A REVOLUTION WITHOUT A CAUSE: THE DIGITAL MARKETS ACT AND NEO-BRANDEISIAN ANTITRUST

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This Article uses the Digital Markets Act (DMA), which took effect in the European Union on November 1, 2022, to demonstrate the neo-Brandeisian antitrust movement's most fundamental problem: it has not yet shown why its proposals are necessary to accomplish its stated goals. Neo-Brandeisians cite perceived unfair conduct by the likes of Google and Apple as evidence that the existing legal regime's approach of fostering competition has failed, and that a new approach of regulating each unfair conduct specifically is necessary. But the mere fact that bad things happen does not mean that existing law has irredeemably failed, just as the continued existence of crime does not mean that criminal law has failed. The solution might not necessarily be to abandon existing law, but to change how existing law is applied. Indeed, this Article shows that existing law in both the European Union and the United States can feasibly achieve the neo-Brandeisian goal of regulating unfair conduct by platforms like Google and Apple, thereby making the DMA unnecessary.

The DMA would also be counterproductive and ineffective for achieving its own stated objectives. For example, the DMA's requirement that app store owners like Google and Apple use only "transparent, fair and non-discriminatory" criteria to rank apps would not prevent Google and Apple from distorting their rankings practices—just as a law school ranked outside the top 180 can rank itself second in the nation by equally weighting neutral factors such as total campus square footage and the number of chairs in the law school library. In fact, an app ranked fourth for revenue on Google Play ranks 148th in the number of users, indicating that Google could easily attach different weights to any number of superficially neutral criteria to produce drastically different rankings. This Article's chief contention is that, as long as the neo-Brandeisian antitrust movement fails to present a sober cost-benefit analysis of its own proposals, its demand to replace existing antitrust law with regulatory micromanagement of specific conduct will remain a call for a revolution without a cause.

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INTRODUCTION

Lina Khan, the Chair of the Federal Trade Commission,[1] is credited with the modern revival of the Brandeisian antitrust movement.[2] Neo-Brandeisians argue that existing law cannot restrain firms like Google or Amazon from unfair practices.[3] One reason, according to neo-Brandeisians, is that "the current framework fails to register" the full

1. *Commissioners and Staff*, FTC, https://www.ftc.gov/about-ftc/commissioners-staff/lina-m-khan [https://perma.cc/D5BR-UZBN].

2. *See* John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S.C. L. REV. 305, 308 (2020) ("[T]he [progressive] movement earnestly emerged with Lina Khan's argument that modern antitrust doctrine, particularly in relation to platform markets, is incapable of properly constraining market power."). The progressive movement is also referred to as "neo-Brandeisian." James Keyte, *New Merger Guidelines: Are the Agencies on a Collision Course with Case Law?*, 36 ANTITRUST 49, 49 (2021) ("[T]he progressive or Neo-Brandeisian perspective on today's antitrust environment . . . .").

3. Yun, *supra* note 2, at 309.

range of such "predatory conduct."[4] Another proffered reason is that existing antitrust law cannot prevent market failures before they occur. Professor Nikolas Guggenberger argues that breaking up dominant platforms pursuant to existing antitrust law "might not suffice to guarantee open markets in the . . . long[] term" because "markets might quickly re-consolidate" back into one platform in the future,[5] indicating a belief that the possibility, not necessarily the existence, of a market failure should be enough to justify antitrust intervention.

The movement appears to have resonated with policymakers. The European Commission argues that existing rules "do not . . . capture all unfair business practices by large digital gatekeepers" because "these practices do not necessarily have an anticompetitive object or effect," or because "there is no effect on competition on clearly identifiable relevant markets,"[6] a statement which is consistent with the neo-Brandeisian claim that existing law fails to account for the full range of predatory conduct by dominant platforms. The commission also argues that "the current legal framework would not allow it to address the market failures" created by digital platforms because "enforcement of [existing] rules can only take place *ex post*, i.e. after a competition problem has emerged" and cannot take place "in the absence of some preconditions, such as the existence of an anticompetitive agreement."[7] This is consistent with the neo-Brandeisian notion that a potential—not necessarily the actual—existence of a market failure justifies antitrust regulatory intervention.

The commission identifies specific examples of such unfair practices, one of which is self-preferencing.[8] Many third parties who are not affiliated with Apple develop applications for Apple's iOS operating system (OS).[9] But "Apple's App Store is the only app store" that distributes apps for iOS devices such as iPhones or iPads.[10] Apple has

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4. Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 717 (2017).

5. Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237, 246 (2021).

6. *Commission Staff Working Document Impact Assessment Report Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, ¶ 121, SWD (2020) 364 final (Dec. 15, 2020) [hereinafter *Commission Impact Assessment Report*].

7. *Id.* ¶¶ 118–19.

8. *Id.* ¶ 41.

9. Pinar Akman, *Online Platforms, Agency, and Competition Law: Mind the Gap*, 43 FORDHAM INT'L L.J. 209, 267–68 (2019) ("[M]any of the apps sold in the App Store are developed by third-party developers, and Apple earns a commission on each app purchased.").

10. Emma C. Smizer, Comment, Epic Games v. Apple*: Tech-Tying and the Future of Antitrust*, 41 LOY. L.A. ENT. L. REV. 215, 230 (2021).

been accused of exploiting this gatekeeping power to engage in self-preferencing—such as putting Apple apps at the top of App Store search results,[11] ranking Apple apps above competing apps in the App Store's list of most popular apps,[12] and even removing competitors' apps from the iPhone's quick access menu and replacing them with Apple's apps without permission from the iPhone user.[13]

Another example of unfair behavior, according to the commission, is a dominant platform imposing its payment system on apps that are distributed via the platform's app store.[14] In-app purchases—for example, buying in-game items in a smartphone game—are a significant source of revenue for app developers.[15] Google and Apple require most apps on their respective app stores to use only Google's or Apple's payment system, through which they collect up to thirty percent of in-app purchase revenues.[16] This practice has led to the "prevailing perception that Google and Apple are exploiting their market power to extract exorbitant

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11. Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, WALL ST. J. (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221 [https://perma.cc/6EC8-4SKG].

12. Nikolas Guggenberger, *The Essential Facilities Doctrine in the Digital Economy: Dispelling Persistent Myths*, 23 YALE J.L. & TECH. 301, 325 (2021) ("Audiobooks.com's downloads . . . decreased by 25%, when Apple down-ranked the app. . . . [T]here is ample evidence that the iOS App Store . . . up-ranks [Apple's] own application offers.").

13. Sarah Perez, *iPhone Users Complain Apple Music Is Installing Itself to the Dock, Booting out Their Other Apps*, TECHCRUNCH (May 5, 2022, 12:37 PM), https://techcrunch.com/2022/05/05/iphone-users-complain-apple-music-is-installing-itself-to-the-dock-booting-out-their-other-apps/ [https://perma.cc/GW3B-46ZR] ("[T]he Apple Music iOS app is installing itself directly to the iPhone's dock when downloaded . . . [and] kicking out other apps users had set up in their dock and taking their spot . . . . Epic Games CEO Tim Sweeney . . . . not[ed] Apple Music replaced his Spotify app."). *See also Use the Dock on Mac*, MACOS USER GUIDE, https://support.apple.com/guide/mac-help/dock-mh35859/mac [https://perma.cc/6AXT-PZZ3] ("The Dock . . . is a convenient place to access apps and features that you're likely to use every day. . . .").

14. *Commission Impact Assessment Report*, *supra* note 6, ¶¶ 39, 49.

15. Erik Allison, Comment, *The High Cost of Free-to-Play Games: Consumer Protection in the New Digital Playground*, 70 SMU L. REV. 449, 454 (2017) ("In 2013 alone, in-app purchases' share of the Apple App Store's total revenue from the top 200 apps grew from 77% to 92%.") (quoting *The Psychology of Freemium*, PSYCHGUIDES.COM http://www.psychguides.com/interact/the-psychology-of-freemium/ [https://perma.cc/3ENB-2JLM]).

16. *See* Yunsieg P. Kim, *Does the Anti-Google Law Actually Help Google and Hurt Startups?*, 110 GEO. L.J. ONLINE 120, 121, 123 (2021) https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/11/Kim_Anti-Google-Law.pdf [https://perma.cc/Z9JN-3ASM].

profits from app developers."[17] The European Commission argues that a reduction of "fees in large app stores . . . from 30% to 15%" would "increase consumer surplus by up to EUR 490 million in the EU per year."[18]

To address such perceived problems, the European Union passed the Digital Markets Act (DMA), which took effect on November 1, 2022.[19] Whereas existing law targets anticompetitive activity as measured by quantitative indicators such as prices or market concentration,[20] the DMA states that its objective is "to ensure that markets where gatekeepers are present . . . remain . . . fair, *independently from the actual . . . effects of the conduct of a given gatekeeper . . . on competition*."[21] Thus, the DMA lists and prohibits specific acts it deems unfair, independent of the actual effect of those acts on market competition. For example, the DMA bars certain dominant platforms, called "gatekeepers,"[22] from self-preferencing in ranking their products or services against competing products or services[23]—such as apps distributed through their app stores. The DMA also requires gatekeepers to "apply transparent, fair and non-discriminatory conditions to such ranking,"[24] and bars gatekeepers from imposing a particular payment system on apps.[25] Meanwhile, in the United States, both chambers of Congress have reported bills with similar provisions out of committee.[26]

This Article argues that the neo-Brandeisian movement has not yet shown why its proposals are needed to achieve its goals. Assuming without deciding that practices such as self-preferencing or collecting

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17. *Id.* at 126.

18. *Commission Impact Assessment Report*, *supra* note 6, ¶ 313.

19. Council Regulation 2022/1925 of Sept. 14, 2022, On Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1; European Commission Press Release IP/22/6423, Digital Markets Act: Rules for Digital Gatekeepers to Ensure Open Markets Enter into Force (Oct. 31, 2022).

20. *See, e.g.*, *United States v. Hsiung*, 778 F.3d 738, 744 (9th Cir. 2015); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 361–62 (1963).

21. 2022 O.J. (L 265) at 3 (emphasis added).

22. *Id.* at 30 (defining a gatekeeper platform).

23. *Id.* at 35 ("[A] gatekeeper shall not treat more favourably[] in ranking . . . services and products offered by the gatekeeper itself than similar services or products of a third party.").

24. *Id.*

25. *Id.* at 34.

26. S. 2992, 117th Cong. § 3(a)(1) (2021) (banning self-preferencing that "would materially harm competition"); H.R. 3816, 117th Cong. § 2(a)(1) (2021) (barring self-preferencing); *id.* at § 2(b)(6) (banning "restrict[ing] or imped[ing] businesses users from communicating information . . . to covered platform users to facilitate business transactions").

thirty percent fees are indeed predatory, the mere fact that bad things happen does not mean that existing law has irredeemably failed, just as the existence of murder does not necessarily mean that laws against murder are useless. The solution might not necessarily be to abandon existing law, but to change how existing law is applied. As anticlimactic as it may be, a revolution requires a showing that a reform could not achieve the same end. If a proposed radical overhaul cannot justify its high cost compared to a smaller tweak, that proposal is unfortunately a call for a revolution without a cause. At most, the only cause it would vindicate is a preference for a particular type of policy instrument.

Neo-Brandeisians have not justified the necessity of their approach, represented by the DMA. They argue that existing law permits "certain forms of anti-competitive harm" because it "fails to register" the full range of platforms' "predatory conduct."[27] In contrast, the DMA "directly address[es] some of the business practices that have been identified as specifically problematic."[28] But a law need not specifically describe every act it intends to regulate in order to regulate it, and listing every act intended to be regulated does not ensure that it will be regulated. In fact, a benefit of competition is that it deters many kinds of unfair acts at once, without needing legislators to anticipate, and regulators to address, every single unfair act imaginable. Assume that a dominant firm providing bad services at exorbitant prices is put out of business by a better and cheaper competitor. The dominant firm's unfair practices would have been addressed at once by competition, not by legislation micromanaging each unfair practice separately—for example, prohibiting the firm from favoring its inferior in-house brands over superior competing products or from collecting more than a certain share of revenue from subcontractors.

It is not merely in textbooks that competition can deter unfair practices without having to micromanage every possible practice individually. Competition has actually addressed many of the problems that neo-Brandeisians point to, in an environment highly analogous to that targeted by the DMA. Just as Google and Apple have app stores for

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27. Khan, *supra* note 4, at 717, 737.

28. Guggenberger, *supra* note 5, at 316–17 (arguing that the DMA, which "directly address[es] some of the business practices that have been identified as specifically problematic," would "lend [itself] as inspiration when designing" a new legal doctrine "that embraces notions of access to markets and a participatory economy"); *see also, e.g.*, Henri Piffaut, *Algorithms: The Impact on Competition*, 23 BUS. L. INT'L 5, 20 (2022) (arguing that "the difficulty of correcting ex post negative effects on competition have often led to a policy choice for ex ante regulation that would specify obligations . . . and constrain behaviour"); 2022 O.J. (L 265) at 35 ("[A] gatekeeper shall not treat more favourably[] in ranking . . . services and products offered by the gatekeeper itself than similar services or products of a third party.").

smartphone operating systems, Microsoft has its app store equivalent for its Windows OS, distributing its own as well as third-party software since opening in 2012.[29] Microsoft initially took thirty percent of third-party software sales revenue, like Google and Apple do.[30] A competitor named the Epic Games Store, which opened on December 6, 2018,[31] began to charge a flat fee of twelve percent on third-party software sales revenue.[32] On April 29, 2021, the Microsoft Store announced that it would reduce its fee for third parties from thirty percent to twelve percent.[33] As Part II details, competition among storefronts also appears to have forced them to amend how the software they sell is rated, in response to user complaints.[34]

Because competition has addressed many of the major issues that neo-Brandeisians point to, in a market similar to that targeted by the DMA, the commission's pronouncement that existing law "cannot . . . deal with the market failures resulting from the behaviour of gatekeepers"[35] is premature, at the very least. To establish that existing law cannot curb self-preferencing or excessive fees, for instance, it is not enough to show that existing law fails to address "all unfair business practices by . . . gatekeepers" individually.[36] Instead, the commission must show that existing law cannot force a platform like Apple to compete against third-party app stores on its own operating system. If existing law can be applied in such a manner, Apple could be forced by third parties to reduce its fees and to refrain from distorted ranking practices, just as Microsoft and other PC software storefronts apparently were.[37] If existing law can force the likes of Apple to compete, that avenue would at least be worth considering before condemning existing

29. Matt Booty, *Continuing Our PC Gaming Journey in 2021 and Beyond*, MICROSOFT: XBOX WIRE (Apr. 29, 2021, 6:00 AM), https://news.xbox.com/en-us/2021/04/29/continuing-our-pc-gaming-journey-in-2021-and-beyond/ [https://perma.cc/AP37-2MHL].

30. *Id.*

31. Nick Statt, *Epic's PC Game Store Is Live Now*, VERGE (Dec. 6, 2018, 8:41 PM), https://www.theverge.com/2018/12/6/18126139/epic-store-games-pc-ashen-hades-game-awards-2018 [https://perma.cc/BZF8-V86Y].

32. *Frequently Asked Questions*, EPIC GAMES, https://store.epicgames.com/en-US/distribution (last visited Oct. 2, 2023).

33. *See* Booty, *supra* note 29.

34. *See infra* Section II.A.

35. *Commission Impact Assessment Report*, *supra* note 6, ¶ 119.

36. *Id.* ¶ 121.

37. *See infra* notes 182–83 and accompanying text.

antitrust principles as "absurd"[38] and rushing to implement a law like the DMA, which is likely to be extraordinarily costly to enforce.[39]

Indeed, this Article argues that the DMA is not necessary to achieve neo-Brandeisians' stated goals in the context of app stores. Existing law in the EU and the U.S. can force a gatekeeper like Apple to compete against third-party app stores on its own OS by establishing that the company unlawfully tied its OS with its app store. If this claim succeeds, Apple could not condition the sale of iOS devices on the use of its App Store, meaning that Apple would no longer monopolize the distribution of iOS apps. This tying claim would require defining the relevant market as a single OS (or a few operating systems at most), which both European authorities and U.S. courts have done in past cases against Google and Microsoft.[40] Because existing law can force platforms to compete with third-party app stores, this Article argues that the DMA, which would micromanage each unfair practice separately, is unnecessary.

The DMA would not only be redundant to existing law, but also inferior. First, the DMA would be ineffective in deterring much of the conduct it considers to be unfair. Even if gatekeepers obey the DMA's requirement that they use only "transparent, fair and non-discriminatory" criteria to rank apps,[41] gatekeepers could still easily manipulate those criteria. For example, an app ranked first on Google Play in terms of revenue is estimated to rank fifty-third in the number of users.[42] Even though an app's revenue and its number of users are both superficially "transparent, fair and nondiscriminatory" criteria, nothing in the DMA bars a platform from attaching weights to such factors when creating app rankings. Thus, by attaching their preferred weights to any number of facially neutral criteria, gatekeepers could easily manipulate app rankings for expedient purposes while superficially complying with the DMA—just as a law school ranked outside the top 180 can publish its own rankings placing itself second in the nation by equally weighting facially

38. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 135 (2018) (arguing that "antitrust's intended economic and political roles cannot be fully recovered without jettisoning the absurd and exaggerated premise" that "'consumer welfare' [is] the lodestone of the antitrust law").

39. *See infra* Part IV.

40. *See* Commission Decision of July 7, 2018, Relating to a Proceeding Under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099 – Google Android), 2018 O.J. (C 4761) 1, 60; *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("[d]efining the market as Intel-compatible PC operating systems" and finding that "Microsoft ha[d] a greater than 95% share" of the relevant market).

41. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 35.

42. *See infra* Section III.A.

neutral factors such as total campus square footage and the number of chairs in the law school library.[43]

The commission might argue that the DMA's failure to specify the "transparent, fair and non-discriminatory conditions"[44] that gatekeepers must use to rank apps is not permanent. Article 12 of the DMA, which is entitled "[u]pdating obligations for gatekeepers," permits the European Commission to "supplement" the self-preferencing ban by adopting "delegated acts," which bear some similarity to regulations under U.S. law.[45] Such delegated acts would be "based on a market investigation . . . that has identified . . . practices . . . that are unfair in the same way as the practices addressed" in Article 6, which is the provision that bars self-preferencing.[46] The DMA requires such delegated acts to "specify[] the manner in which the obligations laid down in Article[] . . . 6 are to be performed by gatekeepers . . . to ensure effective compliance."[47] In short, the DMA indicates that it would have the commission specifically define a set of "transparent, fair and non-discriminatory conditions" and update that list of criteria in response to changing conditions.

But identifying such conditions in the context of app rankings—let alone updating them—would be impracticable. The commission would

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43. *Compare Western Michigan University (Cooley) 2023–2024 Rankings*, U.S. NEWS & WORLD REPORT (2023), https://www.usnews.com/best-graduate-schools/top-law-schools/western-michigan-university-thomas-m-cooley-law-school-03080 (ranking the school between 180 and 196), *with* THOMAS E. BRENNAN & DON LEDUC, JUDGING THE LAW SCHOOLS, at xi, xiv–xv, 1 (12th ed. 2010), https://web.archive.org/web/20120312154449/http://www.cooley.edu/rankings/_docs/Judging_12th_Ed_2010.pdf (ranking school second). *See also* Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1524 n.235 (2004) (book review) (stating that every law school that published an alternative law school ranking system "ranks higher under [its own] alternative method than it does in *U.S. News & World Report*").

44. 2022 O.J. (L 265) at 35. The DMA defines the word "unfair" in the context of Article 6 as, among others, "an imbalance between the rights and obligations of business users and the gatekeeper obtains an advantage from business users that is disproportionate to the service provided by that gatekeeper to those business users." *Id.* at 40–41. But the DMA does not define "transparent, fair and non-discriminatory conditions." *Id.*

45. *Id.* at 40. *See also* Consolidated Version of the Treaty on the Functioning of the European Union, art. 290, § 1, Mar. 30, 2010, 2010 O.J. (C 83) 47, 172 [hereinafter TFEU] (permitting legislative acts to authorize the European Commission to adopt "non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act"); Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, 67 ADMIN. L. REV. 629, 646–47 (2015) (referring to "implementing and delegated acts [as] the EU counterpart of U.S. regulations").

46. 2022 O.J. (L 265) at 40.

47. *Id.* at 41.

need to determine which of the factors that a platform uses to rank apps are fair and which are not, but such rankings are based on "hundreds of factors" that are "a carefully guarded secret,"[48] which is "particularly well suited for trade secret protection."[49] Even if the DMA extracts that information despite its recognition of "legitimate interest[s] . . . in the protection of . . . business secrets,"[50] the commission is unlikely to be able to timely update its knowledge of ranking criteria. If a ranking criterion in Google's algorithm is exposed, Google can "tweak" that algorithm.[51] Updating the commission's knowledge of that algorithm would require another market investigation, which can take up to eighteen months.[52] Thus, this Article submits that the commission's characterization of the DMA as "future proof"[53] amounts to hubris.

Indeed, the DMA's "future-proofing" device is the second reason, on top of ineffectiveness, that the DMA is inferior to existing law: the DMA would be counterproductive to its own goal of enhancing "quality, fair competition, choice and innovation."[54] In an apparent attempt to preempt the kinds of circumvention that would make the DMA ineffective, Article 13 bans "any behaviour that undermines effective compliance . . . regardless of" the nature of behavior[55] and, in the event of a violation, permits the commission to impose measures deemed required "to effectively comply with the [DMA's] obligations."[56] The commission may also punish violations with fines of up to twenty percent of a platform's worldwide turnover, depending on whether it is a repeat offender.[57] This Article argues that preventing circumvention by prohibiting circumvention would give regulators effectively unrestricted power, which could lead to abuse that deters beneficial business activity.

The DMA would also undermine consumer welfare by distorting competition more directly. For example, the DMA's ban on self-

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48. Brent J. Horton, *Malign Manipulations: Can Google's Shareholders Save Democracy?*, 54 WAKE FOREST L. REV. 707, 716 (2019).

49. Michael Mattioli, *Disclosing Big Data*, 99 MINN. L. REV. 535, 550 (2014).

50. 2022 O.J. (L 265) at 55.

51. Horton, *supra* note 48 (describing "tweaks [to the search algorithm] by Google insiders that may favor or disfavor a specific page . . . or a class of pages").

52. *See* 2022 O.J. (L 265) at 46 (requiring findings to be published within eighteen months).

53. EUR. COMM'N, *Questions and Answers: Digital Markets Act: Ensuring Fair and Open Digital Markets*, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 (Sept. 6, 2023) [https://perma.cc/FST9-F5MN] [hereinafter *DMA Q&A*] ("Ensuring that the [DMA] is and remains future proof has been a key objective . . . .").

54. 2022 O.J. (L 265) at 2.

55. *Id.* at 42.

56. *Id.* at 38.

57. *Id.* at 52.

preferencing can reasonably be read to bar a gatekeeper from ranking its own apps more favorably without exception, even when a gatekeeper's app is actually superior to the competition. Self-preferencing bans typically "do not preclude platforms from elevating their own offerings when they *deserve* more favorable placement" because "preventing this would harm consumers by obscuring the most attractive options and reducing the platform's incentive to offer consumers a better deal."[58] But Article 6(5) of the DMA can be read to prohibit such an exception because it states that a gatekeeper "shall not treat more favourably, in ranking . . . services and products offered by the gatekeeper itself than similar services or products of a third party."[59] Unlike the DMA, a bill in Congress that would regulate gatekeepers prohibits self-preferencing only if it "would *materially harm* competition" and lists affirmative defenses to self-preferencing.[60]

The DMA's shortcomings reveal a fundamental error underlying the neo-Brandeisian antitrust movement. The movement's argument that "the current framework fails to register" the full range of "predatory conduct" by platforms[61] contains two propositions. First, gatekeepers' practices such as self-preferencing are actually harmful. Second, addressing these harms requires much more than small fixes to the status quo; to do so, the existing antitrust legal framework must be "formally abandon[ed]."[62] The first proposition, that gatekeeper platforms engage in predatory behavior, appears to have convinced many politicians,[63] academics,[64] and members of the public.[65] Despite empirical evidence indicating that at least some of the practices criticized as predatory are likely benign or

58. Thomas A. Lambert, *Addressing Big Tech's Market Power: A Comparative Institutional Analysis*, 75 SMU L. REV. 73, 98 (2022).

59. 2022 O.J. (L 265) at 35. *See also infra* Section IV.A.

60. S. 2992, 117th Cong. §§ 3(a)(1), (b) (2021) (emphasis added).

61. Khan, *supra* note 4, at 717.

62. *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition & Consumer Rts. of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Barry C. Lynn, Executive Director, Open Markets Institute), https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf [https://perma.cc/2F7U-H9ZZ]. *See also* WU, *supra* note 38, at 50–51 (arguing that "antitrust's intended economic and political roles cannot be fully recovered without jettisoning the absurd and exaggerated premise" that "'consumer welfare' [is] the lodestone of antitrust law").

63. *See, e.g.*, Shira Ovide, *How Klobuchar and Hawley See Things When It Comes to Technology*, N.Y. TIMES (May 13, 2021), https://www.nytimes.com/2021/05/13/books/amy-klobuchar-antitrust-josh-hawley-tyranny-big-tech.html.

64. *See, e.g.*, Guggenberger, *supra* note 12, at 324–28.

65. Kim, *supra* note 16, at 123 (discussing "a growing public perception that Google and Apple are exploiting their market power to extract exorbitant profits from app developers").

even beneficial to consumers,[66] the fact that enough voters want to regulate gatekeepers is sufficient reason in a democratic society to seriously consider the proposal, at the very least.

Where neo-Brandeisians leave the realm of debatable opinion and commit a logical error is in the second proposition: that the only way to regulate gatekeepers' predatory acts is to abandon existing law in favor of a micromanaging regulatory scheme. The intensity of political support for an idea does not guarantee its success. As with any attempt at diagnosing and solving a problem, addressing harmful behavior by platforms requires a careful study of precisely how far-reaching a solution is needed, because overtreatment may be just as harmful as undertreatment. Indeed, this Article's analysis of the DMA's likely consequences shows that the DMA's overly micromanaging approach would do more harm than good, and that its intended objectives can be achieved within the existing legal framework. In effect, neo-Brandeisians insist on a revolution without considering whether a reform would be enough to achieve their goals. Demanding a likely costly, ineffective, and unnecessary solution, when existing law could do the job for cheaper, may reflect a preference for form over function—just as every problem might look like a nail to the Ministry of Hammers.

This Article proceeds as follows. Part I surveys existing literature on the neo-Brandeisian antitrust movement as well as various proposed and enacted laws regulating gatekeepers. It argues that advocates and critics of the neo-Brandeisian movement alike focus on its proposed use of antitrust law for unconventional goals such as redistribution, while neglecting the more fundamental error on which that movement relies: the assumption that promoting competition under existing law cannot address unfair practices by gatekeepers, and that each practice must be micromanaged by regulators instead. Part II establishes that this assumption is indeed an error by using the DMA as an example. It shows that the DMA is not necessary to limit self-preferencing by app stores, because existing antitrust law in both the European Union and the United States can already be applied to curb self-preferencing in ranking apps as well as collecting excessive fees on apps' revenue. After establishing that the DMA would be unnecessary, Part II shows that the DMA would also be inferior to existing law.

Part III argues that the DMA would be ineffective in deterring self-preferencing. The DMA states that "[a] gatekeeper shall not treat more favourably[] in ranking . . . services and products offered by the

66. *See* Elyse Dorsey, *Anything You Can Do, I Can Do Better—Except in Big Tech?: Antitrust's New Inhospitality Tradition*, 68 KAN. L. REV. 975, 1005–06 (2020) ("[E]mpirical literature demonstrates [that] most vertical arrangements will benefit (or at least not harm) consumers.").

gatekeeper itself than similar services or products of a third party" and requires platforms to "apply transparent, fair and non-discriminatory conditions to such ranking."[67] But superficially neutral ranking criteria such as an app's revenue and its number of users can be manipulated to produce rankings that favor certain apps. Moreover, it would be impracticable for the commission to micromanage which criteria gatekeepers use to rank apps or how each criterion is weighted, because gatekeepers would likely enjoy more control over, and expertise in, their own algorithms than the commission. Part IV shows that the DMA would be counterproductive by reducing consumer welfare and distorting how app developers compete.

Having shown that the DMA's micromanaging approach would be unnecessary and inferior to promoting competition under existing law, I conclude with this Article's chief contention: the DMA and the neo-Brandeisian movement which it represents are a revolution without a cause. Like it or not, proposals for sweeping change must be backed by a correspondingly compelling case for that change. But neo-Brandeisian notions have become policy without "careful consideration of specific claims."[68] The likely failure of the DMA would be an undeniably significant data point against neo-Brandeisian antitrust, and would be an overdue opportunity for neo-Brandeisian reform proposals to begin anchoring themselves on the concrete theoretical and evidentiary foundation that they need.

I. THE NEO-BRANDEISIAN ANTITRUST MOVEMENT IN LEGISLATION AND SCHOLARSHIP

Despite vehement disagreement on nearly every debatable point,[69] advocates and critics of the neo-Brandeisian antitrust movement can agree that its influence has seen a meteoric rise. In a mere six years, the movement has grown from a law review Note[70] to law in some of the most advanced economies of the world. As far as is known, the first

67. Council Regulation 2022/1925, O.J. (L 265) 1, 35.

68. Yun, *supra* note 2, at 310.

69. *Compare* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 279–80 (2017) ("[T]he efficiency-based approach has failed even on its own terms."), *with* Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294, 296–97 (2019) ("Populist antitrust advocates also ignore why modern antitrust rejects a simplistic and arbitrary focus on market structure and concentration in favor of analyzing actual competitive effects. The economics underlying the . . . structuralist approach . . . has long been discarded to the dustbin of history.").

70. Khan, *supra* note 4.

national legislation to specifically target unfair practices by gatekeepers independent of their effect on competition is South Korea's 2021 amendment to its Telecommunications Business Act, colloquially known as the Anti-Google Law (AGL).[71] At the time, Google and Apple required most apps hosted on their app stores to use only Google or Apple payment systems, through which Google and Apple collected up to thirty percent of an app's revenue.[72] The AGL barred app store operators such as Google and Apple from requiring apps to use a particular payment method, and from retaliating against apps that use other payment methods.[73] Members of the European Parliament and prominent app developers praised the AGL as "go[ing] in the right direction"[74] and as "a major milestone in the 45-year history of personal computing."[75]

But the AGL was predicted to fail even before taking effect. "[M]any app users may prefer to use Google's and Apple's payment systems because they allow consumers to arrange payment only once to make payments in dozens of apps"[76] hosted on Google and Apple app stores. Because users value the convenience of not "having to arrange payment separately for every single app they use," they were predicted to abandon apps using payment systems other than Google's or Apple's.[77] Given that few apps would be able to afford user attrition in a hypercompetitive market in which "most apps are already estimated as losing between 86.6% to 97.7% of their users within the first thirty days" of launch, all but the most popular apps would "continue to use Google's

71. Jeongitongsinsa-eobbeob [Telecommunications Business Act], art. 22 § 9(1), amended by Act. No. 18451, Sept. 14, 2021 (S. Kor.), https://lawnb.com/Info/ContentView?sid=L000CF10075F3E50_0 [https://perma.cc/8CGT-JKL2], *translated in* Korean Legislation Research Institute's online database, https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60897&lang=ENG [https://perma.cc/FM47-UQNF].

72. Kim, *supra* note 16, at 121.

73. *Id.* at 125.

74. Reis Thebault, *European Lawmakers Welcome South Korean Action on Apple, Google App Stores, Promise More Regulatory Efforts*, WASH. POST (Sept. 1, 2021, 3:48 PM), https://www.washingtonpost.com/technology/2021/09/01/eu-apple-google-korea-react/ [https://perma.cc/MK8F-9V2E] ("Marcel Kolaja, a [member and] vice-president of the European Parliament . . . said . . . 'This South Korean bill goes in the right direction, and I am happy that it's not only the European Union that is looking into this systematic problem and trying to resolve it systematically[.]'").

75. Tim Sweeney (@TimSweeneyEpic), TWITTER (Aug. 31, 2021, 5:14 AM), https://twitter.com/TimSweeneyEpic/status/1432648097075707904 [https://perma.cc/898T-29QE] (Tim Sweeney, founder and CEO of Epic Games).

76. Kim, *supra* note 16, at 126.

77. *Id.* at 125.

or Apple's payment system despite the AGL" permitting each app to use its own preferred payment system.[78]

Of course, the AGL's ban on platforms imposing a payment system might not have been toothless, if it had forced a gatekeeper like Apple to compete against third-party app stores on its own OS. Imagine that a critical mass of apps voluntarily coalesces around a non-Apple app store which operates on iOS but uses a non-Apple payment system and takes lower fees from apps than Apple does. The competing app store would offer users the convenience of being able to pay in many apps by registering a payment method only once, and the competition between the two app stores would reduce fees collected from apps—just as "a large enough number of merchants accept Visa cards that they offer consumers convenience, but the presence of competing credit cards theoretically prevents Visa from charging merchants 30% in fees on every transaction."[79] But the AGL did nothing to force a platform like Apple to compete with other app stores on its own OS, meaning that the AGL merely "permits apps to use their preferred payment systems without creating an environment in which apps could afford to use their preferred payment systems."[80]

Since taking effect in March 2022, the AGL has indeed failed to create an environment in which apps would use third-party payment systems. Local reports quote developers who continue to use Google's payment system and pay Google thirty percent of in-app spending revenue precisely because of its convenience to users.[81] Google also imposed a rule that even further reduces apps' incentive to use third-party payment systems: Google required apps that use third-party payment systems to pay twenty-six percent of in-app spending revenue to Google,[82] with Apple following suit.[83] Even though using third-party payment systems is now four percent cheaper than using Google's payment system, this discount does not appear to have persuaded apps to give up the convenience that Google's or Apple's payment system offers

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78. *Id.* at 125, 129.

79. *Id.* at 133.

80. *Id.* at 134.

81. Darin Kim, *Aemmaket Gyeolje Jeongchaek Dugo, Gieobui Dongsangimong [Gugeul Inaepgyeolje Uimuhwa Yeopa]* [*Companies Have Contrasting Incentives over App Market Payment Policies—Consequences of Google Mandating In-App Payment Policy*], ECONOMIST (S. Kor.) (June 15, 2022), https://economist.co.kr/article/view/ecn202206150062.

82. *Id.*

83. *Aepeul-do Gugeulcheoreom Kkomsu . . . 6Wol Susuryo 26% Je3ja Inaepgyeolje Doip* [*Apple to Charge 26% Fee for Third-Party Payment Systems in June*], FIN. NEWS (S. Kor.) (Apr. 5, 2022), https://www.fnnews.com/news/202204051848230923 [https://perma.cc/3XCM-5P7E].

consumers. In contrast, had the AGL required a gatekeeper like Apple to compete against third-party app stores on iOS, the competition might have forced Apple to charge a lower fee than twenty-six percent to apps using third-party payment systems.

The DMA takes a much more detailed approach to regulating what it deems unfair practices. Like the AGL, the DMA bans imposing a particular payment system on apps.[84] But Article 6 of the DMA also requires a gatekeeper to enable third-party app stores to operate on the gatekeeper's OS,[85] bars gatekeepers from "treat[ing] more favourably[] in ranking . . . services and products offered by the gatekeeper itself than similar services or products of a third party," and requires gatekeepers to "apply transparent, fair and non-discriminatory conditions to such ranking."[86] The DMA also imposes a host of requirements beyond its self-preferencing ban, such as banning the use of certain non-public data "in competition with business users"[87] and requiring gatekeepers to provide advertisers with performance analytics tools for free upon request.[88] The DMA defines gatekeepers as platforms that satisfied the following in the last three years: (1) their annual revenue, market capitalization, or market value exceeds a certain amount; (2) their services are "an important gateway for business users to reach end users"; and (3) their user numbers exceed a certain level.[89]

In addition to specific behavioral restrictions, the DMA also imposes a broad, unspecified restriction on behavior. Article 13, entitled "Anti-circumvention," requires gatekeepers to "ensure that the obligations of Articles 5, 6, and 7 are fully and effectively complied with" and prohibits gatekeepers from "any behaviour that undermines effective compliance with the obligations of Articles 5, 6, and 7 regardless of" the nature of the behavior.[90] As stated in the previous paragraph, Article 6 is the provision banning self-preferencing.[91] "[If a] gatekeeper circumvents or attempts to circumvent any . . . obligation[] in Article 5, 6, or 7" in violation of Article 13,[92] the commission may sua sponte impose upon a gatekeeper measures deemed required "to effectively comply with the

84. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 34.
85. *Id.* at 35.
86. *Id.*
87. *Id.*
88. *Id.* at 36.
89. *Id.* at 30.
90. *Id.* at 42.
91. *Id.* at 34–35.
92. *Id.* at 42.

obligations . . . in Article 6."[93] Article 13 does not further specify the nature of such measures.

Separately from the anti-circumvention measures of Article 13, the DMA has provisions intended to minimize the need for legislative amendments and to increase regulatory flexibility, which is consistent with the European authorities' stated goal of "[e]nsuring that [the DMA] is . . . future proof."[94] Article 3(6) permits the commission to "regularly adjust" the numerical formula that determines whether a platform qualifies as a gatekeeper.[95] Article 12 permits the commission to "adopt delegated acts . . . to supplement . . . the obligations . . . in Articles 5 and 6,"[96] including the ban on self-preferencing and the obligation to "apply transparent, fair and non-discriminatory conditions to such ranking."[97] Delegated acts permitted by Article 12 "shall be based on a market investigation pursuant to Article 19 that has identified the need to keep those obligations up to date."[98] Findings of an investigation pursuant to Article 19 must be published within eighteen months.[99] Article 8 permits the Commission to adopt "implementing acts[] specifying the measures that [a] gatekeeper . . . is to implement . . . to effectively comply with the obligations . . . in Article 6."[100]

Overall, the DMA is designed to prevent unfair conduct before it occurs. Before the DMA's passage, the commission stated that it has "no tools . . . that would allow it to intervene . . . before competition problems would occur," and that existing law is inadequate because it operates only "after a competition problem has emerged."[101] Article 6 of the DMA requires gatekeepers to use only "transparent, fair and non-discriminatory conditions" to rank products;[102] if this rule operates as intended, it would preempt unfair ranking practices. Whether an unfair practice would actually cause a competition problem is immaterial to the DMA, because it intends to "ensure that markets where gatekeepers are present . . . remain . . . fair, independently from the actual . . . effects of the conduct of a given gatekeeper . . . on competition," and "aims to protect a different legal interest" from that of competition law.[103] A bill

93. *Id.* at 38.
94. *DMA Q&A*, *supra* note 53.
95. 2022 O.J. (L 265) at 31.
96. *Id.* at 40.
97. *Id.* at 35.
98. *Id.* at 40.
99. *Id.* at 46.
100. *Id.* at 38.
101. *Commission Impact Assessment Report*, *supra* note 6, ¶ 119.
102. 2022 O.J. (L 265) at 35.
103. *Id.* at 3.

before the U.S. Congress would also prohibit self-preferencing but that bill, unlike the DMA, would ban self-preferencing only if it "*materially harm[s]* competition."[104]

Neo-Brandeisians support preempting conduct that might lead to competition problems in the future, as well as conduct that is merely "unfair" in ways that are unrelated to competition. For example, some argue for "grant[ing] competitors equal and fair access to essential infrastructure for commerce" by forcing "Amazon, Google, Apple, and Facebook to grant third-part[ies] . . . access to their platforms on fair terms."[105] One justification is that breaking up platforms like Amazon "might not suffice to guarantee open markets in the . . . long[] term" because "markets *might* quickly re-consolidate" back into one platform in the future.[106] Another justification is that the "fees of up to 30% for in-app purchases" charged by Google and Apple "*presumably* exceed[] competitive levels,"[107] implying that the possibility, not necessarily the existence, of a competition problem is enough to justify intervention. Others go further and advocate for antitrust intervention against perceived unfairness that is unrelated to competition issues, such as wealth inequality.[108]

Neo-Brandeisian notions have attracted fierce opposition. Most scholarly criticisms of the movement focus on its call to abandon foundational antitrust rules, its weak theoretical basis, and its demand that antitrust law be applied to effect sweeping societal changes which are unrelated to competition. Neo-Brandeisian scholars such as Professor Tim Wu advocate "jettisoning the absurd and exaggerated premise" that "'consumer welfare' [is] the lodestone of the antitrust law."[109] Critics respond that abandoning the consumer welfare standard would lead to "incoherent and inconsistent" results that relinquish the benefits of that standard and promote harms such as "rent seeking when [industry participants] appear[] before the federal antitrust authorities."[110] As for neo-Brandeisian scholars' calls to abandon the longstanding rule of

104. S. 2992, 117th Cong. §§ 3(a)(1), 3(b) (2021) (emphasis added).
105. Guggenberger, *supra* note 5, at 245.
106. *Id.* at 246 (emphasis added).
107. *Id.* at 244 (emphasis added).
108. Khan, *supra* note 4, at 740–42, 804.
109. WU, *supra* note 38, at 135.
110. Wright, Dorsey, Klick & Rybnicek, *supra* note 69, at 364–65.

reason in favor of per se rules,[111] critics argue that doing so would "harm[] the very interests [the per se rule] was intended to protect."[112]

Some scholars have criticized the weak basis of some of the most oft-cited neo-Brandeisian antitrust ideas. Neo-Brandeisians advocate banning self-preferencing by gatekeepers.[113] Professor Thom Lambert has explained that a harmless prohibition on self-preferencing is infeasible even in theory, due to the difficulty of creating objective criteria on a product's "deservingness" to be ranked higher than another product.[114] "[D]etermining true deservingness, which must be done to identify instances of illicit (undeserved) self-preferencing, requires regulators to specify *ex ante* what would make one offering superior to another in the absence of any benefits from favorable placement."[115] But "[t]he popularity of an offering (the number of user clicks, etc.) could not be the sole criterion for . . . deservingness . . . because past display prominence may itself have influenced an offering's popularity."[116] Thus, any self-preferencing ban would require regulators to impose their subjective views of "deservingness" and, "if they get the deservingness formula wrong or if their formula becomes outdated, offerings will be displayed in a way that degrades the user experience."[117]

Still others criticize the neo-Brandeisian argument that antitrust law should be used for political ends that are not related to market competition. Neo-Brandeisians argue that existing law has "effectively embraced concentration" by "orienting antitrust toward material rather than political ends."[118] They argue that "antitrust should . . . disperse economic and political power," and that doing so would "help mitigate inequality."[119] Critics respond that "antitrust populists dislike independence of antitrust agencies, where political whim and regulatory interventionism can face institutional obstacles."[120] "Antitrust agencies

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111. Khan & Vaheesan, *supra* note 69, at 279 ("If antitrust law is to . . . protect consumers . . . from powerful sellers and buyers, maintain open markets, and disperse economic and political power, antitrust enforcers and courts must eschew the open-ended rule of reason and adopt simple presumptions for many forms of anticompetitive conduct.").

112. Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 111 (2018).

113. *See, e.g.*, Guggenberger, *supra* note 5, at 250 ("[R]egulators and courts must bar discrimination and self-preferencing by platforms.").

114. Lambert, *supra* note 58, at 98.

115. *Id.*

116. *Id.*

117. *Id.*

118. Khan, *supra* note 4, at 742.

119. Khan & Vaheesan, *supra* note 69, at 276.

120. Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 STAN. J.L. BUS. & FIN. 131, 164 (2020).

are ideally independent from party-politics . . . [and] insulated from electoral considerations . . . . to design . . . policies that suit consumer welfare and innovation rather than political interest," just as "a central bank should design its monetary policy independently from government as much as possible."[121] This position echoes the well-established findings from economists that, the more politicized a central bank is, the less effective it is in fighting inflation.[122]

Mounting criticism of the aforementioned aspects of neo-Brandeisian antitrust seems to have created a new battleground between advocates and critics. Professor John Yun argues that, "amid the calls to either change antitrust presumptions or seek legislative solutions," neo-Brandeisians fail to offer "a full consideration of the potential benefits of the specific practices" they propose.[123] Professor Yun further submits that "there is little self-examination in considering whether the proposed changes could give rise to problems of their own, . . . making the 'cure' worse than the 'disease.'"[124] Thus, "[neo-Brandeisian] recommendations have already moved to the policy proposal level" without "careful consideration of specific claims."[125] On the other side, scholars who defend the neo-Brandeisian antitrust movement argue that it does offer defenses of specific proposals, but that the movement's critics "have not engaged . . . with the populists' specific reform proposals."[126]

Defenders of neo-Brandeisian antitrust are correct that critics tend to focus on its theory and its demand to pursue political goals using antitrust law,[127] perhaps at the expense of examining specific policy

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121. *Id.*

122. Helge Berger, Jakob de Haan & Sylvester C.W. Eijffinger, *Central Bank Independence: An Update of Theory and Evidence*, 15 J. ECON. SURVS. 3, 31 (2001) ("[T]he majority of papers surveyed find the negative correlation between central bank independence and inflation to be quite robust."); Seda Demiralp & Selva Demiralp, *Erosion of Central Bank Independence in Turkey*, 20 TURKISH STUD. 49, 51 (2019) (arguing that "the decline in central bank independence . . . . diminishes Turkey's capacity to fight inflation"); *Turkey's Inflation Hits 24-Year High of 85.5% After Rate Cuts*, REUTERS (Nov. 3, 2022, 4:14 AM), https://www.reuters.com/markets/asia/turkeys-inflation-hits-24-year-high-855-after-rate-cuts-2022-11-03/ [https://perma.cc/NZ2D-WBZU] ("Turkish annual inflation climbed to a new 24-year high of 85.51% in October, official data showed . . . after the central bank cut its policy rate despite surging prices.").

123. Yun, *supra* note 2, at 309.

124. *Id.*

125. *Id.* at 310.

126. Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 ANTITRUST L.J. 393, 394 (2020).

127. *Cf.* Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191 (1977) ("Whether antitrust policy promotes, or should promote, social goals other than efficiency and

proposals. But critics such as Professor Yun are also correct that neo-Brandeisians have neglected to sufficiently consider the consequences of their own proposals before legislating them. The AGL is just such an example. It enacted a specific version of the neo-Brandeisian view against self-preferencing, by barring an app-store owning platform from imposing its payment system on app developers.[128] The intent was to enable apps to use their own payment systems, so as to stop gatekeepers from collecting what were seen as excessive commissions on apps' revenue.[129] The then-South Korean president called the law a historic precedent that would develop into a global standard,[130] while European legislators praised the bill as "going in the right direction"[131] and Members of Congress from both major parties argued that "[i]t's time the U.S. follow suit."[132]

But these legislators apparently failed to foresee that Korean developers would likely have no choice but to continue using the gatekeepers' payment systems. This was because the payment systems imposed by Google and Apple enable customers to make payments in nearly every app by registering a payment method only once.[133] If apps abandoned those payment systems, that would likely make consumers register a payment method individually for each app, which may be inconvenient enough to drive users away.[134] Legislators apparently did

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competitive markets deserves some thought because it lies at the root of so much controversy in antitrust."); *id.* at 1199–1200 (discussing "income redistribution" and "the equity preference for small businesses").

128. Jeongitongsinsa-eobbeob [Telecommunications Business Act], art. 22 § 9(1), amended by Act. No. 18451, Sept. 14, 2021 (S. Kor.), https://lawnb.com/Info/ContentView?sid=L000CF10075F3E50_0 [https://perma.cc/T427-56TQ], *translated in* Korean Legislation Research Institute's online database, https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60897&lang=ENG [https://perma.cc/KEE8-FPYU].

129. Kim, *supra* note 17, at 123–24.

130. *See Mun Daetongnyeong, 'Gugeul Gapjil Bangjibeop'E "Segye Choechojabusim Gajil Il"* [*President Moon Praises Anti-Google Law as "A Global First to Be Proud of"*], MBC NEWS (Sept. 2, 2021), https://imnews.imbc.com/news/2021/politics/article/6298005_34866.html [https://perma.cc/QM4J-6C4F].

131. Thebault, *supra* note 74.

132. Heekyong Yang, *S. Korea's Parliament Passes Bill to Curb Google, Apple Commission Dominance*, REUTERS (Aug. 31, 2021, 4:38 PM), https://www.reuters.com/technology/skoreas-parliament-passes-bill-curb-google-apple-commission-dominance-2021-08-31/ [https://perma.cc/WN37-LEWB] ("'It's time the U.S. follow suit to reduce Big Tech's app store influence. I urge Congress to swiftly pass my bill with Senators Blumenthal and Klobuchar that will help ensure fair competition for innovative startups,' said Senator Marsha Blackburn . . . .").

133. Kim, *supra* note 17, at 126.

134. *Id.* at 127–28.

not anticipate the fact that consumers might put a high enough premium on convenience to deter apps from using their own payment systems,[135] but the app developers did. Developers who thought that they could not afford user attrition from using their own payment systems said so,[136] and developers who went ahead with using their own payment systems gave their users large discounts on in-app spending (for example, twenty percent) to offset the inconvenience of arranging payment separately with their app.[137]

Neo-Brandeisians' failure to fully consider the likely consequences of their own proposals is not isolated to just one law or a few scholars. Many existing works do study the consequences of the DMA, but they do so assuming that it regulates gatekeepers as intended—which neglects the possibility of the DMA not working as intended. Some cite side effects of the DMA operating as intended, such as "European . . . protectionism" against "the dominance of the US/Silicon Valley [in] the platform economy"[138] or "burden[ing] [platforms] with the risk of over-regulation and . . . stifl[ing] innovation."[139] Others suggest better ways for the DMA to achieve its intended effects. One idea is for a "settlement submission procedure (whereby parties agree to comply in exchange for a reduced fine) . . . at least for first infringements" because "enforcement [would be] quicker and less costly."[140] Another idea is to impose tailored obligations on different kinds of gatekeepers instead of "subjecting them all to the same set of obligations," because "[a] single set of rules that

135. Sun-young Yoon, *Gugeul, Yejeong-daero Inaep Gyeolje Ganghaeng Gukoe, Gapjil Chu-ga Jejae Umjigim* [*Google Proceeds with In-App Payment Policy; National Assembly Indicates Additional Regulatory Action*] DIGIT. TIMES (S. Kor.) (June 2, 2022), http://www.dt.co.kr/contents.html?article_no=2022060202101231820001 [https://perma.cc/K49N-9QDF] (stating that Google has effectively circumvented the AGL and that legislators from both major parties are discussing amendments to the AGL to address Google's response to the law).

136. *See* Kim, *supra* note 81 (stating that the smartphone game industry is largely not resisting Google's attempts to collect thirty percent fees even after the passage of the AGL, and quoting an app developer describing Google's thirty percent fee as the price of the convenience of the "global network effects" of the Google Play Store).

137. *See The Fortnite Mega Drop - Permanent Discounts up to 20%*, FORTNITE, https://www.fortnite.com/news/the-fortnite-mega-drop-permanent-discounts-up-to-20-percent [https://perma.cc/CWV4-RE2R] (Sept. 10, 2020).

138. Michelle Cini & Patryk Czulno, *Digital Single Market and the EU Competition Regime: An Explanation of Policy Change*, 44 J. EUR. INTEGRATION 41, 45 (2022).

139. Maciej Hulicki, *Algorithm Transparency as a* Sine Qua Non *Prerequisite for a Sustainable Competition in a Digital Market?*, 5 EU & COMPAR. L. ISSUES & CHALLENGES 238, 255 (2021).

140. Giorgio Monti, *The Digital Markets Act: Improving Its Institutional Design*, 5 EUR. COMPETITION & REGUL. L. REV. 90, 96 (2021).

applies indiscriminately to all . . . gatekeepers . . . is unlikely to be equally effective across all . . . gatekeepers."[141]

Studies limited to the assumption that the DMA achieves its intended results are consistent with a larger school of thought in relevant literature. Well before the EU adopted measures outside competition law to regulate gatekeepers, scholars had already argued that "EU competition law is powerful" and thus consequential, for better or worse. As "[b]reaches can lead to fines of up to 10% of worldwide turnover . . . as well as derivative private litigation claims[,] . . . . the legal uncertainty could dissuade companies" outside the EU from working with their EU counterparts.[142] Scholars have also argued that the impact of EU law can reach well beyond the EU. Professor Anu Bradford advances the "Brussels Effect," which she argues enables the EU to "exercise genuine unilateral power . . . by fixing the standards of behavior for the rest of the world."[143] The claim is that factors such as the size of the internal market, the EU's "significant regulatory capacity . . . supplemented with the political will to deploy it," and the stringent nature of the EU's regulations would induce firms throughout the world to voluntarily comply, despite large compliance costs.[144]

It is undoubtedly important to study what would happen if a law achieves its stated goals; for example, should the DMA's "competition-enhancing" regulation succeed, that success might "adversely affect consumers' comfortable user experience" or "stifle innovation incentives."[145] If the DMA does achieve its stated goals, the commission could be justified in defending the DMA on the basis of "what is gained in return" despite being "well aware that the DMA could reduce . . . innovation incentives."[146] But, while the DMA might

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141. Pinar Akman, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act 27–28 (Dec. 16, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625 [https://perma.cc/R8YS-DFDL].

142. Shin-Shin Hua & Haydn Belfield, *AI & Antitrust: Reconciling Tensions Between Competition Law and Cooperative AI Development*, 23 YALE J.L. & TECH. 415, 420–21 (2021).

143. ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 23–24 (2020).

144. *Id.* at 26, 37, 53–54.

145. Klaus Keller, Stefan Scheuerer & Klaus Wiedemann, *'New Directions in the European Union's Innovation Policy?' – Report on the Conference of the Max Planck Institute for Innovation and Competition in Collaboration with the MPI Alumni Association in Munich, 9 July 2021*, 70 GRUR INT'L 1074, 1075–76 (2021).

146. Pierre Larouche & Alexandre de Streel, *The European Digital Markets Act: A Revolution Grounded on Traditions*, 12 J. EUR. COMPETITION L. & PRAC. 542, 548 (2021).

succeed, this Article posits that it is much more likely to fail for the following reason: the DMA's various provisions are unnecessary, ineffective, and counterproductive to achieving its central goals, such as curbing self-preferencing in ranking apps. Unrealistically rosy views of neo-Brandeisian ideas only substantiate Professor Yun's critique of that movement—that it does not "consider[] whether the proposed changes could give rise to problems of their own, potentially making the 'cure' worse than the 'disease.'"[147]

But the argument that neo-Brandeisian antitrust has not engaged in a sober analysis of its own risks understates the true extent of the problem. The fundamental problem of neo-Brandeisian antitrust is that, despite the political fanfare that fueled its meteoric rise,[148] it has not yet justified why it is necessary. Neo-Brandeisians argue that existing law is inherently incapable of regulating unfair conduct by gatekeepers[149] by pointing to examples of gatekeepers such as Amazon, Apple, and Google engaging in such acts.[150] Yet, the fact that bad things happen does not justify applying a new policy without sufficient consideration. The fact that bad things happen also does not mean that existing law has irredeemably failed, just as the existence of crime does not mean that criminal law is useless. Indeed, scholars have shown that Chair Khan's invocation of Amazon as evidence of existing law's failure to rein in predatory conduct by gatekeepers relied on a "factual error" and "an error in logic" concerning Amazon's business practices and profit motivations.[151]

The rest of this Article provides what neo-Brandeisians and critics demand from each other, but both fail to supply: a study of whether specific laws intended to advance neo-Brandeisian antitrust objectives would actually be necessary, by examining whether existing law could achieve those same goals at a lower cost. The failure of existing scholarship to provide such analyses may be attributed to the fact that the scholarly debate has largely focused on whether neo-Brandeisian ideas

147. Yun, *supra* note 2, at 309.

148. *Cf.* Mark Jamison, *Applying Antitrust in Digital Markets: Foundations and Approaches*, B.C. INTELL. PROP. & TECH. F., Jan. 22, 2020, at 1, 8 ("Despite economists' emphasis on the need for economic foundations for antitrust, political motivations persist for some people and perhaps drive some antitrust cases."); Wright & Portuese, *supra* note 120, at 181 ("[S]cholars need to better apprehend the antitrust challenges brought about by digital platforms without fueling political antitrust populism—let alone using the rhetoric of political antitrust populism.").

149. *See supra* notes 4–7 and accompanying discussion.

150. Khan, *supra* note 4 (Amazon); Guggenberger, *supra* note 12, at 314–25 (Apple and Google).

151. Jamison, *supra* note 148, at 18.

are normatively superior to existing theory.[152] While debates on normative claims can be worthwhile, it is too often difficult to prove that someone is right or wrong on values differences, such as beliefs on whether antitrust should tackle political issues. It is unsurprising, then, that vocal debate on the normative merits of neo-Brandeisian antitrust has not seen much progress, because "[t]he fact that no one can be proven wrong enables the same debates to repeat themselves ad nauseam."[153]

In contrast to existing works, this Article accepts arguendo the normative assumption that self-preferencing is indeed harmful, and instead presents an analytic study of whether the DMA would be a better option than existing law to curb self-preferencing. By removing the normative factor from the scope of debate, this Article aims to improve our understanding of something that is just as important as deciding whether a policy goal should be achieved: determining the most cost-effective way to achieve that goal. Part II argues that the DMA's regulation of specific conduct would be unnecessary to curb self-preferencing by app store operating gatekeepers. It argues that existing law in both the European Union and the United States can curb self-preferencing, by establishing tying claims against app store operators such as Apple. Parts III and IV show that the DMA would not only be unnecessary but also inferior to existing law because the DMA would be both ineffective in, and counterproductive to, achieving some of the neo-Brandeisian movement's most central stated objectives.

II. THE DMA'S REGULATION OF SPECIFIC CONDUCT WOULD BE UNNECESSARY

Part I established that neo-Brandeisians have not yet justified the necessity of their proposed policies. The first step in determining whether policies such as the DMA are necessary is to examine whether existing law can achieve the same goals that neo-Brandeisians pursue. Whether existing law can also achieve neo-Brandeisian ends says nothing about whether existing law would be a *better* way than neo-Brandeisian policy to achieve those ends.[154] But if existing law can achieve neo-Brandeisian goals, that fact alone would be evidence against the claim that the *only* feasible way to combat unfair conduct by gatekeepers is to abandon the

152. *See supra* notes 118–22 and accompanying discussion.

153. Yunsieg P. Kim, *Conflict of Laws for the Age of Cybertorts: A Game-Theoretic Study of Corporate Profiteering from Choice of Law Loopholes and Interstate Torts*, 46 BYU L. REV. 329, 383 (2021).

154. The issue of whether existing law would be a better way than neo-Brandeisian policy to achieve neo-Brandeisian ends is discussed *infra* Part III.

existing legal framework and adopt neo-Brandeisian policies.[155] Part II demonstrates that existing law can achieve a central goal of the DMA: preventing app-store owning gatekeepers from self-preferencing in ranking their own apps or collecting excessive fees, which the European Commission claims that existing law cannot achieve[156] and, hence, is used as a reason to justify the DMA.[157]

A. Competition Has Restrained Self-Preferencing in Similar Markets Without Regulatory Micromanagement of Specific Conduct

One type of self-preferencing an app-store owning gatekeeper can engage in is ranking the gatekeeper's apps more favorably than apps offered by competitors without a valid reason.[158] Another is requiring apps hosted on a gatekeeper's app store to use only the gatekeeper's payment system and preventing apps from directing users to other options, the latter of which is called anti-steering.[159] Anti-steering is cited as enabling gatekeepers to collect fees that "presumably exceed[] competitive levels."[160] The DMA regulates self-preferencing by requiring gatekeepers to use only "transparent, fair and non-discriminatory" ranking factors.[161] As for anti-steering, the DMA bars platforms from requiring "users to use . . . [certain] payment systems for in-app purchases."[162] The DMA states that existing law is inadequate because its applicability "is limited to certain instances of market power" and "enforcement occurs *ex post* and requires an extensive investigation of often very complex facts."[163] It adds that existing law "does not

155. *See, e.g.*, WU, *supra* note 38, at 135 (arguing that "antitrust's intended economic and political roles cannot be fully recovered without jettisoning the absurd and exaggerated premise" that "'consumer welfare' [is] the lodestone of the antitrust law").

156. *Commission Impact Assessment Report*, *supra* note 6, ¶ 119 (Existing law "can only take place ex post, . . . after a competition problem has emerged," and it "has currently no tools . . . that would allow it to intervene ex ante i.e. before competition problems . . . occur.") (emphasis omitted).

157. *Id.* ¶¶ 10, 21 (stating that the DMA "propos[es] ex ante rules for certain large platforms and aim[s] at ensuring fair and contestable digital markets" and "[t]he purpose of the DMA initiative is therefore to allow these platforms to unlock their full potential by addressing the most salient incidences of unfair practices and weak contestability so as to allow consumers and business users alike to reap the full benefits of the platform economy") (emphasis omitted).

158. *Id.* ¶¶ 41–42.

159. *Id.* ¶ 39.

160. Guggenberger, *supra* note 5, at 244.

161. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 35.

162. *Id.* at 34.

163. *Id.* at 2.

address . . . the challenges . . . posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms."[164]

But the fact that some apparently anticompetitive acts occur does not necessarily mean that existing competition law is incapable of addressing gatekeepers' anticompetitive acts—just as the continued existence of crime does not mean that criminal law is useless.[165] It just may be that existing law needs to be adapted, not abandoned, just as the advent of cryptocurrencies has created new issues "in cases from fraud to secured transactions" but "[e]xisting commercial law . . . could be adapted" to address such issues while maintaining "[s]ensitivity to existing practices."[166] Because the DMA will likely be highly costly to both regulators and businesses,[167] a serious consideration is warranted as to whether the DMA's goals could be achieved using existing law. If existing law can be tweaked to become fit for purpose, insisting on using the DMA may merely indicate European authorities' bias for complex and intrusive instruments,[168] bringing to mind the old quip that every problem will look like a nail to those in charge of the Ministry of Hammers.

Fortunately, one need not imagine an alternate reality to understand that self-preferencing by app stores could be curbed without regulatory micromanagement of how gatekeepers run app stores. This is because an analogous market seems to be restraining self-preferencing without laws like the DMA. The intuition is simple: if Apple can engage in unfair practices by exploiting the fact that it is "the only game in town" for distributing iOS apps, it may be harder to engage in such behavior if

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164. *Id.*

165. *Cf.* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 426 (2016) (quoting *The Law Against Carrying Concealed Weapons*, DAILY EVENING BULL. (S.F.) Nov. 23, 1867, at 2) ("There is certainly originality if not wisdom in opposing the law because it is obeyed only by the well-disposed. On this principle every law against crime should be repealed.").

166. Stephen McJohn & Ian McJohn, *The Commercial Law of Bitcoin and Blockchain Transactions*, 47 UNIF. COM. CODE L.J. 187, 187–88 (2017).

167. Michael Dietric & Thomas Vinje, *The European Commission's Proposal for a Digital Markets Act*, 22 COMPUT. L. REV. INT'L 33, 37 (2021) ("[The DMA's] self-reporting obligation has severe consequences . . . as [a gatekeeper] must comply with the obligations in [Articles] 5 and 6 . . . and, in case of non-compliance, may be subject to high fines."); Monti, *supra* note 140, at 96 (arguing for a "settlement submission procedure . . . at least for first infringements" because "enforcement [would be] quicker and less costly" for the European Commission).

168. Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European "Fashion" Export the United States Can Do Without*, 17 TEMP. POL. & CIV. RTS. L. REV. 491, 508 (2008) ("Europe's penchant for over-regulation . . . has effectively rendered European industry less globally competitive.").

third-party owned app stores competed against Apple on iOS.[169] If app stores must compete to attract apps, a developer who believes that a store charges excessive fees or engages in unfair ranking practices can take its business to another store, which should incentivize app stores to lower their fees and to refrain from biased ranking practices. Indeed, there is a market in which the owner of the operating system has its own software storefront for that OS, but third parties also compete with the OS owner on that OS: "Steam, GOG, and the Epic Game Store . . . sell computer games for Microsoft Windows," but these storefronts are not owned or operated by Microsoft.[170]

Causality between two phenomena is often difficult, if not impossible, to prove—something which lawyers know only too well.[171] But in the market for Windows software distribution, the correlation between more competition and less unfair conduct seems to come as close to causation as it can. On November 30, 2018, Steam changed its 30% flat fee on game sales revenue to a varying fee of 30% for the first $10 million in revenue, 25% for the next $40 million, and 20% thereafter.[172] The Epic Games Store, which launched on December 6, 2018,[173] has charged a flat fee of 12% since launching.[174] On April 29, 2021, the Microsoft Store announced that it would reduce its fee from 30% to 12%.[175]

Such competition occurs in the context of not only Windows software distribution, but also app stores for smartphones. Unlike Apple's App Store, which is the only means of distributing apps for iOS,[176] Google's Play Store is not the only app store for Android.[177] But despite the availability of other app stores, "Play Store is dominant

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169. *See* Kim, *supra* note 16, at 133.

170. *Id.*; Booty, *supra* note 29 (announcement by the Microsoft Store); MICROSOFT STORE, https://apps.microsoft.com/store/apps [https://perma.cc/PMF3-EUWL] (selling Windows apps and PC games, among other software).

171. *Cf.* David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 740 (2001) ("Real world antitrust litigation is too complex and messy for bright-line approaches to such difficult issues as causation.").

172. *New Revenue Share Tiers and Other Updates to the Steam Distribution Agreement*, STEAM, https://steamcommunity.com/groups/steamworks/announcements/detail/1697191267930157838 [https://perma.cc/N3LN-P4LJ].

173. Statt, *supra* note 31.

174. *See* EPIC GAMES, *supra* note 32.

175. *See* Booty, *supra* note 29.

176. *See* Smizer, *supra* note 10.

177. *In Re Apple iPhone Antitrust Litig.*, No. 11-CV-06714-YGR, 2020 WL 5993223, at *2 (N.D. Cal. Oct. 9, 2020) ("The Galaxy Store is not the only source of apps for users of Samsung's devices, however. Google Play, Android's centralized app marketplace, comes preinstalled along with the Galaxy Store on Samsung's Android OS devices.").

because . . . it is the most frequently preinstalled app store on Android [] phones and most app downloads for Android are from Play Store."[178] Google does not enjoy this dominance in China because "Google Play exited China in 2011," meaning that "the 70% of Chinese mobile gamers who use Android devices must instead navigate the 200 to 400 other app stores that filled the void of Google's exit."[179] Although some Chinese app stores have collected up to fifty percent in fees, some app developers chose "stores charging smaller fees or none at all" and, "despite not listing on the main app stores" owned by Chinese Android device makers, those developers have placed some of their games among the top ten grossing apps.[180]

Such examples show, albeit anecdotally, that competition among app stores may be capable of addressing an oft-cited example of unfair conduct by app store operating platforms—collecting a share of apps' revenue that "presumably exceed[s] competitive levels."[181] Competition, delivered in the form of criticism by consumers,[182] also appears to have forced computer software storefronts to improve the system they use to rate the software they sell.[183] While a monopolist would likely suffer no adverse consequences for using biased or flawed rating schemes, a storefront that does not dominate the market likely could not afford to ignore user complaints about bad rating systems because it would risk

178. Renato Nazzini, *The Evolution of the Law and Policy on Tying: A European Perspective from Classic Leveraging to the Challenges of Online Platforms*, 27 J. TRANSNAT'L L. & POL'Y 1, 22 (2018).

179. Michael Dean Krebs, Comment, *Increasing the Difficulty Level: China's 2016 Mobile Game App Regulations, Another Restrictive Market Entry Barrier to Foreign Corporations*, 31 TEMP. INT'L & COMPAR. L.J. 521, 525–26 (2017).

180. Zheping Huang, *China's App Store Fees Make Apple's Look Cheap*, BLOOMBERG (Oct. 8, 2020, 5:45 AM), https://www.bloomberg.com/news/newsletters/2020-10-08/china-s-app-store-fees-make-apple-s-look-cheap [https://perma.cc/6PWS-QQJF?type=image].

181. Guggenberger, *supra* note 5, at 244.

182. James Batchelor, *Epic Games Store Avoids Review Bombing with OpenCritic Integration*, GAMESINDUSTRY.BIZ (Jan. 16, 2020) ("One of the many criticisms against the Epic Games Store has been the lack or reviews or ratings, while market leader Steam offers both the Metacritic score and user reviews."), https://www.gamesindustry.biz/epic-games-stores-avoids-review-bombing-with-opencritic-integration [https://perma.cc/9SG8-H43W].

183. *The Epic Games Store "Ratings and Polls" Update*, EPIC GAMES (June 17, 2022) (adopting a new rating system that randomly solicits reviews of games only from people who have played a game for at least two hours), https://store.epicgames.com/en-US/news/the-epic-games-store-ratings-and-polls-update; Mustafa Mahmoud, *3 and a Half Years After Launch, the Epic Games Store Is Getting User Ratings*, KITGURU (June 20, 2022), https://www.kitguru.net/desktop-pc/mustafa-mahmoud/3-and-a-half-years-after-launch-the-epic-games-store-is-getting-user-ratings/ [https://perma.cc/S88E-LLCK].

being undercut by competing storefronts offering improved rating systems. In other words, in markets which are highly similar to the one that a gatekeeper like Apple operates in, competition seems to have curbed many of the unfair acts that the DMA is designed to target, without the need for a law like the DMA and the regulatory micromanagement it would implement.

This indicates that neo-Brandeisians' lack of faith in existing law's ability to rein in gatekeepers is premature. European authorities' justification for command-and-control regulation, such as mandating "transparent, fair and non-discriminatory" ranking criteria[184] and banning the imposition of payment systems,[185] is that there is no other feasible way to restrain gatekeepers from engaging in unfair conduct such as self-preferencing or taking excessive fees.[186] But the examples of computer software distribution worldwide and Android app distribution in China show another potential way to stop self-preferencing and excessive fees, without telling platforms how to rank apps and collect fees[187]: forcing competition between platforms so that consumers and app developers can abandon platforms that engage in unfair conduct. Thus, it is worth at least considering whether existing law can foster competition among platforms without regulatory micromanagement, something which neo-Brandeisians have not yet done.[188] It is especially worth considering alternatives to command-and-control regulation whenever possible, as it is usually much more costly to enforce than the alternatives.[189]

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184. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 35.

185. *Id.* at 34.

186. Piffaut, *supra* note 28, at 20 (arguing that "the difficulty of correcting ex post negative effects on competition ha[s] often led to a policy choice for ex ante regulation that would specify obligations . . . and constrain behaviour"); 2022 O.J. (L 265) at 2–3 ("[The scope of existing law] is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs *ex post* and requires an extensive investigation of often very complex facts . . . . Moreover, existing Union law does not address . . . 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.").

187. 2022 O.J. (L 265) at 35; *id.* at 34. *See also Commission Impact Assessment Report*, *supra* note 6, ¶ 313 ("[I]f commission fees in large app stores were to be reduced from 30% to 15%, the average prices of apps and digital content acquired through these apps would fall, which would increase consumer surplus . . . .").

188. *See supra* notes 148–53 and accompanying text.

189. *See, e.g.*, Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 31–32 (1983) ("The inefficiencies of extensive command-and-control regulation fall on consumers and producers alike. . . . [T]here is good reason to think that many forms of regulation may be superior to command-and-control supervision."); *id.* at 33 (stating that even an argument in favor of command-and-control regulation would acknowledge that it "has greater costs than those of

B. Existing Law Can Force Gatekeeper-Operated App Stores to Compete against Third Parties

Section II.A argued, citing evidence from analogous markets, that forcing app-store operating platforms to compete could restrain them from self-preferencing and taking excessive fees without the need for laws like the DMA. Section II.B argues that existing law in the EU and the U.S. can force a gatekeeper-owned app store, like the Apple App Store, to compete with third-party app stores on the gatekeeper's OS. Existing law could enable third parties to operate app stores on a gatekeeper's OS by establishing that the gatekeeper unlawfully tied its OS with its app store. If such a claim is established, Apple would no longer be able to condition the sale of its iOS devices on the use of its App Store, meaning that the Apple App Store would no longer be the only means of distributing apps for the iOS. Such a claim would require defining the relevant market as a single OS (or a few operating systems), which both European authorities and U.S. courts have done in past cases against Google and Microsoft.

1. ESTABLISHING A TYING CLAIM AGAINST A GATEKEEPER-OPERATED APP STORE UNDER EU LAW

Article 102 of the Treaty on the Functioning of the European Union (TFEU), which is "the European equivalent to Section 2 of the Sherman Act," prohibits anticompetitive tying.[190] Article 102(d) defines an example of "abuse by . . . undertakings of a dominant position within the internal market" as "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[191] The commission has established the following four-pronged test to identify unlawful tying under Article 102:

> (1) the tying and tied products are two separate products; (2) the undertaking concerned is dominant in the market for the tying product; (3) the dominant undertaking does not give its

alternatives"). *See also* Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 485 (1995) ("In addition to their cost-ineffectiveness, command-and-control approaches [in the context of environmental regulation] discourage technological innovation.").

190. Giorgio Monti & Alexandre Ruiz Feases, *The Case Against Google: Has the U.S. Department of Justice Become European?*, ANTITRUST, Spring 2021, at 26, 26.

191. TFEU, *supra* note 45, art. 102(d).

> customers or end users a choice to obtain the tying product without the tied product; and (4) the tying is capable of restricting competition.[192]

Despite the lack of "a clear test for anti-competitive tying" due to "the paucity of [relevant] cases in this area and the way . . . issues have been raised, or not, before the EU Courts,"[193] the commission's treatment of tying claims against Microsoft and Google indicates that it would find anticompetitive tying involving a gatekeeper's operating system and app store, if it has not done so already. In its 2009 *Microsoft Tying* ruling, the commission found that Microsoft had tied its browser Internet Explorer to its Windows OS.[194] The commission set "the relevant product markets [as] the market for client PC operating systems and the market for web browsers for client PC operating systems,"[195] defining "client PCs" as "general-purpose computers designed for use by one person at a time."[196] The commission then found that Microsoft had a dominant position in the market for the tying product, observing that "Microsoft holds a worldwide market share of around 90% . . . in the market for client PC operating systems" and that, despite the availability of other PC operating systems such as Linux, almost all "commercial applications written for client PCs are . . . available for the Windows platform."[197]

The commission found that "end users could not technically and legally obtain Windows without Internet Explorer" given that, "[u]ntil very recently, none of the top ten OEMs [Original Equipment Manufacturers] in the USA and in the EEA shipped a client PC with Windows with a non-Microsoft web browser pre-installed."[198] The commission then found that this "tying was liable to foreclose competition on the merits between web browsers."[199] Until Microsoft's release of Windows 7 in 2009 shortly before the commission's decision

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192. AT.40099—*Google Android*, Comm'n Decision, ¶ 741 (July 18, 2018) (summary at 2019 O.J. (C 402) 19), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1128(02)&qid=1694126492168 [https://perma.cc/NWU6-N84Y].

193. Nazzini, *supra* note 178, at 19.

194. Case COMP/C-3/39.530—*Microsoft (Tying)*, Comm'n Decision, ¶ 56 (Dec. 16, 2009) (summary at 2010 O.J. (C 36) 7), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_5.pdf [https://perma.cc/N52V-UXKH].

195. *Id.* ¶ 17.

196. *Id.* at 5 n.9.

197. *Id.* ¶¶ 18, 24, 27.

198. *Id.* ¶¶ 36, 42.

199. *Id.* ¶ 36.

in this case, "it was not possible for OEMs or users to turn off Internet Explorer" on any version of Windows.[200] Windows also carried various design and interface features that created a bias towards Internet Explorer, resulting in "users . . . tend[ing] to stick to Internet Explorer as the installed default web browser."[201]

As for the requirement that the tying and tied goods be separate products, *Microsoft Tying* did not explain in any detail its finding that Internet Explorer and Windows were separate products because of "specific characteristics and the lack of realistic substitutes."[202] But the commission's 2004 ruling in a separate case against Microsoft held, applying what is now Article 102 of the TFEU, that "[i]f there is no independent [consumer] demand for an allegedly 'tied' product, then the products at issue are not distinct and a tying charge will be to no avail."[203] Under this reading of Article 102, treating web browsers as a separate good is justified because there is independent demand for them—as indicated by the allegation in the *Microsoft Tying* complaint that "the tying of Internet Explorer to Windows prevents Opera's web browser from competing on the merits with Internet Explorer."[204] Applying this reasoning to smartphones, there clearly is (or would be) a demand for app stores that is separate from the demand for a particular smartphone or its OS, if the number of app stores on Android is any indication.[205]

In fact, another applicable case is the 2018 *Google Android* ruling, which held that Google engaged in a number of anticompetitive tying practices involving its Play Store, its web browser Chrome, and its Google Search app for Android phones.[206] As relevant here, the commission effectively found that Google had unlawfully tied particular versions of Android OS to the Google Play Store.[207] Android is an open-source OS, meaning that anyone can develop modified versions of that OS. But Google "explicitly or tacitly" approved smartphones that ran only certain versions of Android OS, which the commission referred to as Google Android.[208] Google required device manufacturers to enter into

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200. *Id.* ¶ 43 & n.22.

201. *Id.* ¶¶ 63–64 & n.35.

202. *Id.* ¶ 22.

203. Case COMP/C-3/37.792—*Microsoft Corp.*, Comm'n Decision, ¶ 803 (Mar. 24, 2004) (summary at 2007 O.J. (L 32) 23), https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf [https://perma.cc/3N7N-3BQT].

204. Case COMP/C-3/39.530—*Microsoft (Tying)*, *supra* note 194, ¶ 5.

205. *See supra* notes 176–79 and accompanying text (discussing many app stores for Android apart from the Google Play Store).

206. AT.40099—*Google Android*, *supra* note 192, ¶ 4.

207. *Id.* ¶ 4(3).

208. *Id.* ¶ 131.

anti-fragmentation agreements that prohibited installing versions of Android OS not approved by Google.[209] Google also "grant[ed] a licence to pre-install the Play Store . . . only with . . . manufacturers who . . . entered into the anti-fragmentation obligations."[210] The commission found that Google was dominant in the market for what is the tying product for the purposes of this claim, the "worldwide market (excluding China) for Android app stores."[211]

The *Microsoft Tying* and *Google Android* cases indicate that the commission would find, or already has found, anticompetitive tying involving a gatekeeper's operating system and its app store. The *Microsoft Tying* case found anticompetitive tying involving Microsoft's Windows OS and its software (web browser) by limiting the relevant market to the market for a certain type of OS.[212] The *Google Android* case found anticompetitive tying involving a gatekeeper's app store and its operating system, by holding that Google had unlawfully tied its preferred versions of Android OS to its Play Store.[213] Under this reasoning, a tying claim against Apple involving iOS and the Apple App Store would be even stronger than a tying claim involving Google Android and the Play Store because "Google's Play Store was considered to be dominant among Android App Stores" and "[s]ince Apple is the only iOS App Store and has a 100% market share, it is reasonable to assume that the European Commission would consider it to be dominant among iOS App Stores."[214]

This means that, once the commission finds anticompetitive tying involving a gatekeeper's app store and its OS, it can restrain the gatekeeper from self-preferencing by forcing the gatekeeper to open its OS to third party-owned app stores using existing law. Regulation 1/2003 permits the commission, upon finding an infringement of Article 102 of the TFEU, to "impose . . . any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement . . . to an end."[215] Regulation 1/2003 does not define "structural remedies," but the European Parliament has stated that they include "divestment or break-up of companies."[216] Although the

209. *Id.* ¶¶ 157–64.

210. *Id.* ¶ 1034.

211. *Id.* ¶ 590.

212. Case COMP/C-3/39.530—*Microsoft (Tying)*, *supra* note 194, ¶ 17.

213. AT.40099—*Google Android*, *supra* note 192, ¶ 4(3).

214. Roger D. Blair & Tirza J. Angerhofer, *Apple's Mounting App Store Woes*, ANTITRUST, Spring 2021, at 75, 80 n.34 (2021).

215. Council Regulation 1/2003, art. 7, 2003 O.J. (L 1) 1, 4 (EC).

216. EUR. PARLIAMENT, EU COMPETITION POLICY: KEY TO A FAIR SINGLE MARKET 8 (2019), https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642209/EPRS_IDA(2019)642209_EN.pdf [https://perma.cc/N6JY-44WX].

commission has yet to impose structural remedies for a gatekeeper's dominance in app distribution,[217] the commission is likely to believe that any such remedy is "proportionate to the infringement committed" by gatekeepers. After all, as Part III discusses, the DMA permits more drastic measures such as Article 13, which bans *any* behavior deemed to be a circumvention of the Digital Markets Act and allows the commission to impose unspecified corrective measures sua sponte.[218]

2. Establishing a Tying Claim against a Gatekeeper-Operated App Store under U.S. Law

Tying claims can invoke various statutes, including the Clayton Act and Sections 1 and 2 of the Sherman Act.[219]

> A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.[220]

A tying claim invoking Section 1 of the Sherman Act can be evaluated under the per se rule or the rule of reason.[221] "A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'"[222] "[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market" because, without a definition of the relevant market,

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217. *See, e.g.*, AT.40099—*Google Android*, *supra* note 192, at 324–26.

218. *See Commission Impact Assessment Report*, *supra* note 6, ¶¶ 41–42.

219. 15 U.S.C. §§ 1, 2, 14 (outlawing restraint of trade, monopolization, and contracts that lessen competition).

220. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461–62 (1992) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958); *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969)).

221. *See Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15–18 (1984), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

222. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)).

"there is no way to measure [the defendant's] ability to lessen or destroy competition."[223]

A landmark case in the history of tying claims under U.S. law is *United States v. Microsoft Corp.*,[224] which arose from allegations that Microsoft had tied its web browser Internet Explorer with its Windows OS in violation of Sections 1 and 2 of the Sherman Act.[225] The trial court in that case held that the relevant market was "the worldwide market for Intel-compatible PC operating systems," in which Microsoft's share "exceed[ed] ninety-five percent."[226] The trial court then held that Microsoft exploited this dominance to "monopolize the [web] browser market in violation of § 2," finding that "Microsoft's actions increased the likelihood that pre-installation of [a competing web browser] onto Windows would cause user confusion and system degradation, and therefore lead to . . . reduced sales for the OEMs," thus excluding other browsers from "competition on the merits."[227]

The D.C. Circuit affirmed in part and reversed in part. The D.C. Circuit agreed with the district court's definition of the relevant market as the market for Intel-compatible PC operating systems and rejected Microsoft's claim that Apple's macOS should be included in the definition of the relevant market.[228] But the D.C. Circuit reversed the district court's finding that Microsoft had committed a per se tying violation regarding Internet Explorer and Windows, holding that the rule of reason, rather than per se analysis, applied to the tying claim.[229] Thus, the D.C. Circuit "remand[ed] the case for evaluation of Microsoft's tying arrangements under the rule of reason."[230] Following the D.C. Circuit's ruling, the Department of Justice "decided not to pursue the [tying claim] any further"[231] and "ultimately settled the case with Microsoft in November of 2002."[232]

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223. *Am. Express*, 138 S. Ct. at 2285 (alteration in original) (internal quotation marks omitted) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)).

224. (*Microsoft II*), 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

225. *Id.* at 45.

226. *United States v. Microsoft Corp.* (*Microsoft I*), 87 F. Supp. 2d 30, 36 (D.D.C. 2000), *aff'd in part, rev'd in part and remanded*, 253 F.3d at 34 (D.C. Cir. 2001).

227. *Id.* at 39–40, 54.

228. *Microsoft II*, 253 F.3d at 52.

229. *Id.* at 84.

230. *Id.* at 94.

231. Travis Clark, Comment, Google v. Commissioner*: A Comparison of European Union and United States Antitrust Law*, 47 SETON HALL L. REV. 1021, 1028 (2017).

232. Chris Butts, Comment, *The Microsoft Case 10 Years Later: Antitrust and New Leading "New Economy" Firms*, 8 NW. J. TECH. & INTELL. PROP. 275, 280 (2010).

Although no federal court has found an unlawful tying arrangement of a gatekeeper's OS and its app store, a recent ruling from the Northern District of California, which is pending petition for a writ of certiorari,[233] indicates how such a claim may fare in the future. *Epic Games, Inc. v. Apple Inc.*,[234] arose from Apple's fees collected from apps on its App Store.[235] Apple required apps on the App Store to use only Apple's in-app payment system, through which Apple collected thirty percent of in-app purchase revenues.[236] Fortnite, a game owned by Epic, was on the App Store and thus was subject to Apple's fee policy.[237] On August 13, 2020, Epic implemented its own in-app payment system "allowing Epic Games to collect in-app purchases directly."[238] Apple removed Fortnite from the App Store on the same day.[239] Epic sued alleging, inter alia, that Apple tied its in-app payment system with access to the App Store, the only means to distribute iOS apps which Apple solely controls, in violation of Section 1 of the Sherman Act.[240]

The district court held in favor of Apple on all federal law claims, including the tying claim under the Sherman Act. The court held that Epic's claim fails "because a tying claim cannot be sustained where the alleged good is not a 'separate and distinct product,'" and because Apple's in-app payment system was "not bought or sold [by users] but . . . is integrated into the iOS devices."[241] As to the fact that "Apple uses both technical and contractual means to restrict app distribution" on iOS "outside the [Apple] App Store,"[242] the court held that these restrictions "do have *some* anticompetitive effects" under Section 1 of the Sherman Act "by precluding developers, especially larger ones, from opening competing game stores on iOS and compet[ing] for other developers and users on price."[243] But the court also held that Epic Games failed to rebut Apple's justifications for those restrictions—such as its App Store vetting apps so as to "prevent[] social engineering attacks"

233. *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021), *aff'd in part, rev'd in part*, 67 F.4th 946 (9th Cir. 2023); *Epic Games, Inc. v. Apple, Inc.*, 73 F.4th 785 (9th Cir. 2023) (granting motion to stay the mandate pending petition for writ of certiorari).

234. 559 F. Supp. 3d 898 (N.D. Cal. 2021).

235. *Id.* at 921.

236. *Id.* at 939, 945.

237. *Id.* at 937.

238. *Id.* at 940.

239. *Id.*

240. *Id.* at 1044.

241. *Id.* at 1046 (quoting *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 974 (9th Cir. 2008)).

242. *Id.* at 993.

243. *Id.* at 1037.

and the claim that "unfettered app distribution" would cause "mayhem."[244]

Although the Ninth Circuit affirmed the district court in *Epic Games* except as to the district court's definition of the market (an error which the Ninth Circuit deemed to be harmless) and to the district court's ruling concerning attorney's fees, the case remains on appeal pending the filing of a petition for a writ of certiorari.[245] Furthermore, the ultimate results of this case would account for only one case in an area where many cases will undoubtedly follow. But this case indicates how a tying claim involving a gatekeeper's OS and app store could succeed, and thus permit existing law to force a gatekeeper to genuinely compete against third-party app stores on its own OS, without micromanagement by laws like the DMA. Most importantly, the district court recognized that the existence of "competing game stores on iOS" would likely lead to "compet[ition] for other [game] developers and users on price."[246] As for the primary reason that Epic's tying claim failed—Apple's in-app payment system and access to Apple's App Store are not separate products—that reasoning would likely not apply to a tying claim involving a gatekeeper's app store and its operating system because existing caselaw indicates that the two products are distinct goods.[247] Indeed, the Ninth Circuit expressly held that "the district court erred by imposing a categorical rule that an antitrust market can *never* relate to a product that is not licensed or sold—here smartphone operating systems."[248]

Of course, the *Epic Games* ruling can also be read unfavorably for a tying claim involving a gatekeeper's app store and its operating system. Despite recognizing that Apple's monopoly on iOS app distribution "ha[s] *some* anticompetitive effects," *Epic Games* held that the monopoly

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244. *Id.* at 1038–39.

245. *See Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 966 (9th Cir. 2023) (affirming the district court "except for its ruling respecting attorney fees"); *id.* at 973 ("We agree that the district court erred in certain aspects of its market-definition analysis but conclude that those errors were harmless."); *Epic Games, Inc. v. Apple, Inc*, 73 F.4th 785, 785 (9th Cir. July 17, 2023) (granting Apple's motion to stay the mandate of 67 F.4th 946 for 90 days to permit the filing of a petition for writ of certiorari in the Supreme Court of the United States); *Epic Games, Inc. v. Apple Inc.*, No. 23A78, 2023 WL 5728479 (U.S. Aug. 9, 2023) (the Supreme Court denying Epic Games's application to vacate the stay granted by the Ninth Circuit).

246. *Epic Games,* 559 F. Supp. 3d at 1037.

247. *Reilly v. Apple Inc.*, 578 F. Supp. 3d 1098, 1110 (N.D. Cal. 2022) ("Plaintiff repeatedly notes that Apple does not allow competing app stores on iOS. . . . But Plaintiff does not allege that he sought to create such a competing store."). *See also Microsoft II*, 253 F.3d 34, 52 (D.C. Cir. 2001) (per curiam) (recognizing the relevant market as the market for "Intel-compatible PC operating systems").

248. *Epic Games,* 67 F.4th at 978.

was justified by security concerns, including the possibility of rogue third-party app stores distributing malware or apps designed to trick people.[249] But contrary to the implied claims of the testimony cited by the district court, the two extremes of a *monopoly* on app distribution and "*unfettered*" distribution by rogue app stores that would cause "mayhem"[250] are not the only ways to distribute apps. As the district court acknowledged, some third-party app stores on Android are operated by device manufacturers such as Samsung and platforms such as Amazon,[251] both of whom have as strong an incentive as Apple does to ensure that they are not blamed for distributing malware.

In addition, security justifications for restrictions on distributing apps for an OS are heavily fact-dependent, meaning that they can be persuasively rebutted depending on the circumstances. For example, the district court in *Epic Games* recognized disagreements between the litigants as to "whether Android [which permits third-party app stores] is less secure than iOS [which does not]" and "whether centralization of app review [like Apple's] increases or decreases its effectiveness," but failed to make factual findings as to either issue.[252] Moreover, the court accepted the effectiveness of Apple's human vetting process for rogue apps on the basis of "Apple's former head of app review testifying that [the error rate] was around 15% in 2015" and Apple's current Senior Vice President of Software Engineering "confirm[ing] that the error rate is generally small."[253] This Article submits that such remarkable faith in a party's "self-serving statements and those of interested witnesses" does not reflect the conventional practice of federal courts,[254] and thus that tying claims under existing law involving a gatekeeper's operating system and its app store have a nontrivial chance of success in the future.

Part II having shown that existing law is capable of achieving some of the DMA's major stated goals in the context of app distribution—restraining gatekeepers from self-preferencing or taking excessive fees—Part III shows that the DMA would likely be unable to achieve those goals.

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249. *Epic Games*, 559 F. Supp. 3d at 1005, 1037.

250. *Id.* at 1038–39 (emphasis added).

251. *Id.* at 976–77.

252. *Id.* at 1004 n.526, 1005 n.528.

253. *Id.* at 1004.

254. *Garcia v. Limon*, 542 F. Supp. 3d 577, 583 (S.D. Tex. 2021) (quoting *De Vargas v. Brownell*, 251 F.2d 869, 871 (5th Cir. 1958)) ("As for testimony, courts weigh the credibility of witnesses, but receive a plaintiff's self-serving statements and those of interested witnesses 'with a grain of salt.'").

III. THE DMA'S SELF-PREFERENCING BAN WOULD BE INEFFECTIVE

Part II has shown that existing law is capable of achieving some of the DMA's major stated goals in the app distribution context. The next question, naturally, is whether the DMA would be able to achieve those same goals. A close examination of whether the DMA can deliver on its promises is especially warranted, given that the DMA has chosen a particularly difficult path to achieving some particularly difficult goals. Recall that the DMA, in order to restrain app store operating gatekeepers like Apple from preferencing their own apps over apps developed by third parties, requires gatekeepers to use only "transparent, fair and non-discriminatory conditions" in their ranking algorithms.[255] This is a "command and control regulation," which is "the issuance of prescriptive rules intended to directly control the behavior of private actors"[256]: in other words, a regulation that dictates not only the desired end result, but also the required means of achieving that end result.

It is well known that "[e]nforceability under command and control decreases as the complexity of the regulation increases," and that "command and control regulations are easy to enforce for clear and simple matters, but difficult to enforce for complex matters."[257] Thus, command and control is "an optimal regulation for clear cut rules that can quickly be inspected to look for a violation," but "not optimal for broad, complex regulations that are in opposition to the interest of the company" being regulated.[258] The DMA's problem is that regulating a gatekeeper's algorithms is exactly the kind of complex subject for which command and control is unsuited. Scholars have argued that "the dynamic nature of algorithms makes them difficult, not only to understand, but also to regulate" and, "[i]n particular, complete transparency of algorithms . . . can . . . lead to new market manipulations."[259] The question relevant to this Article is whether the DMA can overcome these hurdles to successfully micromanage algorithms that gatekeepers like Apple use to rank apps.

Part III argues that the DMA would fail to regulate how gatekeepers use algorithms to rank apps, and thus fail to restrain app store operating gatekeepers from engaging in self-preferencing, for two reasons. First,

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255. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 35.

256. Timothy F. Malloy, *The Social Construction of Regulation: Lessons from the War Against Command and Control*, 58 BUFF. L. REV. 267, 268 (2010).

257. Blake C. Norvell, *Business Regulatory Lessons Learned from Amusement Park Safety Concerns: An Integrated Approach to Business Regulation*, 27 TEMP. J. SCI. TECH. & ENV'T L. 267, 272 (2008).

258. *Id.*

259. Hulicki, *supra* note 139, at 255–56.

even if app store-operating gatekeepers follow the DMA's requirement that they use only "transparent, fair and non-discriminatory" factors in ranking apps, the gatekeepers can still easily manipulate those criteria to produce biased rankings. Second, micromanaging the design of such rankings in a timely fashion as the DMA intends to is highly likely to be infeasible.

A. Superficially Neutral Ranking Criteria Can Be Manipulated to Distort Rankings

As of when this Article was written, Google's Play Store ranked apps according to revenue and "popularity," although the labels on those categories differed slightly depending on a user's physical location when accessing the Play Store. In some locations, the Play Store shows separate rankings for free-to-use apps ("Top free") and apps that must be purchased ("Top paid"). For example, accessing the Play Store from Korea shows rankings of "Popular," "Top grossing," and "Top paid" apps, but accessing the same page from the United States shows rankings of "Top free, "Top grossing," and "Top paid" apps.[260]

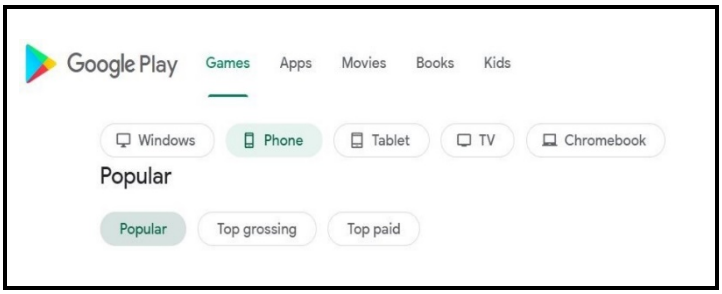

Figure 1. Accessing the Google Play Store from Korea.

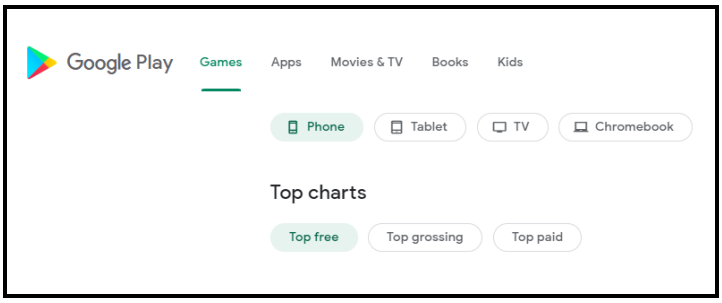

Figure 2. Accessing the Google Play Store from the United States.

260. *Games*, *Google Play*, GOOGLE, https://play.google.com/store/games?device=phone [https://perma.cc/MQU9-TZZ3].

Figures 3 and 4 show Google's "Popular" and "Top grossing" rankings of smartphone game apps, as they were shown to users who accessed the Play Store from South Korea on July 9, 2022.[261]

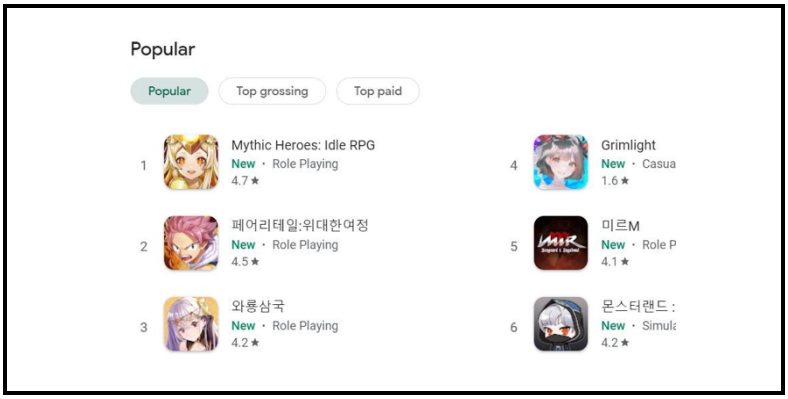

Figure 3. Google Play Store's "Popular" App Rankings. (July 9, 2022)

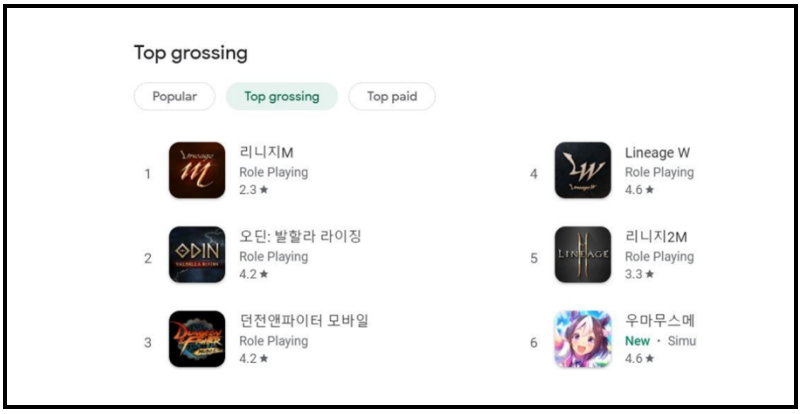

Figure 4. Google Play Store's "Top Grossing" App Rankings. (July 9, 2022)

A few things are immediately apparent. First, Google's "Popular" ranking is not just based on apps' revenue, given the difference between the "Popular" and "Top grossing" rankings. Second, Google's "Popular" ranking is also not based solely on users' average rating for apps, because the app ranked fourth in that category has a 1.6 rating but

261. *Id.*

the app ranked fifth has a 4.1 rating. In fact, Google states that "[m]any factors are involved" in ranking apps, "including . . . strong technical performance and a good user experience" as well as "editorial value," which refers to Google's "curated recommendations to help users find content that is noteworthy and interesting."[262] Such criteria, as well as Google's descriptions of them, indicate that its "Popular" ranking algorithm contains multiple factors other than revenue or user rating, some of which it does not disclose and could exploit in order to preference certain apps or otherwise distort the rankings.

The discrepancy between a ranking system based on revenue and a ranking system based on multiple unspecified factors including Google's own "curated recommendations" may appear to justify a provision like the DMA's self-preferencing ban. Recall that the DMA bars a gatekeeper from "treat[ing] more favourably[] in ranking . . . services and products offered by the gatekeeper itself than similar . . . products of a third party" and requires gatekeepers "to apply transparent, fair and non-discriminatory conditions to such ranking."[263] One may believe that forcing gatekeepers to limit the factors in their rankings to arguably neutral (if imperfect) measures of performance like revenue[264] would address potential manipulation of rankings through the use of criteria such as Google's "curated recommendations to help users find content that is noteworthy and interesting."[265]

Such a belief would be mistaken for two reasons, even if gatekeepers obey the requirement that they base their rankings of apps solely on "transparent, fair and non-discriminatory conditions" (which, as Section III.C shows, is highly unlikely). First, two superficially neutral factors can produce drastically different rankings, leaving plenty of room for gatekeepers to choose the "neutral" factor that is the most expedient to them. Consider, for example, ranking apps by the number of users—a measure of an app's performance that is at least as superficially unbiased as revenue. Google Play does not provide rankings based on an app's number of users.[266] But a firm named Mobile Index Insight (MII) ranks apps according to their estimated number of users in South Korea, and the discrepancy between a ranking based on revenue and one based on

262. *Google Play Console Help*, *App Discovery and Ranking*, GOOGLE, https://support.google.com/googleplay/android-developer/answer/9958766?hl=en [https://perma.cc/FKW9-YRBX] [hereinafter *Google Play Console Help*].

263. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 35.

264. *Cf.* Peter Conti-Brown, Note, *Scarcity Amidst Wealth: The Law, Finance, and Culture of Elite University Endowments in Financial Crisis*, 63 STAN. L. REV. 699, 740 (2011) ("The tendency to rank institutions, particularly universities, is strong. The absolute size of an endowment provides a clear criterion for objective ranking.").

265. *Google Play Console Help*, *supra* note 262.

266. GOOGLE, *supra* note 260.

user numbers indicates that gatekeepers could easily manipulate rankings based on superficially neutral criteria.

For ease of comparison, Figure 5 shows smartphone games ranked according to their estimated aggregate revenue for the week of June 27, 2022 to July 3, 2022.[267]

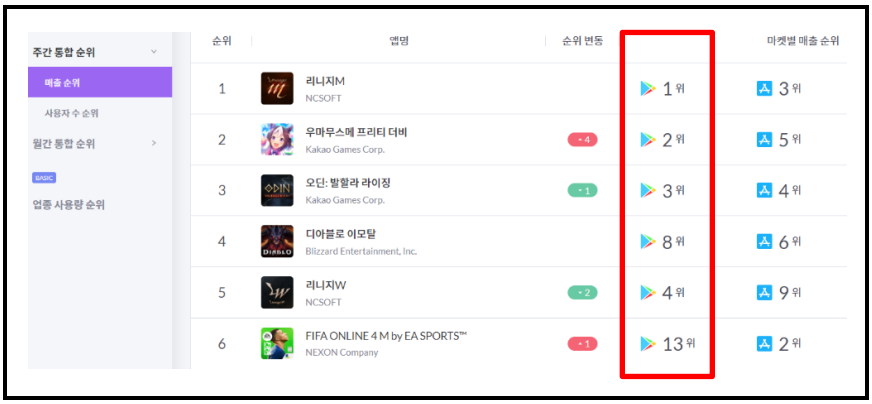

Figure 5. MII Rankings by Estimated Aggregated Revenue. (June 27 to July 3, 2022)

The rectangle shows an app's ranking based only on its estimated revenue from Google's Play Store, excluding the estimated revenue from Apple's App Store, as indicated by the Play Store logo next to each number. MII's revenue ranking tracks the revenue ranking provided by the Play Store fairly well: the apps that MII ranks first and fourth respectively in terms of revenue from the Play Store, Lineage M and Lineage W, also ranked first and fourth in the Play Store's own "top grossing" chart of smartphone games.[268] Now compare the rankings based on revenue to rankings based on the number of users. Figures 6 and 7 show apps ranked according to their weekly estimated number of users in Korea for the same week of June 27 to July 3, 2022. Lineage M and Lineage W, ranked first and fourth for revenue, respectively rank 53rd and 148th for weekly numbers of users.[269]

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267. *Weekly Aggregate Estimated Revenue*, MOBILE INDEX INSIGHT, https://www.mobileindex.com/mi-chart/weekly-rank/revenue (rectangle added for emphasis).

268. *Supra* notes 260, 267.

269. *Weekly Aggregate Estimated Users*, MOBILE INDEX INSIGHT, https://www.mobileindex.com/mi-chart/weekly-rank/user (rectangles added for emphasis). While MII ranks apps separately for their estimated revenue from the Google Play Store and the Apple App Store, MII's ranking of apps based on user numbers appears to aggregate users that downloaded apps from the Play Store and the App Store.

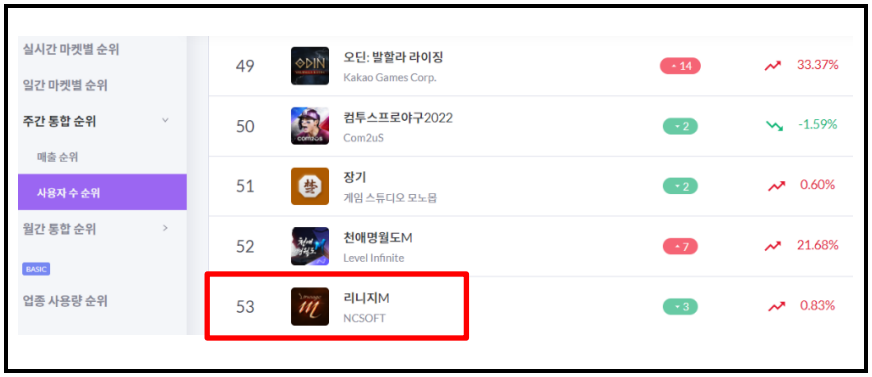

Figure 6. MII Ranking of Lineage M by

Estimated Number of Users in Korea.

(June 27 to July 3, 2022)

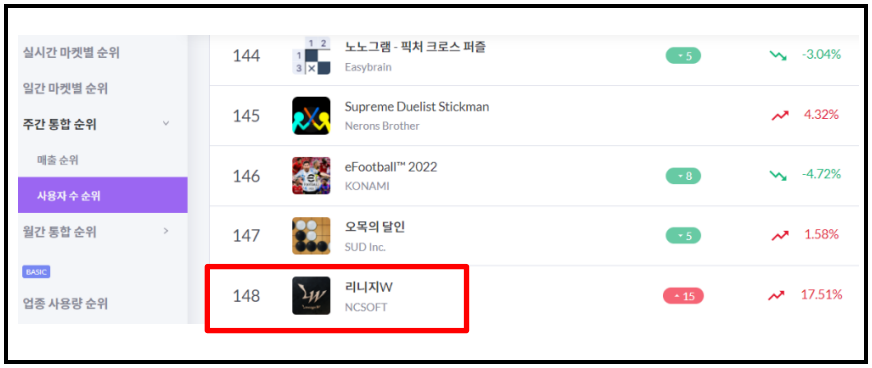

Figure 7. MII Ranking of Lineage W by

Estimated Number of Users in Korea.

(June 27 to July 3, 2022)

These facts indicate that, even if the DMA were to make app store-operating gatekeepers use, say, only one facially neutral criterion to rank

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See MOBILE INDEX INSIGHT, *supra* note 267 (ranking apps separately for revenue on Google Play and Apple App Store); MOBILE INDEX INSIGHT, *supra* note 269 (stating at the top of the page that apps for both the Android and iOS operating systems are ranked, but providing only one set of rankings for the estimated number of users without separating the users for the two operating systems).

apps, gatekeepers could easily pick the criterion that produces the rankings most expedient to them. Such criteria can include not only revenue and the number of existing users, but also the number of times an app is newly downloaded per day, the average user rating, and the average amount of time spent using an app, to name only a few.

Another reason that gatekeepers can use superficially neutral ranking criteria to produce biased rankings is that gatekeepers can combine multiple ranking criteria with weights attached to each factor. Nothing in the DMA prevents gatekeepers from producing rankings based on multiple weighted factors, even though Google has already stated that it does exactly that in the status quo.[270] Assume, for the sake of argument, that every gatekeeper ranks apps using only the criteria of revenue and user numbers. As shown, each of the two criteria produces starkly different rankings: an app ranked fourth for revenue ranks 148th in user numbers. Given this result, attaching preferred weights to each criterion would make it even easier to produce biased rankings compared to using only one criterion. Two gatekeepers could produce rankings preferencing different apps simply by changing the weight attached to each factor—just as a law school ranked outside the top 180 can rank itself second in the nation by attaching equal weights to superficially neutral criteria such as "library total square footage" and the number of chairs in the law school library.[271]

B. Prohibiting Circumvention Would Not Prevent Gatekeepers from Circumventing the DMA

Proponents of the DMA may argue that it has a provision intended to prevent the precise scenario discussed in Section III.A—gatekeepers complying with the letter of the law while defeating its purpose, by using superficially neutral ranking criteria to create biased rankings. Article 13 of the DMA requires gatekeepers to "ensure that the obligations of Articles 5, 6, and 7 are fully and effectively complied with" and bans any behavior "that undermines effective compliance with the obligations of Articles 5, 6, and 7 regardless of" the nature of the circumvention.[272] Article 6 states that a gatekeeper "shall not treat more favourably, in ranking . . . services and products offered by the gatekeeper itself than similar services or products of a third party" and requires the gatekeeper to "apply transparent, fair and non-discriminatory conditions to such ranking."[273] Thus, despite the possibility of a gatekeeper circumventing

270. *Google Play Console Help* , *supra* note 262.
271. *Supra* note 43 and accompanying text.
272. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 42.
273. *Id.* at 35.

the DMA's self-preferencing ban as shown in Section III.A, one may argue that Article 13 would prevent that outcome by prohibiting circumvention of any kind.

The DMA's anti-circumvention measure would be either ineffective or vulnerable to abuse. Start from an intuitive point: if a blanket ban on circumvention would end circumvention, why have so many legislators throughout history failed to thwart circumvention and helplessly watched as ill-doers make a mockery of their laws? For example, California law bans the sale of pythons[274] "for environmental and sustainability reasons."[275] In response, fashion designers "circumvent[ed] the law in . . . [a] perhaps ultimately more destructive . . . way[] by using anaconda in lieu of python."[276] Why, then, did California ban the sale of pythons specifically, instead of passing a law banning the sale of any animal (or anything, for that matter) that California deems a threat to the environment?

The obvious answer is that a blanket ban on circumvention is likely to be abused. A maxim of criminal law that is so basic as to be "a democratic platitude," particularly in continental law,[277] is *nullum poena sine lege*—"no conduct shall be held criminal unless it is specifically described in the behavior-circumstance element of a penal statute."[278] While the DMA is not exactly a "penal statute," Article 13 does exactly what the principle says a law should not do: it bans "any" behavior that "undermines effective compliance . . . regardless of whether that behaviour is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of behavioural techniques or interface design,"[279] a description broad enough to encompass every behavior imaginable. Adding to the risk of Article 13 being abused is the severity of the punishment for violation: penalties of up to ten percent of a gatekeeper's worldwide turnover and twenty percent for repeat offenses.[280]

Because the DMA's ban on circumvention presents such a high risk of abuse, this Article argues that it presents an equally high risk of judicial review. As Section III.A showed, gatekeepers could easily

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274. CAL. PENAL CODE § 653o(a) (2020).

275. Sophia Mossberg, Note, *Python Crossing Prohibited: The Interplay of Ethics, Aesthetics, Regulation, and Industry Transformation in the Luxury Apparel Market*, 41 WM. & MARY ENV'T L. & POL'Y REV. 751, 759 (2017).

276. *Id.* at 761.

277. Edward M. Wise, *The International Criminal Court: A Budget of Paradoxes*, 8 TUL. J. INT'L & COMPAR. L. 261, 273 (2000).

278. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1937).

279. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 42.

280. *Id.* at 51–52.

comply with the letter of Article 6 while defeating its goal. That may prompt the commission to find that a gatekeeper engaged in circumvention in violation of Article 13 and, using the same provision, impose whatever corrective measures it deems necessary.[281] Assume that a gatekeeper successfully challenges its Article 13 violation in court. The gatekeeper must have prevailed on at least one of these two claims: the commission exceeded its authority in finding that the gatekeeper engaged in circumvention, or in imposing whatever corrective measure it imposed. Succeeding on either claim would likely render Article 13 ineffectual. If the court imposes any limits on what behavior constitutes circumvention, Article 13's blanket ban would no longer be a blanket ban. If the court limits the kinds of corrective measures the commission can impose, that would render symbolic the commission's ability to remedy circumvention regardless of the kind of behavior involved.

Granted, there is no *guarantee* that judicial review would be available. The DMA does not unequivocally provide for comprehensive judicial review,[282] and the notoriously opaque standing requirements of EU law may force gatekeepers to litigate in the EU member states' national courts instead of the Court of Justice.[283] But scholars have stated that "[t]here is . . . little doubt that the EU courts would have the power to oversee the interpretation of Articles 3, 5 and 6."[284] And, in a landmark case reviewing an action by the European Commission "based . . . on an assessment of complex economic situations," the Court of Justice reserved the authority to review "whether there has been a manifest error of assessment or abuse of powers" by the commission.[285] Thus, there is a nontrivial likelihood of judicial review that renders Article 13 ineffective and allows gatekeepers to circumvent the self-preferencing ban of Article 6, in the manner that Section III.A describes.

Of course, a challenge to Article 13 in court might be unsuccessful or unavailable. In that case, Article 13's attempt to end circumvention by prohibiting circumvention would have facially succeeded—by enabling

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281. *Id.* at 42.

282. *Id.* at 59 ("[T]he Court of Justice has unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments.").

283. Brian Libgober, Comment, *Can the EU Be a Constitutional System Without Universal Access to Judicial Review?*, 36 MICH. J. INT'L L. 353, 365–66 (2015) (showing "how a challenger wandering through [t]his byzantine fortress of legal terminology might unwittingly fall into a standing gap").

284. Pablo Ibáñez Colomo, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, 12 J. EUR. COMPETITION L. & PRAC., 561, 573 (2021) ("There is . . . little doubt that the EU courts would have the power to oversee the interpretation of Articles 3, 5 and 6.").

285. MAHER M. DABBAH, THE INTERNATIONALISATION OF ANTITRUST POLICY 80 (2003) (citing Case 42/84, *Remia BV v. Commission*, 1985 E.C.R. 2545, 2575–78).

the commission to prohibit and penalize, in its sole discretion, any behavior that undermines the DMA's various behavioral obligations. But the unchecked nature of that power is precisely what would make Article 13's "success" a hollow one. It is well established by now that "an overly harsh regulatory scheme" and "a blanket, catchall regulation, rather than a nuanced regulatory scheme to address a particular issue" create a serious risk of overregulation,[286] no matter how well-intending a regulator may be. Even before the DMA, EU platform regulations have raised concerns of overregulation[287] and of legal uncertainty due to harsh penalties, such as "fines of up to 10% of worldwide turnover," thus discouraging cooperation between European and non-European firms.[288] The DMA has both a blanket, catchall regulation and harsh penalties, in the form of the powers granted by Article 13 and fines of up to twenty percent of worldwide turnover.[289]

Hence, Article 13's "success" resulting from an unsuccessful challenge in court would be pyrrhic, by repelling from Europe the very entities that Article 13 intends to regulate. Of course, a complete exit would likely be a last resort for gatekeepers given the size and political prominence of the internal market.[290] But scholars should not be so quick to argue that "firms potentially subject to Articles 5 and 6 might not necessarily have an incentive to seek litigation . . . . [because the] DMA is expressly designed to reward cooperation with the Commission,"[291] without considering the effect of Article 13. While cooperating with regulators can be beneficial, cooperating with regulators who can impose unpredictable and unmanageable burdens is a different matter. If those burdens get big enough, a platform can leave—even from a market larger than, and at least as politically prominent as, the internal market.[292] A law creating so many regulatory burdens for gatekeepers that it leaves no

286. Eric C. Chaffee, *The Heavy Burden of Thin Regulation: Lessons Learned from the SEC's Regulation of Cryptocurrencies*, 70 MERCER L. REV. 615, 631 (2019).

287. Karanjot Gill, *Regulating Platforms' Invisible Hand: Content Moderation Policies and Processes*, 21 WAKE FOREST J. BUS. & INTELL. PROP. L. 171, 190 (2021) ("European [content moderation] policies likely result in the over-censorship of speech, caused by ambiguous statutory language . . . [and] steep monetary penalties.").

288. Hua & Belfield, *supra* note 142, at 420–21.

289. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 42, 52.

290. *See* BRADFORD, *supra* note 143, at 26–28, 53–54.

291. Ibáñez Colomo, *supra* note 284, at 573.

292. *See, e.g.*, Krebs, *supra* note 179, at 525–26 ("Google . . . exited China in 2011 in response to cyberattacks and Chinese censorship requirements."); *Google Threatens to Withdraw Search Engine from Australia*, BBC, (Jan. 22, 2021) ("Google has threatened to remove its search engine from Australia over the nation's attempt to make the tech giant share royalties with news publishers."), https://www.bbc.com/news/world-australia-55760673 [https://perma.cc/EDN6-E4U4?type=standard].

gatekeeper to be regulated would be a hollow win for the EU and its citizens.

C. Micromanaging Ranking Algorithms Would Be Impracticable

Sections III.A and B showed that the DMA would be ineffective in curbing self-preferencing by app store operating gatekeepers—even assuming that gatekeepers use only "transparent, fair and non-discriminatory" criteria to rank apps.[293] Unfortunately for the DMA, a more realistic assumption is that gatekeepers would not comply enthusiastically and that European authorities would have to monitor and enforce compliance, which are timeless problems in regulation and law.[294] With this realistic assumption in place, the likelihood of the DMA successfully restraining app store operating gatekeepers from self-preferential app ranking practices declines even further, due to the impracticality of monitoring and enforcement. It is far from a secret that platforms use "hundreds of factors" in their ranking algorithms.[295] What is "a carefully guarded secret,"[296] which is "particularly well suited for trade secret protection,"[297] is the precise identity of those ranking criteria, which a gatekeeper's company executives can change at any moment for any reason.[298]

Achieving the DMA's various goals requires the authorities to extract a substantial amount of information from gatekeepers, starting with the information required to determine whether a platform qualifies as a gatekeeper.[299] As for self-preferencing, the authorities would need to know which ranking criteria a gatekeeper uses in order to determine whether it is applying "transparent, fair and non-discriminatory

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293. 2022 O.J. (L 265) at 35.

294. *Cf.* Julie Roin, *Truth in Government: Beyond the Tax Expenditure Budget*, 54 HASTINGS L.J. 603, 639–40 (2003) ("Monitoring requires information about the subject being monitored. And no one would dispute that using perfect information . . . in the monitoring process is the ideal. But like all ideals, this one is often impossible to attain."); ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE 66 (2002) (quoting JONATHAN HARWOOD, A REPORT ON ANNUAL REPORTS SUBMITTED BY THE PARTIES TO CITES 1 (2000)) ("Non-compliance with reporting guidelines is . . . a persistent problem. . . . Failure to report, as well as inaccurate and incomplete reporting, was . . . '[a] major area[] of concern' at COP11.").

295. Horton, *supra* note 48, at 716.

296. *Id.*

297. Mattioli, *supra* note 49, at 550.

298. Horton, *supra* note 48, at 716 (describing "tweaking" of proprietary algorithms done by "Google insiders.").

299. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 30, 42.

conditions" to its rankings and is refraining from self-preferencing.[300] To know whether a gatekeeper is undermining compliance with those duties by, for example, using "behavioural techniques or interface design,"[301] the commission would need information about those techniques as well. To that end, Article 21 states that "to carry out its duties under [the DMA], the [c]ommission may . . . require from [platforms] . . . all necessary information" and authorizes the commission to "require access to any data and algorithms . . . information about testing, as well as . . . explanations of them."[302] At the same time, the DMA states that "[t]he [c]ommission shall take account of the legitimate interest of [platforms] in the protection of their business secrets."[303]

Nothing in the DMA indicates how gatekeepers would be made to give up this information, other than by granting the commission unspecified powers and by providing for harsh penalties—which, as Section III.B established, would merely expose the DMA to the risk of judicial review and likely render the DMA ineffective or harmful.[304] The DMA does promise to "take account of the legitimate interest of [platforms] in the protection of . . . business secrets,"[305] but such a feeble concession is unlikely to persuade gatekeepers to surrender trade secrets. Given the extent of the information the DMA authorizes the commission to extract from gatekeepers, the DMA's promise is about as reassuring as Facebook's claim that "[y]our privacy matters."[306] The DMA's assurance apparently sounds no more believable to other scholars, who have argued that the DMA "does not protect gatekeeper platforms' trade secrets and intellectual property rights."[307]

Even if the commission does manage to extract these guarded secrets, that still does not mean that the DMA will restrain gatekeepers from self-preferential ranking practices. First, the commission may not be able to know whether the information it obtained from a gatekeeper is accurate. The DMA permits the commission to "require access to any . . . algorithms . . . as well as . . . explanations of them,"[308] but "[a]gencies generally lack . . . the technical expertise . . . to consider fully the

300. *Id.* at 35.

301. *Id.* at 42.

302. *Id.* at 46.

303. *Id.* at 43, 55.

304. *See supra* Section III.B.

305. 2022 O.J. (L 265) at 43, 55.

306. *Your Privacy*, FACEBOOK HELP CENTER, https://www.facebook.com/help/238318146535333 [https://perma.cc/UF8B-2NFF].

307. Peter R. Enia, Note, *A Continental Rift? The United States and European Union's Contrasting Approaches to Regulating the Monopolistic Behavior of Gatekeeper Platforms*, 16 BROOK. J. CORP. FIN. & COM. L. 249, 272 (2022).

308. 2022 O.J. (L 265) at 46.

implications of embedding values in [technological] design."[309] Assuming arguendo that an investigation by the commission does extract accurate information about a gatekeeper's ranking algorithm, the commission is unlikely to be able to update that information in a timely fashion. Whereas a gatekeeper can change its algorithm at any moment,[310] "it is natural for bureaucracies to react slowly."[311] The commission is no exception. Market investigations under the DMA can take up to eighteen months.[312] Albeit in a different context, a Vice-President of the European Commission has chastised his own civil servants for being "slow" and "ineffective."[313]

In sum, Section III.A shows that the DMA's self-preferencing ban would likely be ineffective even if it is assumed that gatekeepers would comply with the letter of the law, because superficially unbiased ranking criteria can be manipulated to produce biased rankings. Section III.B establishes that Article 13, the provision designed to prevent circumvention, is vulnerable to judicial review because it grants the commission unchecked authority to designate any behavior as circumvention and impose whatever corrective measures deemed necessary in its sole discretion. Section III.B also argues that, if judicial review is unavailable or unsuccessful, Article 13 would present a nontrivial risk of repelling gatekeepers from the internal market. Finally, Section III.C argues that, in the event that gatekeepers do not willingly comply with the DMA, it would be difficult for regulators to enforce compliance due to the infeasibility of timely monitoring how gatekeepers use algorithms. Part III having demonstrated that the DMA would likely be ineffective in restraining app store operating gatekeepers from self-preferencing, Part IV argues that the DMA would also be counterproductive.

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309. Deirdre K. Mulligan & Kenneth A. Bamberger, *Saving Governance-by-Design*, 106 CALIF. L. REV. 697, 701 (2018).

310. *See, e.g.*, Horton, *supra* note 48, at 716, 723.

311. B. Dan Wood & Richard W. Waterman, *The Dynamics of Political-Bureaucratic Adaptation*, 37 AM. J. POL. SCI. 497, 504 (1993).

312. 2022 O.J. (L 265) at 46 (requiring findings to be published within 18 months).

313. Jennifer Rankin, *EU Foreign Policy Chief Says Diplomats Are Slow, Ineffective and Patronising,* GUARDIAN (Oct. 11, 2022, 1:41 PM), https://www.theguardian.com/world/2022/oct/11/eu-foreign-policy-chief-josep-borrell-says-diplomats-are-slow-ineffective-and-patronising [https://perma.cc/93FS-SWWX]; *Josep Borrell Fontelles,* EUROPEAN COMMISSION (showing Borrell as a Vice-President of the European Commission), https://ec.europa.eu/commission/commissioners/2019-2024/borrell-fontelles_en [https://perma.cc/T2QH-QUS2].

IV. THE DMA'S SELF-PREFERENCING BAN WOULD BE COUNTERPRODUCTIVE

This Article has shown thus far that existing law is capable of restraining app store operating gatekeepers from engaging in self-preferencing, whereas the DMA would not be. That fact alone would be enough to establish that existing law is a better alternative to the DMA. But there is still another reason to choose existing law over the DMA: the DMA would be counterproductive to its own objectives. Section III.B discusses one way in which the DMA may be counterproductive to its own goals—the broad powers that Article 13 gives the commission and the stringent penalties for violations could repel platforms from the EU. Yet, even though Section III.B argues that scholars should not be so quick to dismiss the risk of repelling gatekeepers from the internal market, it also recognizes that a full exit would likely be a last resort. Part IV demonstrates that, even if it does not cause platforms to leave the internal market, the DMA's self-preferencing ban would reduce consumer welfare and distort the way in which app developers compete—contrary to the commission's argument that the DMA would "have a clearly positive effect on overall welfare."[314]

A. The DMA Would Reduce Consumer Welfare and Distort How App Developers Compete

Scholars have already argued that the EU's general regulatory approach against gatekeepers, including the DMA, would be counterproductive. For example, Dirk Auer, Geoffrey Manne, and Sam Bowman argue that the EU's approach, "unmoored from a set of subject-specific constraints imposed by courts and legislatures," may become a "sprawling, economy-wide set of regulations that resembles more closely a national industrial policy."[315] Such an economy-wide approach would "facilitate the imposition of policies . . . outside of competition policy, in ways that . . . will promote other policies at the very *expense* of competition."[316] The authors point to, for example, the "wholesale condemnation of self-preferencing . . . by . . . the Digital Markets Act."[317] According to the authors, such hostility to self-preferencing

314. *Commission Impact Assessment Report*, *supra* note 6, ¶ 322.

315. Dirk Auer, Geoffrey A. Manne & Sam Bowman, *Should ASEAN Antitrust Laws Emulate European Competition Policy?*, 67 SINGAPORE ECON. REV. 1637, 1670, 1673 (2022).

316. *Id.* at 1673.

317. *Id.* at 1674.

induced the commission in the 2017 *Google Shopping*[318] case to devote "nearly . . . 216 pages to describing the *fact*"[319] of Google's self-preferential behavior without showing "that consumers were denied a superior service as a consequence."[320]

The authors' view that DMA is a "wholesale condemnation of self-preferencing" that does not account for whether consumers are actually denied a better choice[321] is not only correct, but also an understatement. The authors are obviously correct because the DMA bans self-preferencing "independent[] from the actual . . . effects of the conduct of a . . . gatekeeper . . . on competition."[322] But the DMA does not stop at punishing self-preferencing regardless of whether it is harmful. The DMA also punishes behavior which is not self-preferencing as if it were self-preferencing. This is because the DMA appears to prohibit platforms from ranking their own products more favorably without exception, even when a platform's products are genuinely superior to competing products: "The gatekeeper shall not treat more favourably[] in ranking . . . products offered by the gatekeeper itself than similar . . . products of a third party."[323] But ranking one's own actually superior product higher than competitors is not self-preferencing, let alone depriving consumers of better options.[324]

One may argue that the phrase "shall not treat more favourably[] in ranking" in Article 6(5) does not prohibit gatekeepers from ranking their own superior products higher than the competition. The argument might be that Article 6(5) merely bars gatekeepers from putting a thumb on the scale when rating their own apps compared to the competition and, as long as gatekeepers did not "treat [their own apps] more favourably" *in the course of* rating their apps, gatekeepers are permitted to rank their own apps higher if a fair rating scheme found those apps to be better than the competition.

While a reasonable person could take that position, an equally reasonable reading of Article 6(5) is that it bars platforms from ranking

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318. Case AT.39740—*Google Search (Shopping)*, Comm'n Decision (June 27, 2017) (summary at 2018 O.J. (C 9) 11), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [https://perma.cc/9T37-4P2E].

319. Auer, Manne & Bowman, *supra* note 315, at 1674.

320. *Id.* (quoting *Is Margrethe Vestager Championing Consumers or Her Political Career?*, ECONOMIST (Sept. 14, 2017), https://www.economist.com/business/2017/09/14/is-margrethe-vestager-championing-consumers-or-her-political-career).

321. *Id.*

322. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 3.

323. *Id.* at 35.

324. *See* Lambert, *supra* note 58, at 98–99.

their own superior apps more favorably than competing apps because the act of "treat[ing] more favourably[] in ranking" can include, among other practices, the act of ranking itself. The fact that other proposed legislation against self-preferencing is written to expressly exclude such an interpretation is evidence that Article 6(5) can reasonably be read to bar gatekeepers from ranking their own superior apps more favorably. The American Innovation and Choice Online Act, for example, prohibits "preferenc[ing] products, services, or lines of business of the [gatekeeper] over those of another business user on the [gatekeeper's] platform in a manner that would *materially harm* competition" and lists affirmative defenses to self-preferencing.[325] Unlike the American bill, Article 6(5) of the DMA can be read to prohibit a gatekeeper from ranking its own app more favorably even if it outperforms the competition—an act which is not self-preferencing.

One may believe that gatekeepers deserve the injustice of being unable to rank their own genuinely superior apps more favorably than the competition (especially if a gatekeeper has a past record of preferencing its inferior apps over superior competitors), or that such unfairness is worth the gains from reducing gatekeepers' influence.[326] But the DMA's counterproductive effects can extend beyond a short-term unfairness and into distortions of market competition to the long-term detriment of consumers which is much worse than, say, having to use the second-best ride-hailing app instead of the best one. Recall that the commission defends regulating gatekeepers "before competition problems . . . occur" because existing law applies only "after a competition problem has emerged," and "competition law interventions may mean not only delays in the interventions but also that irreparable effects . . . may no longer be reversible."[327] Other European authorities also argue that "the difficulty of correcting ex post negative effects on competition have . . . led to a policy choice for ex ante regulation that would . . . constrain [the] behaviour" of gatekeepers.[328]

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325. S. 2992, 117th Cong. §§ 3(a)(1), (b) (2021) (emphasis added).

326. *Cf.* Guggenberger, *supra* note 5, at 324–27 (arguing that the costs of erroneously designating a non-gatekeeper as a gatekeeper may not necessarily outweigh the costs of erroneously failing to designate a gatekeeper as a gatekeeper); Khan, *supra* note 4, at 740 (quoting Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979)) (arguing that "concentration of economic power also consolidates political power" and thus "breed[s] antidemocratic political pressures").

327. *Commission Impact Assessment Report*, *supra* note 6, ¶ 119 (quoting EUROPEAN COURT OF AUDITORS, THE COMMISSION'S EU MERGER CONTROL AND ANTITRUST PROCEEDINGS: A NEED TO SCALE UP MARKET OVERSIGHT ¶ 59 (2020), op.europa.eu/webpub/eca/special-reports/eu-competition-24-2020/en/#timeline).

328. Piffaut, *supra* note 28, at 20.

A simple thought experiment shows why, contrary to the commission's assumption, the DMA's ex ante regulatory approach can create profoundly negative ex post effects by distorting competition. As Section III.A explains, the number of users and revenue are both facially neutral criteria for ranking apps. Imagine that, following the DMA's passage, an app store begins to rank apps according to the number of users, pursuant to the DMA's requirement that gatekeepers "apply transparent, fair and non-discriminatory conditions" to rank apps.[329] Thereafter, the commission's market investigation pursuant to Article 19 reveals that some app developers created fake accounts on their own apps to exaggerate their user numbers so as to goose up their rankings.[330] Following this investigation, the commission orders the app store to abandon its ranking algorithm based on an app's number of users and to rank apps according to revenue instead—under the belief that in-app spending figures are harder for unscrupulous developers to manipulate[331] and thus that revenue is a more "fair and non-discriminatory" ranking criterion for apps than the number of users is.

In this scenario, the DMA's ex ante requirement that gatekeepers use "transparent, fair and non-discriminatory conditions" to rank apps[332] would have created a substantial ex post effect on competition. Most apps are "estimated as losing between 86.6% to 97.7% of their users within the first thirty days" of launch.[333] In this cutthroat market, "[r]ankings in the app store significantly impact app download counts and, thus, commercial success."[334] But an app ranked fifty-third for the estimated number of users can rank first for revenue on Google's Play Store.[335]

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329. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 35.

330. *Cf.* Michael H. Keller, *The Flourishing Business of Fake YouTube Views*, N.Y. TIMES (Aug. 11, 2018), https://www.nytimes.com/interactive/2018/08/11/technology/youtube-fake-view-sellers.html (describing a company that sold 196 million fake views to videos posted on YouTube over three years, and showing that videos that had purchased fake views were more likely to retain attention of genuine human viewers); Preston M. Torbert, *"Because It Is Wrong": An Essay on the Immorality and Illegality of the Online Service Contracts of Google and Facebook*, 12 CASE W. RSRV. J.L. TECH. & INTERNET, no. 1, 2020–2021, at 48, 120 (observing that the reported number of Facebook users "may be incorrect" because "[i]n 2019, it was reported [by third-party sources] that Facebook deleted 800,000 'false' accounts a quarter, equivalent to one-third of its monthly active users").

331. Most apps currently use payment systems operated by app store owners in order to facilitate consumers' in-app spending. Kim, *supra* note 16, at 126. Those entities collect a portion of that in-app spending as fees. *Id.* Thus, in order to goose up revenue figures, a developer would likely have to pay more money as fees to payment facilitators. In contrast, creating fake accounts to goose up user numbers would not cost such fees.

332. 2022 O.J. (L 265) at 35.

333. Kim, *supra* note 16, at 129.

334. Guggenberger, *supra* note 12, at 325.

335. *See supra* notes 267–69 and accompanying text.

Under these circumstances, a chance to jump up in rankings would be difficult to ignore. Thus, app developers would be strongly incentivized to convert their business model from one that attempts to attract more users to one that extracts the maximum possible amount of spending from users.

This distortion of competition between developers, in turn, could substantially undermine consumer welfare. As is implied by the fact that an app ranking fifty-third for users can rank first for revenue, "0.15 percent of mobile gamers account for 50 percent of the industry's revenue from micropayments" and "1.9 percent make up 90 percent of revenue," whereas "the overwhelming majority of gamers . . . either never pay or . . . pay very little."[336] If the ranking criterion changes from the number of users to revenue, developers would be incentivized to rely even more heavily than they already do on the techniques that encourage in-app spending: "predatory design practices that tend to promote behavioral addiction" to spending money, including "loot boxes" that return random rewards akin to a slot machine.[337] Thus, contrary to the apparent assumption of European authorities, the ex ante regulatory approach employed by the DMA has created in this hypothetical scenario profoundly negative ex post effects by distorting competition and harming consumers.

This Article does not argue that the DMA *will* inevitably cause such a scenario to materialize. However, it does argue that justifying the ex ante regulation of gatekeepers by pointing to "the difficulty of correcting ex post negative effects on competition"[338] would not necessarily address the DMA's potentially negative ex post effects on competition and welfare. Such a justification would merely prevent the DMA from recognizing, and thus addressing, its own negative ex post effects.

B. The DMA May Punish Harmless Conduct Simply Because It Could *Become Harmful*

Section IV.A argued that the DMA's self-preferencing ban would be counterproductive in an economic sense, by reducing consumer welfare and distorting how app developers compete. However, the DMA's self-preferencing ban would not only be economically harmful but also questionable in a jurisprudential sense. This is because the DMA

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336. Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 140 (2019).

337. *Id.* at 169; Andrew V. Moshirnia, *Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI. & TECH. 77, 80–82 (2019) ("[App] developers may sell 'loot boxes,' which contain . . . random items.").

338. Piffaut, *supra* note 28, at 20.

can punish conduct that is not anticompetitive in the present for the reason that it *might* become anticompetitive in the future.

Recall that the European Commission defends regulating gatekeepers "before competition problems . . . occur" because "competition law interventions may mean . . . irreparable effects . . . may no longer be reversible."[339] The commission has also conceded that some conduct barred by the DMA would not be harmful or unfair. For example, self-preferencing "may not be considered generally anti-competitive under the EU competition rules" but "*certain forms* of self-preferencing may amount to an unfair business practice."[340] Yet, the DMA categorically bars self-preferencing by gatekeepers.[341] Scholars understand what this means: "fairness-driven conduct rules inherently introduce . . . uncertainty and subjectivity into the assessment of what is lawful and what is unlawful."[342] Some scholars expressly advocate for the idea of punishing a party that has not yet committed a concrete harm because it *might* do so in the future, arguing that breaking up platforms under existing competition law is insufficient because "markets might quickly re-consolidate."[343]

The fact that the DMA may punish parties on the basis of what may or may not become harmful conduct in the future is as great a concern as the concerns warranted by the DMA's anti-circumvention provision. As Section III.B discussed, Article 13 permits the commission to punish any conduct deemed to be a circumvention of the DMA. While Article 13 is vulnerable to abuse because it permits the commission to decide which conduct to punish in its sole discretion, Article 13 at least claims to punish conduct that has caused concrete harm in the present: circumventing the DMA. But punishing conduct that *might* be determined to be harmful in the future goes further, reminiscent of the dystopian movie in which law enforcement predicts a murder and arrests the would-be perpetrator "for the future murder of [his wife and her lover] to take place today."[344]

While a dystopian movie is, after all, only a movie, an analogous class of risk is all too real. Governments *retroactively* punishing conduct that was legal at the time when it originally occurred is not only a

339. *Commission Impact Assessment Report*, *supra* note 6, ¶ 119 (quoting EUROPEAN COURT OF AUDITORS, THE COMMISSION'S EU MERGER CONTROL AND ANTITRUST PROCEEDINGS: A NEED TO SCALE UP MARKET OVERSIGHT ¶ 59 (2020), op.europa.eu/webpub/eca/special-reports/eu-competition-24-2020/en/#timeline).

340. *Id.* at ¶ 41 (emphasis added).

341. Council Regulation 2022/1925, 2022 O.J. (L 265) 1, 35.

342. Akman, *supra* note 141, at 109.

343. *See* Guggenberger, *supra* note 5, at 246–50.

344. Mark C. Niles, *Preempting Justice: "Precrime" in Fiction and in Fact*, 9 SEATTLE J. SOC. JUST. 275, 276 (2010).

historical fact,[345] but also an ongoing reality.[346] The danger of ex post facto legislation is likely why it is banned by the European Convention on Human Rights,[347] to which all EU member states as well as the EU itself are parties.[348] If European officials feel justified in citing the convention to criticize governments for passing laws that retroactively punish what was harmless conduct in the past,[349] it may behoove them to also ask why the commission, through the DMA, should be allowed to preemptively punish what is harmless conduct in the present.

CONCLUSION

A frequent criticism of neo-Brandeisian antitrust is that the same theory has already been tried unsuccessfully decades ago. That is, neo-Brandeisian antitrust is "a return to the antitrust doctrines of yesteryear—when the government thought big is bad, small is good, and inefficiency and higher prices are sometimes worth it ('it' often left undefined)."[350] Hence, this "earlier structuralist approach . . . has long been discarded to the dustbin of history."[351] This argument against neo-Brandeisian antitrust is undoubtedly persuasive, given that a materially identical idea

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345. *See*, *e.g.*, Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 440, 443 (2010) ("[F]ive of the ten state constitutions that included law-of-the-land provisions also included separate provisions specifically forbidding 'retrospective' or '*ex post facto*' laws or punishments. . . . [T]he law-of-the-land provision of New York's constitution . . . did not prohibit ex post facto criminal punishments.").

346. Gábor Attila Tóth, *Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism*, *in* CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 386, 410–11 (Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin eds., 2017) ("[T]he Fundamental Law [of Hungary] paves the way for . . . retroactive criminal legislation . . . .").

347. Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

348. *Accession of the European Union*, EUR. CT. OF HUM. RTS., https://www.echr.coe.int/accession-of-the-european-union [https://perma.cc/9NRJ-2RSB].

349. Written Questions by Members of the European Parliament and Their Answers Given by a European Union Institution, 2013 O.J. (C 339 E) 1, 257 (stating that Hungary's Fundamental Law no longer prohibited ex post facto legislation as of 2012, citing the "explicit ban on *ex post facto* law in Article 7 of the European Convention on Human Rights," and asking the European Commission whether it "agree[s] that *ex post facto* legislation is unacceptable in a Member state, since the fact of its being unacceptable is a keystone of EU legislation") (remarks of Csaba Sándor Tabajdi, member of European Parliament).

350. Christopher Marchese, *Debunking the "Big is Bad" Bogeyman: How Facebook Benefits Consumers*, 28 GEO. MASON L. REV. 1, 2 (2020).

351. Wright, Dorsey, Klick & Rybnicek, *supra* note 69, at 297.

has indeed failed and that failure is credited with creating the framework that governs antitrust law today.[352]

Unfortunately, the argument that neo-Brandeisian antitrust is merely "old wine in new bottles"[353] does not appear to have persuaded anyone who does not already agree with it. It is not difficult to see why neo-Brandeisians might believe that the old failures will not repeat themselves, or that any risk of repeating them is tolerable: this time is different. Neo-Brandeisians argue that "[g]atekeepers like Google, Amazon, Facebook, and Apple wield unprecedented power to exclude rivals from the marketplaces they control"[354] and that "Google, Amazon, Apple, Facebook, and Microsoft . . . are buying smaller companies at an unprecedented pace."[355] The strength of the "this time is different" belief, particularly against arguments to the contrary, is also historically documented. Professors Carmen Reinhart and Ken Rogoff famously published a book by that title recounting eight centuries' worth of financial crises repeating themselves throughout the world.[356]

Hence, the argument that Brandeisian antitrust already failed decades ago does not seem likely to persuade neo-Brandeisian scholars in the present. To be fair to neo-Brandeisian scholars, the aforementioned critics' belief that neo-Brandeisian antitrust will likely fail because it failed in the past may not necessarily be correct, because it is theoretically possible that this time is really different. Nevertheless, whereas the critics have compelling evidence behind their argument in the form of history, neo-Brandeisians lack anything nearing sufficient support for their belief that existing antitrust law is fundamentally incapable of reining in gatekeepers and that neo-Brandeisian antitrust ideas must replace it.[357] In fact, as this Article shows, legislation that would implement neo-Brandeisian antitrust is not only likely to

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352. *Id.* ("[T]he modern consumer welfare standard was an endogenous and direct response to this earlier [structuralist] regime.").

353. Wright & Portuese, *supra* note 120, at 149.

354. Guggenberger, *supra* note 12, at 311–12.

355. Mark Glick, Catherine Ruetschlin & Darren Bush, *Big Tech's Buying Spree and the Failed Ideology of Competition Law*, 72 HASTINGS L.J. 465, 467 (2021) (arguing that the "existing law of mergers is ill-equipped to address the tech firms' acquisition of startups").

356. CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2011).

357. *See*, *e.g.*, Thomas B. Nachbar, *Heroes and Villains of Antitrust*, ANTITRUST SOURCE, June 2019, at 1, 1 (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)) ("Wu misdiagnoses the ills of today's antitrust while failing to demonstrate either that his vision of antitrust is any more workable today than it was when it was rejected or, for that matter, that yesterday's antitrust still makes sense to solve so many problems for which we have other, modern regulatory solutions.").

disappoint, but also to prove itself counterproductive and inferior to existing law. As long as the neo-Brandeisian movement puts off a sober examination of its likely consequences and fails to present evidence that it will overcome historical failures, its goal to overthrow existing law will unfortunately remain a call for a revolution without a cause.

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