timothy J. Muris, Chairman, *Federal Trade Commission Protecting Consumers' Privacy: 2002 and Beyond* (Oct. 4, 2001) (remarks delivered at The Privacy 2001 Conference in Cleveland, Ohio).

telemarketing sales calls, since the FTC's main consumer protection data base (Consumer Sentinel), had recorded a growing volume of complaints about unsolicited sales calls. Muris and Beales also examined the efforts of a number of state governments to establish do-not-call systems of their own.[46] The two FTC officials drew upon these sources of learning to devise a mechanism to give citizens control over whether telemarketers could access their phone numbers.

The DNC Rule allowed citizens to enroll their telephone numbers in a registry which telemarketers were required to purchase. The DNC Registry was structured on an opt-in basis – a fact that became important in subsequent litigation. Telemarketers are forbidden to call numbers contained in the DNC Registry. Telemarketers must check the DNC Registry every three months to get an updated list of people who do not want to be called. Telemarketers who called people on the DNC Registry could be fined up to $11,000 for each violation. The DNC Rule excluded calls placed by charitable institutions, political fund-raising campaigns, and those that involved a pre-existing commercial relationship.

The DNC Rule was a bet-your-agency initiative. It was a bold approach to what many consumers perceived to be a serious problem. If the DNC Rule was effective, the FTC would accumulate political capital that could be spent on other projects, including controversial matters that aroused opposition from vested political interests. If, on the other hand, the DNC Rule failed, the FTC would suffer a massive reputational loss that would permanently tarnish its stature and weaken its ability to pursue the balance of its portfolio of antitrust and consumer protection programs.

III. DESIGN CHALLENGES

The development of the DNC Rule forced the FTC to confront six major challenges: assembling and sustaining the necessary team of FTC professionals; developing a new theory of harm; complying with protections for free speech; ensuring the technical feasibility and effective management of the registration system; deflecting legislative opposition; and securing needed cooperation of other government agencies (notably, the Federal Communications Commission). We address each of these challenges in turn.

[46] At the time the DNC Registry was launched in June 2003, some 36 states had established their own do-not-call laws, and 26 of these states had created their own registries. The FTC's rule did not preempt these state regimes, except to preempt state laws that were less restrictive than the FTC rule.

A. Assembling the Team

In Washington, it is widely believed that "personnel is policy."[47] The formulation of an effective DNC Rule required the FTC to assemble the right team. Muris chose one of the FTC's preeminent attorneys, Lois Greisman, to head the DNC effort. Greisman had achieved distinction as an attorney in the Bureau of Consumer Protection and in service as the Chief of Staff to two FTC chairs (Robert Pitofsky and Timothy Muris).[48] The selection of Greisman to head the DNC effort, and the assembly of a strong supporting team, reflected the agency's understanding, derived from past experience with rulemaking and litigation, that ambitious policy initiatives can succeed only if led by and carried out by truly superior personnel. To design and implement the DNC Rule, the FTC mobilized its very best resources.

Muris and Greisman also understood that the right team for the job should include engineers and other technologists. The technologists assisted at various points during the design of the DNC Rule and DNC Registry, including the selection of a vendor to run the DNC Registry, and elaboration of the registration process. This wrinkle suggests a larger point: a regulator dealing with technologically dynamic sectors is likely to find it necessary to develop its own team of technologists to understand the affected sector.

B. A New Theory of Harm

In prior consumer protection initiatives, the FTC relied on theories of harm based on unfairness or deception. Those theories were directly based on the FTC Act, which authorized it to pursue cases involving "unfair methods of competition," and "unfair or deceptive acts or practices."[49] FTC staff had plenty of experience applying these theories of harm to every form of misconduct under the sun.

However, these two classic theories of consumer harm didn't fit all that well with the DNC rule. Instead, the harm at issue consisted of unwanted

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[47] *See, e.g.,* Scot Faulkner, *Personnel is Policy,* WASH. EXAMINER, Feb. 2, 2016, https://www.washingtonexaminer.com/personnel-is-policy; David E. Lewis, *Personnel Is Policy: George W. Bush's Managerial Presidency* in PRESIDENT GEORGE W. BUSH'S INFLUENCE OVER BUREAUCRACY AND POLICY. THE EVOLVING AMERICAN PRESIDENCY SERIES (Palgrave Macmillan, New York (2009)).

[48] In December 2021, Greisman received the 2021 Presidential Rank Award given for distinguished service in the federal government's Senior Executive Service. Federal Trade Commission, Press Release, FTC's Lois C. Greisman Earns Presidential Rank Award (Dec. 17, 2021), at https://www.ftc.gov/news-events/press-releases/2021/12/ftcs-lois-c-greisman-earns-presidential-rank-award.

[49] 15 U.S.C. § 45.

intrusion into the home.[50] It would be difficult for the Commission to assert that unwanted telephone calls to the home imposed economic harm (at least in the traditional sense). Some telemarketers might have engaged in unfair or deceptive conduct, but proceeding against them missed the far larger number of telemarketing calls that were unwanted – but not unfair or deceptive.

Instead of relying on unfairness or deception, the FTC used the Telemarketing Act, which allowed it to challenge "abusive" conduct. Thus, rather than attempt to fit a square peg (unwanted telemarketing calls) into a round hole (a well-developed framework based on unfair or deceptive conduct), the FTC came up with a novel (and therefore untested) theory of harm that more closely matched the conduct in question.

C. Complying with the 1st Amendment

The 1st Amendment presented the second major challenge to the DNC Rule. At the time, it was far from clear whether the DNC Rule, which seemingly made the FTC the arbiter of whether commercial actors could speak to their desired audience, was compatible with the requirements of the 1st Amendment. To address this concern, agency staff conducted intensive internal studies and consulted external experts – including academics who advised industry opponents to the DNC Rule. These external consultations provided invaluable insight into the likely objections to be raised against the DNC Rule.[51] These same consultations also alerted the FTC that an influential legislator had decided to side with the telemarketers – despite public statements indicating his support for the FTC's DNC Rule.[52]

The FTC's conclusion that the DNC Rule would survive constitutional scrutiny rested heavily on *Rowan v. United States Post Office Department*, where the Supreme Court had upheld a Post Office policy that allowed postal customers to direct the Post Office to intercept and withhold delivery of disfavored forms of mail such as pornographic content.[53] Indeed, *Rowan*

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[50] Muris, Protecting Consumers' Privacy, *supra* note 45 ("Consumers' third concern is with practices that are unwanted intrusions in our daily lives. Unwanted phone calls disrupt our dinner, and our computers are littered with spam. There are unwanted solicitations for pornography and other products many find objectionable. Individually, the injury is relatively small, but in the aggregate the harm can be great.").

[51] One of us (Kovacic) recalls a particularly useful meeting in 2002 in which a former FTC Commissioner working for a telemarketing client arranged for a 1st Amendment scholar to review potential free speech concerns about the rule. In a careful, analytical manner, the expert identified several ways in which DNC Rule was vulnerable to challenge under the 1st Amendment.

[52] *See infra* notes 56-57, and accompanying text.

[53] 397 U.S. 728 (1970) (ruling that a vendor does not have a constitutional right to send unwanted material to an unwilling postal service addressee; upholding constitutionality of a

was the reason the FTC had structured the DNC Rule on an opt-in basis. If *Rowan* was still good law, FTC staff believed that the DNC Rule (which employed a similar opt-in to prevent intrusions into the home) would withstand legal challenge.

Of course, an opt-in approach would only work if enough consumers were sufficiently irritated by unwanted calls to go through the necessary rigamarole to enroll in the DNC registry. Based on decades of work in the consumer protection space, FTC staff were well aware that defaults mattered in how people behave – and a careful examination of the consumer complaint database convinced FTC staff that consumers were so annoyed with unsolicited sales calls that they would take the time and effort to register their phone numbers with the FTC's DNC system.[54] An opt-out approach would have avoided this problem entirely – but would have dramatically increased the vulnerability of the DNC Rule to a challenge under the 1st Amendment.

Rowan was an important precedent for defending the FTC's opt-in regime in the DNC Rule, but the outcome was hardly free from doubt. *Rowan* pre-dated *Central Hudson Gas & Electric Corp.*, in which the Supreme Court expanded the protection of commercial speech.[55] Subsequent Court decisions underscored and extended the principle of *Central Hudson* but did not confront the scenario at issue in *Rowan*. Did *Rowan* retain vitality in the face of *Central Hudson* and its progeny? Or was it no longer good law? The answer was far from clear when the FTC issued the DNC Rule.

Similar difficulties were raised by the structure of the DNC Rule, which applied to commercial actors but excluded calls placed by charitable institutions and political fund-raising campaigns. This structure was largely dictated by the political realities of the situation – but the resulting under-inclusiveness of the DNC Rule created an obvious basis for attack.

D. Ensuring Technical Feasibility

The next challenge FTC staff confronted was technical feasibility of the DNC Registry. Given the extent of broad social discontent with unwanted telemarketing calls, FTC staff believed that millions of people would sign up for the DNC Registry – with a disproportionate share coming in the first

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law authorizing postal customers to instruct the Postmaster to block delivery of posted material from specific senders).

[54] As noted previously, the DNC Registry was launched in June, 2003 – pre-dating Richard Thaler and Cass Sunstein's NUDGE by almost six years.

[55] 447 U.S. 557 (1980). The significance for FTC policymaking of Central Hudson and later Supreme Court decisions involving commercial speech is analyzed in William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy,* 72 Antitrust L.J. 943 (2005).

few days after the program was launched. Unless the FTC could deliver a smooth and glitch-free registration process that minimized user frustration, the entire initiative might blow up on the launching pad.

Implementing the DNC Registry involved a classic "make or buy" decision. FTC staff quickly concluded they should not handle the registration process in-house. Instead, FTC staff decided to contract with AT&T to handle the back-office operations of the DNC list, including the registration process. The contract with AT&T set strict performance requirements, and FTC staff worked closely with AT&T personnel on pre-implementation testing to ensure reliability. Although FTC staff believed the DNC Registry would be extremely popular, they still underestimated the rate at which people would enroll when it opened for business on June 27, 2003. So many people enrolled in the first hour that the transaction load nearly crashed the system.

In the end, careful attention by FTC staff (including in-house technologists) to the technical aspects of the DNC Registry helped ensure a successful launch of the registration process. The wisdom of the FTC's focus on this issue was validated just over a decade later, when healthcare.gov failed on launch – further inflaming the debate over the wisdom of Obamacare.

E. Legislative Opposition

The next obstacle to the DNC Rule was Congress. Many members of Congress endorsed the DNC rule with great enthusiasm. At the same time, several influential legislators (including one who publicly supported the DNC Rule) believed it would badly damage the telemarketing industry -- endangering tens of thousands of jobs.[56] Notwithstanding robust support for the rule in Congress, these opponents were formidable and one of them (i.e., Representative Billy Tauzin) occupied a gatekeeping position in the lawmaking process. When push came to shove, an attempt to deny the agency funding to implement the DNC Rule was narrowly defeated – but it was a near-run thing.[57]

[56] Though outwardly a friend of the DNC Rule, Rep. Billy Tauzin actively worked to prevent congressional approval of legislation responding to an adverse district court decision. *See infra* notes 61-62, and accompanying text. One of us (Kovacic) observed these dynamics during contemporaneous discussions with the FTC's Office of Congressional Affairs, which was working to secure passage of the necessary legislation.

[57] Given the limited time available on the legislative calendar, the advocates of a Congressional fix to the appropriations issue had a narrow window to achieve their goal. Opponents came within four hours of blocking the measure that made it clear that Congress had authorized the FTC to spend funds to carry out the DNC Rule.

F. Inter-Agency Cooperation

Acting alone, the FTC lacked the authority to implement an effective DNC regime.[58] By statute, the FTC has no jurisdiction over common carriers (including telecommunications service companies), not-for-profit enterprises, and banks.[59] Obviously, entities that fell within these categories were responsible for a significant number of telemarketing calls. A DNC Rule that excluded all of them would be woefully incomplete.

Students of public administration know that willing cooperation between different parts of the government is not a given. Departments, agencies, commissions, and bureaus all jealously guard their turf – and the question "what's in this for us/me" is likely to be top of mind when agencies are deciding whether to cooperate with another. Even when there are overlapping grants of regulatory authority, the relevant public agency actors do not routinely regard cooperation with their government counterparts as appealing, much less as a potential source of better performance.[60] Agencies may be more concerned with serving their own institutional prerogatives than achieving superior common solutions.

So, enlisting the FCC in a joint effort required the FTC to come up with a plan that would make it in the FCC's interest to join in. To motivate the FCC to adopt a rule mirroring the DNC Rule, the FTC engaged in extensive discussions with the FCC's leadership, building consensus about the gains from creating a DNC system, and the mutual benefits of policy integration across both agencies.

IV. IMPLEMENTATION CHALLENGES

The FTC spent considerable time and effort working through the design issues outlined in Part III, but it still faced three distinct post-launch implementation challenges. The first challenge involved the lawsuits brought by the telemarketing industry. The second challenge involved technological change, combined with aggressive adaptive efforts by new entrants in the telemarketing space. The third challenge involved heightened expectations among the general public and Congress. We address each in turn.

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[58] The archipelago of public institutions with responsibility for privacy protection is described in Hyman & Kovacic, *Implementing Privacy Policy*, *supra* note 5.

[59] Congress incorporated these jurisdictional limitations into the original (1914) FTC Act, and has left them in place despite dramatic change in the nature and operation of the affected sectors.

[60] Hyman & Kovacic, *Enforcement in a Polycentric World*, *supra* note 5; Hyman & Kovacic, *Why Who Does What Matters, supra* note 5.

A. Litigation

The telemarketing industry filed two lawsuits (one in federal district court in Oklahoma City, and one in federal district court in Denver) seeking to block implementation of the DNC Rule. The industry chose venues in which it could expect a sympathetic hearing: both district courts were located in the Tenth Circuit Court of Appeals, which had historically been quite skeptical of government regulatory interventions.

In both of these challenges, the plaintiffs prevailed and the federal district courts directed the FTC to stand down.[61] Taken together, the district court decisions held that the DNC Rule (a) impermissibly restricted free speech, and (b) the Commission lacked congressional authority to impose the fee collection mechanism to fund the Rule's implementation. If these positions were sustained on appeal, the DNC initiative would have come to a screeching halt.

On the day of the second adverse district court decision, Chairman Muris convened a meeting of the leadership team responsible for the implementation of the DNC Rule. One of us (Kovacic) was the agency's General Counsel and attended the meeting. The mood in the room was grim, except for Muris, who praised the team for its work to date, assumed full responsibility for the strategy and tactics employed so far, and declared his confidence in the ultimate success of the initiative.

In our view, this was leadership of the highest order. Muris rallied his team to redouble their efforts and focus on finding solutions. He instructed the congressional relations staff to work with the FTC's supporters in Congress to draft legislation to cure the perceived appropriations law deficiency. The legislature's response was immediate and wholeheartedly supportive. In three days, Congress adopted the needed measure, and President George W. Bush signed the law.[62] By way of comparison, it took Congress a full week post-9-11 to enact an Authorization for Use of Military Force (AUMF).

The second equally urgent priority was to petition for a stay of the adverse district court decisions pending appeal. Here luck played an important role. The three judges randomly assigned to the panel for the stay petition were far less hostile to the government than the Tenth Circuit as a whole. The panel granted the FTC's petition,[63] and when the same panel heard the

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[61] Mainstream Marketing Services, Inc. v. Federal Trade Commission, 283 F.Supp. 2d 1151 (D. Colo. 2003); U.S. Security v. Federal Trade Commission, 2003 WL 22203719 (W.D. Okla. Sept. 25, 2003).

[62] An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub. L. 108-82, 117 Stat. 1006 (2003).

[63] Federal Trade Commission v. Mainstream Marketing Services, Inc., 345 F.3d 850 (10th Cir. 2003) (per curiam).

dispute on the merits, the FTC prevailed.[64] The Supreme Court subsequently denied certiorari.[65]

The FTC could have easily drawn a more hostile stay panel – which would have been more representative of the views of the Tenth Circuit. If a more hostile panel had denied the stay petition, critical momentum would have been lost, and the DNC Registry might have never been launched. As this counter-factual demonstrates, one should never underestimate the role of luck in agency success (and failure).

B. Adaptive Responses

Every law and regulation triggers adaptive responses, as affected industries try to identify loopholes.[66] Technological change also provides multiple opportunities for affected firms to circumvent regulatory controls – particularly when the incentives to do so are large.[67] This means that "one and done" is never a recipe for regulatory success. Of course, design choices affect how hard it is to circumvent the regulatory prohibitions, and politics will affect enforcement. Nonetheless, the basic lesson – that regulators must remain vigilant, and change tactics when circumstances change -- remains.

After the DNC Registry was launched, the frequency of unwanted telemarketing calls dropped precipitously – although the DNC Rule's carve-outs ensured the rate would never drop to zero. But, as anyone with a cell phone can attest, the volume of unwanted calls rebounded after the emergence of robo-calling and spoofing technology.[68] After underestimating these problems for a good while, the FTC, the FCC, and the state attorneys general have sought to challenge these practices.[69] Congress has also considered (but not adopted) amendments to the Telemarketing Sales Act to forestall these avenues for circumvention.[70]

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[64] Mainstream Marketing Services, Inc. v. Federal Trade Commission, 358 F.3d 1228 (10th Cir.), cert. denied, 125 S. Ct. 47 (2004).

[65] Id.

[66] The race between competitors seeking to fix prices and antitrust agencies seeking to deter price fixing is but one example. William E. Kovacic, Robert C. Marshall & Michael J. Meurer, *Serial collusion by multi-product firms,* 6 J. Antitrust Enforcement 296 (2018).

[67] *See, e.g., The Future of Privacy: Can we safeguard our information in a high-tech, insecure world?,* Scientific American (Sept. 2008).

[68] Sarah Krouse, *Robocallers Dial Up Extra Cash,* Wall St. J., June 5, 2018, at BI.

[69] Federal Trade Commission, Prepared Statement, Abusive Robocalls and How We Can Stop Them, Before the Senate Committee on Commerce, Science, and Transportation (Apr. 18, 2018); see also Kelcee Griffis, AGs, Carriers Unite To Trace and Block Robocalls, Law360 (Aug.26, 2019), https://www.law360.com/articles/1191504/print?section=cybersecurity-privacy.

[70] Grant Gross, Congress takes on robocalls, Washington Examiner, Apr. 16, 2019, at

The FTC did prepare several reports noting that new technologies would complicate its consumer protection mission, but it failed to draw the connection between these developments and the future integrity of the DNC Rule.[71] Although the FTC has brought multiple enforcement cases, resulting in $50 million in civil penalties and $71 million in "redress or disgorgement,"[72] the rise in the number of unwanted calls has led some observers to treat the DNC Registry as a dismal failure.[73]

C. Heightened Expectations

When a regulator announces it has taken steps to address a problem, ordinary citizens and legislators expect the intervention will fix that problem.[74] This means that the regulator now "owns" the problem. The reputational and institutional rewards for the agency and for those responsible will be large if the agency succeeds – but the consequences can be severe if the agency falls short. The more salient the problem (e.g., because it deals with an important product such as gasoline that consumers

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[71] See, e.g., Federal Trade Commission, *Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission* (Dec. 2013); Federal Trade Commission, *Protecting Consumers in the Next Tech-ade* (Spring 2008).

[72] https://www.ftc.gov/news-events/media-resources/do-not-call-registry/enforcement

[73] For representative statements of this view, see Simon Van Zuylen-Wood, *Triumph of the Robo-Callers,* Wash. Post, Jan. 11, 2018, https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a_story.html; Helaine Olen, Congratulations! You Lost, Slate (May 24, 2016), https://slate.com/business/2016/05/robocalls-have-triumphed-over-the-do-not-call-list-whose-fault-is-it.html

[74] This dynamic is particularly important when the regulator is contemplating initiatives that would stretch the application of its mandate to encompass policy concerns that have not been addressed by that regulator in the past. That issue is likely to prove vexing to the Federal Reserve in the future:

> The Fed is a technocratic body that can move quickly because it operates under few political constraints. Turning to it as the first line of defense in this and future crises could compromise its institutional independence. Mr. Powell knew there were risks with the central bank's incursion into credit policy. . . .
>
> Having crossed familiar boundaries, there was a danger, he understood, that lawmakers would come to the Fed later and say, "Fix climate change" or "Use your digital printing press to finance every highway repair."

Nick Timaraos, *March 2020: How the Fed Averted Economic Disaster*, WALL ST. J., Feb. 18, 2022, https://www.wsj.com/articles/march-2020-how-the-fed-averted-economic-disaster-11645199788. *See also* Kovacic & Hyman *Regulatory Leveraging, supra* note 5.

purchase frequently), the greater the reputational damage that comes with a perceived failure to solve it.

Consider the investigations by the U.K.'s CMA of the energy and commercial banking sectors in the early 2010s. The announcement of these investigations created predictable expectations: i.e., that the CMA's intervention would reduce consumers' costs for energy and commercial banking. After an extensive investigation, the CMA imposed a targeted set of reforms to address problematic conduct that its research had uncovered.[75] However, many observers had hoped for a "big bang" package of remedies (e.g., restructuring of the entire industry -- the sort of structural relief now proposed by some Big Tech critics). The dashing of expectations led to recriminations, and charges that the CMA's approach was timid and inadequate.[76] Had expectations not been raised in the first instance, the CMA would not have been criticized for failing to deliver. One also can ask whether the CMA was unwise to initiate two highly ambitious and visible investigations at roughly the same time – in effect, starting two matters for which the failure to satisfy expectations of a dramatic "cure" posed serious reputational risks for the agency.

Of course, expectations are also influenced by evidence of performance, or the lack thereof. For some interventions, citizens have little ability to observe or evaluate the effectiveness of government agency action. If the FTC blocks a merger of two producers of an intermediate input for an industrial process, the impact of the intervention will likely be hard to detect and may be invisible. The DNC Rule is different; either the unwanted calls disappear, or they do not.

It is not just ordinary citizens whose expectations are elevated. The success of the DNC Rule resulted in dramatically raised Congressional expectations. It was as if NASA's success in getting to the Moon was immediately met with, "ok, how soon can you get us to Mars?" Influential members of Congress concluded that the FTC would be able to solve all future problems using similar strategies. Congressional pressure for "do not spam" and "do not track" was the predictable result – even though neither of those were likely to work out as Congress expected, even without taking account of technological adaptation.[77] When the FTC made it clear that "do

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[75] Competition & Markets Authority, *Retail Banking and Market Investigation -- Final Report* (Aug. 8, 2016); Competition & Markets Authority, *Energy Market Investigation – Final Report* (June 24, 2016).

[76] Jill Treanor, *Watchdog demands banking overhaul to save customers money*, THE GUARDIAN, Aug. 9, 2016; Hulya Dagdeviren, *Energy market investigation a let down for consumers paying more for power*, THE CONVERSATION, June 27, 2016.

[77] https://www.computerworld.com/article/2565578/ftc-won-t-create-do-not-spam-

not spam" and "do not track" were unlikely to work out well, Congressional disappointment was higher than it would have been in the absence of the raised expectations created by the FTC's earlier success with the DNC Rule.

V. LESSONS FOR BIG TECH RULEMAKING

The DNC Rule was successful because everything that was required (including innovative leadership, experience with rulemaking, careful preparation, partnership with the FCC, political support, and no shortage of luck in handling the resulting litigation) came together at one point in time. However, success led to heightened expectations – and technological developments created a game of regulatory Whac-A-Mole that the FTC wasn't ready to play. What are the lessons of this initiative – which was successful until it wasn't -- for the regulation of Big Tech?

A. Learn From Past Successes (And Failures)

Successful institutions (whether public or private) learn from the past. When agency leaders evaluate policy initiatives with a historical lens, they can more readily anticipate problems with their proposed strategy -- and develop solutions.[78] "Thinking in time" is a powerful tool for agency personnel who want to do better.[79] Those who hope to master "the regulatory craft" can get a head start by learning from the successes and failures of their predecessors, not just within the same agency, but also across agencies and jurisdictions.[80]

Learning from the experiences of others is even more important when a proposed initiative departs from the established models. Learning should also cover the full range of prior agency performance, ranging from run-away successes (the proverbial grand-slam) to programs that have generated mixed results (which strikes us as an accurate description of the FTC's DNC rule, viewed from the vantage point of 2022) to out-and-out failures. Agency personnel should evaluate the factors that were associated with all three of these outcomes. Did the agency lose a case because its theory was bad – or because it didn't field the right team to argue the case?[81] Did the agency have the capacity/bandwidth to optimally manage its litigation portfolio? Might the agency have done better by focusing on fewer cases and doing a better job on each of them? Did the agency lose because the court was relying on flawed empirical assumptions, and how can the agency

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[78] RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME (1987).

[79] Id. at 270.

[80] Malcolm K. Sparrow, THE REGULATORY CRAFT (2000).

[81] Kovacic & Hyman, *Consume or Invest, supra* note 5.

rebut those assumptions in the next piece of litigation? Similar questions should apply to the full range of formal rulemaking and guidance.

Viewed from this perspective, the study of partially successful and failed initiatives generates valuable insight on how to do better the next time. This is similar to the ways in which Morbidity and Mortality (M&M) rounds are a critical learning device for physicians.[82]

Although we have focused on the importance of learning from past efforts by the FTC and DOJ, it is important to recognize that many other regulators – state, federal, and foreign – may have useful insights to share. In an ideal policymaking environment, regulators within and across jurisdictions would engage in continuous cycle that consists of testing specific regulatory measures, evaluating outcomes, and making refinements based on lessons derived from the evaluation process. Cooperation ensures that individual agencies are not working in isolation but instead benefit from knowledge acquired across a wide range of institutions.

Finally, all of these considerations have particular significance when we are in the midst of a global campaign to regulate Big Tech. The regulatory mechanisms that are being developed and deployed are still under construction – meaning the entire process is inherently experimental. None of the jurisdictions pursing these measures can be confident that they have the "right" policy solution. Design variation across jurisdictions will permit the testing of alternatives and allow for convergence on superior techniques – as long as there is ongoing ex post assessment and updating. Methods for assessment should be built into the regulatory framework from the beginning, rather than bolted on after implementation is well underway. Stated differently, once the plane is in the air, it is too late to add the instrument panel that will ensure a safe landing.[83]

B. Get the Right Team in Place

In sports, having the right team is critical. Consider the Baltimore Orioles circa 1966. The Orioles had flirted with excellence for several years, but it never delivered. The addition of Frank Robinson (HOF, 1982) following a trade with the Cincinnati Reds in December, 1965, was transformational.

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[82] CHARLES BOSK, FORGIVE AND REMEMBER (1988).

[83] In fairness, EDS made a memorable commercial in 2000 suggesting that with the right expertise, one could build a plane in the air. *See* https://adland.tv/adnews/eds-airplane-2000-060-usa. *See also* Ruth Walker, 'Build the plane while you're flying it,' Christian Science Monitor, Mar. 24, 2016, https://www.csmonitor.com/The-Culture/The-Home-Forum/2016/0324/Build-the-plane-while-you-re-flying-it. But, we doubt the FAA would approve such a strategy, nor would any airline accept a plan built under such circumstances.

The Orioles won the American League pennant (its first since 1944), and then swept the Dodgers in four games to win their first-ever World Series.

In an interview after Robinson's death, Jim Palmer (HOF, 1990), recounted seeing Robinson at Orioles spring training in 1966:

> I still remember the first time I ever saw him swing a bat. . . I'm sitting next to Dick Hall on the bench, and Frank had come to Baltimore to look for housing and then he come to spring training, so he's a little bit late, we're playing the inter-squad game at Miami stadium, and [Steve] Cosgrove throws him one of these perfect curve balls, down and away, and he gets out on his front foot, but he keeps his hands back and hits it off the chalk line for a double, and I turned to Dick Hall and I said "I think we just won the pennant."[84]

A similar dynamic applies to public agencies. As noted previously, the DNC Rule faced political headwinds – plus two separate bet-your-agency pieces of litigation in unfavorable fora. Assembling the right team was a critical component in addressing these challenges – and the complexities and difficulties of regulating Big Tech are much harder. The telemarketing industry was well funded and was reasonably politically connected, but it was a molehill compared to the Mt. Everest scale, wealth, and sophistication of Big Tech. Each of the four Big Tech companies has a major lobbying presence in D.C., and all four are veterans of past antitrust litigation. They have already retained the best antitrust lawyers available and thrown money at academics and other commentators -- all as battle space preparation for the coming fight.

To be competitive, the responsible agencies will need to pull together an "A team" of lawyers, economists, and technologists, and assign them to work only on Big Tech for an extended period of time. That assignment is harder than it sounds, because most agencies face capacity and capability constraints that limit their ability to perform the tasks *they are currently handling* – let alone taking on an entirely new flagship initiative like the regulation of Big Tech.

By way of (unfavorable) comparison, the UK's CMA has a large dedicated Data, Technology & Analytics (DaTA) team.[85] This is what a regulator with a real commitment to understanding technological phenomena and performing state-of-the-art data analytics looks like. Regulating Big Tech is

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[84] https://www.facebook.com/MASNOrioles/videos/jim-palmer-on-the-legacy-of-frank-robinson/2437970176276134/.

[85] https://competitionandmarkets.blog.gov.uk/2019/05/28/the-cma-data-unit-were-growing/

not a case where "fake it until you make it" will work. Any attempt to regulate Big Tech with ex ante rules requires regulators to ensure their actual capabilities match their announced commitments.

C. Manage Expectations

As noted previously, heightened expectations can lead to disappointment and disillusion. By lowering expectations – by "under-promising," those responsible will buy themselves time and breathing room so they can "over-deliver." Although it is tempting to point to the bleachers and swing for the fences,[86] the goal for the agency should be to "get on base" – which means not biting off more than the agency can successfully defend in terms of the scope of the ex ante rules, and then racking up some quick successes.[87]

Unfortunately, some prominent New Brandeisians have gone out of their way to create unrealistic expectations. On several occasions, Professor Tim Wu has claimed that winning sweeping antitrust lawsuits against exceptionally well financed opponents is "easy." For example, in 2018, Wu was quoted as follows: "'if you took a hard look at the acquisition of WhatsApp and Instagram, the argument that the effects of those acquisitions have been anticompetitive would be easy to prove for a number of reasons,' says Wu. And breaking up the company wouldn't be hard, he says."[88] Similarly, in 2020, after the FTC and 40 states sued Facebook, Professor Wu asserted "this is straightforward and an easy case."[89] Although Wu thought the case against Facebook would be "smooth sailing," other commentators were less sanguine, highlighting all the difficulties that lay ahead.[90] One of those difficulties materialized roughly six months later, when the case was dismissed for failing to allege a necessary element of a monopolization.[91] Although the FTC refiled its case, and the amended pleading survived a motion to dismiss, this was still not an auspicious start. More broadly, this episode makes clear that despite his brief tenure at the

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[86] We refer of course, to Babe Ruth, playing the Chicago Cubs in game 3 of the 1937 World Series. *See* Chris Landers, *True or False? The Babe Called His Shot,* Feb. 6, 2020, https://www.mlb.com/news/did-babe-ruth-call-his-shot

[87] Moneyball, *He Gets on Base Scene,* https://www.youtube.com/watch?v=PlKDQqKh03Y.

[88] Nilay Patel, *Its Time to Break Up Facebook,* The Verge, Sep. 4, 2018, https://www.theverge.com/2018/9/4/17816572/tim-wu-facebook-regulation-interview-curse-of-bigness-antitrust

[89] Mike Isaac & Cecilia Kang, *'It's Hard to Prove': Why Antitrust Suits Against Facebook Face Hurdles,* N.Y. Times, Dec. 10, 2020, https://www.nytimes.com/2020/12/10/technology/facebook-antitrust-suits-hurdles.html.

[90] Id.

[91] Salvador Rodriguez, Judge dismisses FTC and state antitrust complaints against Facebook, CNBC, https://www.cnbc.com/2021/06/28/judge-dismisses-ftc-antitrust-complaint-against-facebook.html

FTC, Professor Wu severely underestimates the difficulty of winning a monopolization case. Once you leave the realm of conduct that fits squarely in the zone of per se illegality, nothing is ever "easy."

In fairness, FTC Chairman Khan has been more circumspect, particularly in her statements since becoming the agency's chair in June 2021.[92] But, more needs to be done to manage (by which we mean lower) expectations.

D. You're Gonna Need A Bigger Boat

In any endeavor, success requires tools equal to the task. In the classic film thriller *Jaws*, a 25-foot great white shark terrorizes the seaside community of Amity Island. Three men (Brody (the local sheriff), Quint (a professional shark hunter), and Hooper (an oceanographer)) set out in a boat to hunt for the shark. In the most memorable scene in the movie, Brody is tossing chum into the ocean when the shark suddenly emerges from the water and displays its massive jaws. Visibly shaken, Brody backs away from the stern and finds Quint – whom he tells "You're gonna need a bigger boat."[93]

To fulfill their policy aims for Big Tech, regulators are going to need a bigger boat as well – either in the form of better tools, or in a different approach to using the tools they already possess. The existing antitrust toolkit suffers from several weaknesses. The first problem is delay. Antitrust litigation against Big Tech will take years.[94] A process that yields remedial results in the middle of this decade or later is ill-suited to a sector marked by extraordinary dynamism.

The second problem is that the current doctrinal framework is hostile to the claims advanced by the New Brandeisians. Since the late 1970s, Supreme Court decisions interpreting Section 2 of the Sherman Act have imposed few limits on the discretion of dominant firms.[95] Antitrust enforcers will face an uphill battle persuading judges to abandon or limit this extensive body of precedent.

A third problem is the scope of the harms that enforcers are trying to address. Much of the conduct of Big Tech targeted by the New Brandeisians implicates policy domains outside of antitrust -- including consumer

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[92] Federal Trade Commission Chair Lina Khan Speaks Exclusively with Andrew Ross Sorkin and Kara Swisher Live from Washington, D.C., CNBC, Jan. 19, 2022, https://www.cnbc.com/2022/01/19/cnbc-transcript-federal-trade-commission-chair-lina-khan-speaks-exclusively-with-andrew-ross-sorkin-and-kara-swisher-live-from-washington-dc-today.html

[93] *Jaws* (Universal Films, 1975) (directed by Steven Spielberg; screenplay by Peter Benchley and Carl Gottlieb). See *The "You're Gonna Need a Bigger Boat" Scene from Jaws (1975),* https://www.youtube.com/watch?v=6_jmONl1pls

[94] See *supra* notes 25-27 and accompanying text.

[95] Gavil et al, ANTITRUST LAW IN PERSPECTIVE, supra, at 441-677.

protection and privacy. That means that existing antitrust doctrine is often a poor fit with the underlying problem. When the FTC confronted this problem developing the DNC Rule, it switched theories, rather than try to jam a square peg into a round hole.

For the New Brandeisians, switching theories will mean creating an ex ante regulatory framework that incorporates antitrust doctrine plus consumer protection and privacy – in the same way that the FTC focused on "abusive" behavior, rather than deception or unfairness in developing the DNC Rule. However, the FTC could rely on the Telemarketing Act as a basis for the DNC Rule, while it is far less clear that Congress has authorized the FTC to develop ex ante rules based on competition policy considerations.

Almost fifty years ago, the D.C. Circuit Court of Appeals upheld the authority of the FTC to promulgate substantive competition rules in *Petroleum Refiners,* a case involving mandatory posting of octane ratings on gasoline pumps.[96] Two prominent New Brandeisians (Chairman Khan and Rohit Chopra, former FTC Commissioner, and new head of the CFPB) have argued that the *Petroleum Refiners* makes it clear that the FTC can use rulemaking to regulate Big Tech without seeking additional authority from Congress.[97]

However, the matter is far from clear. Since the D.C. Circuit upheld the "Octane Rule" in 1973, the FTC has never promulgated additional competition rules, although it considered doing so in connection with the infamous KidVid initiative.[98] And the analysis in *Petroleum Refiners* is a free-wheeling (if not completely off-road) analysis of the FTC's authority. Prominent administrative law experts have argued that federal courts (and particularly the Supreme Court) are unlikely to endorse *Petroleum Refiners'* generous and creative interpretation of the Commission's authority under Section 6(g).[99] Any attempt to build a new set of ex ante rules for Big Tech on the FTC's existing authority is asking for trouble – particularly given the certainty of litigation. Express Congressional authorization to promulgate

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[96] *National Petroleum Refiners Association v. FTC,* 482 F.2d 672 (D.C. Cir. 1973).

[97] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

[98] Tracey Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy,* 39 Loy. L.A. L. Rev. 79 (2006).

[99] Richard L. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law* (Jan. 2022), https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/12/FTC-Pierce-FINAL.pdf. *See also* Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention,* 116 HARV. L. REV. 46 (2002) and William E. Kovacic, *AMG Aftershocks*, THE REGULATORY REVIEW (July 26, 2021), at https://www.theregreview.org/2021/07/26/kovacic-amg-aftershocks/.

substantive competition rules is the bigger boat the New Brandeisians should procure before setting sail.

E. Expect Litigation – and Adaptive Responses

Big Tech will not roll over and play dead. Instead, they will vigorously challenge the ex ante rules, whatever their substantive content. Knowing that litigation is certain, those responsible should engage with Big Tech while the rules are being developed. This will give the agencies more insight into likely grounds of attack – and allow it to build in defenses (where feasible), rather than be forced to play defense on a weaker hand. More broadly, ex ante public consultation will give those responsible for developing the rules greater understanding of how they can maximize their prospects for success and address the criticisms that inevitably will be forthcoming from the courts and legislators.

What about adaptive response? For understandable reasons, regulators are focused on the problem in front of them. That means that they are likely to discount (or ignore entirely) the problem of adaptive response. The short tenure of most agency heads means that they are likely to believe that adaptive response is a problem for another day – whose consequences will fall on the next person to head the agency.[100] That approach is short-sighted – but it is fully consistent with the advice most agency heads receive, to focus on the "low-hanging fruit."[101]

However, it is a certainty that even the dumbest of covered firms will take steps to adapt to any set of regulatory commands and will do their best to circumvent them – and no one has ever accused Big Tech of being dumb. This dynamic places considerable pressure on the responsible agency's technology team to anticipate possible paths of adaptation and bypass. This dynamism means that agencies must invest in their own technologists – and be prepared to make constant fine (and not so fine) adjustments to the rules as the industry responds to each round of regulation and regulatory revision. When it comes to Big Tech, regulators must be as adaptive and flexible as the firms they are regulating.

F. Hunt in Packs

When launching a regulatory assault, there is strength in numbers. A company facing a multi-jurisdictional assault may sue for peace on terms

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[100] In the corporate setting, the analogous situation is known as "outrunning your mistakes." Richard Jackall, Moral Mazes: The World of Corporate Managers (1988).

[101] William E. Kovacic, *Rating the Competition Agencies:What Constitutes Good Performance?,* 16 Geo. Mason L. Rev. 903, 922 (2009) ("It is a common aphorism in Washington that agency leaders should begin by picking the low-hanging fruit. . . . What is missing in the lexicon of Washington policymaking is an exhortation to plant the trees that, in future years, yield the fruit.")

that are more favorable than if they were litigating the same cases seriatim. A company facing multiple adversaries, each suing on different legal theories, and each seeking independent recoveries/remedies will find their resources stretched and they may make mistakes that a company facing a single regulator would never make.

We have already noted that Big Tech is facing antitrust and privacy-related litigation in multiple jurisdictions. We have also noted the interest of foreign authorities in using new statutory authority (including the E.U.'s Digital Markets Act) and new task forces (including the U.K.'s Digital Markets Unit) to go after Big Tech. And the recent executive order on promoting competition clearly recognizes the importance of inter-agency cooperation, since it advises agencies with related policy functions to work more closely together.[102]

Although the relevant U.S. agencies could certainly go it alone, they are likely to do better if they coordinate their efforts with others engaged in the same campaign. There is a reason why wolves hunt in packs – especially when targeting big game.

VI. BARRIERS FOR AGENCIES THAT WANT TO LEARN FROM THE PAST

Government agencies often fail to capture the benefits of "thinking in time."[103] The first difficulty is that institutional incentives often discourage agencies from investing in retrospection. Ex post reviews that reveal problems weaken the agency's image -- reducing Congressional willingness to fund the agency at its current levels – and weakening the agency's hand in dealing with adversaries in court.

Second, agency management have their own strong incentives to prioritize the prosecution of new cases and the preparation of new rules. Bringing new cases and announcing new rulemaking projects bring favorable headlines. The diversion of resources into ex post evaluation of earlier cases and rules is likely to be viewed as academic navel-gazing.[104] The complexities of conducting a well-designed ex post study may also be beyond the expertise of the agency -- reinforcing the assumption that such evaluation constitutes an extravagant waste of resources.[105]

Management succession also complicates the ability of an agency to learn from the past. New management will either have no interest in rehashing the

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[102] *See supra* note 78, and accompanying text.

[103] William E. Kovacic, *Keeping Score: Improving the Positive Foundations for Antitrust Policy*, 23 U. PA. J. BUS. L. 49, 74-79 (2020).

[104] William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities,* 31 J. Corp. L. 503 (2006).

[105] Id.

policies of their predecessors – or may seek to use ex post reviews to embarrass those who are no longer around to defend their decisions. In the former case, the ex post review will never be conducted. In the latter case, the ex post review will be viewed (both internally and externally) as a hatchet job – limiting the possibility of using the process for learning or improving agency performance.

Alternatively, new management may have gotten their positions by arguing the agency needs to be transformed to perform its assigned tasks.[106] Viewed from this perspective, there is nothing to be learned from the past – since everything that preceded the arrival of new management was an unmitigated disaster. As it happens, a significant body of recent commentary has taken exactly that view.[107] And, as we have noted previously, prominent contributors to that literature now occupy key positions in entities that will be involved in developing ex ante regulations for Big Tech.[108]

Does it seem likely these individuals will be inclined to instruct others to study the past performance of the FTC and the DOJ Antitrust Division when they ascended to prominence by assailing the performance of these same agencies? It does not take an expert in human psychology or an astute student of public administration to recognize such instructions are unlikely to be forthcoming unless those responsible for these disaster narratives are willing to publicly "walk back" their prior criticisms. Anyone want to place a bet on that happening?[109]

In an influential book, Professor Haidt noted how morality simultaneously "binds and blinds."[110] Here, the narrative that enabled the New Brandeisians to achieve power (by binding them together into a cohesive movement) also blinds them to the steps they will need to take to successfully implement their vision.

VII. CONCLUSION

Regulatory failure is a policy perennial – and bad implementation is often the cause.[111] Our case study of the FTC's DNC Rule provides several

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[106] Hyman & Kovacic, *Can't Anyone Here Play This Game? supra* note 5. *See also supra* note 15, and accompanying text.

[107] Kovacic, *Root and Branch Reconstruction, supra* note 12.

[108] *See also* note 18.

[109] In the words of John Kenneth Galbraith, "faced with the choice between changing one's mind and proving that there is no need to do so, almost everyone gets busy on the proof." JOHN KENNETH GALBRAITH, A CONTEMPORARY GUIDE TO ECONOMICS, PEACE, AND LAUGHTER 50 (1971).

[110] JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2012)

[111] Neustadt & May, THINKING IN TIME, *supra* note 78, at 270; Robbie Waters Robichau & Laurence E. Lynn Jr., *The Implementation of Public Policy: Still the Missing Link,* 37

lessons about the potential rewards and real-world risks associated with using rulemaking to make public policy. Simply stated, the DNC Rule solved the problem of unwanted calls – until it didn't. Initial success was not accidental, but was the result of excellent preparation, strong leadership, the dedication of superior personnel, and a strong dose of administrative guile. Subsequent developments provide a cautionary lesson about how reform can falter when technological change or other dynamic features of the market overwhelm the chosen mechanism for control. Regulators need to anticipate and account for the adaptive responses of affected firms and must continually monitor whether and how existing control measures are being circumvented.

Good intentions are not enough. Neither are glowing press notices hailing a new era in antitrust enforcement. Attempts to regulate Big Tech with ex ante rulemaking face a significant risk of failure. Attending to the teachings of history can change those probabilities in our favor.

POLICY STUDIES J. 21 (2009).