Crafting Effective Rules for Internet Platforms

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Maggie Reardon: I'm going to give each of these guys a couple of minutes to tell us what they see as the problem, as it pertains to Google, and what their fixes are.

Frank Pasquale: Google is one of the things I've been trying to think about for a much longer time than the Amazon problem, although they do converge in some serious ways. And I'm just starting small here. As a legal academic, we're trained to start thinking small. So the small thing I'm going to think about right now is the Google Book settlement. This is one of these situations where, from the outside and looking from a naive perspective, or totally consumer-centered perspective, you might think, "My God, we have all of these books. This is amazing, that we have this huge pile of books that has now been digitized." And it is true—this is a great asset to lots of researchers, to book commerce, etcetera.

But one question you might ask is, What about other ways of arranging books? What about other ways of potentially putting books out there? What if there are people who want to create platforms that are more promoting books or offering larger snippets? What about those who want to do fewer snippets of books when you're searching books? How can we ensure that? And I don't think we could just tell companies to go and copy all those books again, right? That would seem to be a big waste of time, right? And we already have one version of that on Amazon, one version on Google.

But what I'm hoping we can think critically about today is, how do we have more versions of this corpus of books? How do we do that?

One of the way of thinking about it is, in the early 20th century, we didn't dig up the streets 15 times for 15 different phone companies. We sort of just figured out ways to have different companies use the same lines. So I think that there have got to be ways of thinking about what

they have with respect to that corpus as potentially being an essential facility or treated as something that we could have more access to through more entities.

Thinking about this type of a pile-up of intellectual property, we've got to be more creative in thinking about how Google has certain advantages and might be sort of locking [others] out or occupying the field where there could be a lot more innovation. I have many other ideas that I propose in a series of articles about how to try to keep power accountable there, but for now I would just add that I really am enthused by many of the proposals to break up different parts of tech companies. It seems like Google is going in the direction of saying, "Oh, we're not really Google, there's Alphabet, and then there's Google and there's all these other companies." David Barnes has an article called "One Trademark Per Source." There should be an easy way in which people are immediately notified that what they're dealing with is, ultimately, a Google property.

Sally Hubbard: So I'll zoom out and look at the big picture. What I'm most concerned about relates also to a Facebook panel: having Facebook and Google controlling the flow of information worldwide. Google, I think its market share is between 80 and 90 percent for internet search. So it has been controlling what is discovered online, and this raises a lot of issues that were brought up in the last panel about Amazon because it is, like Amazon, controlling the arena in which the game is played, and it's also playing the game. When the E.U. fined Google $4.2 billion for prioritizing its own comparison-shopping services and putting the competitors on page four of the search results, that's something that could also have been cognizable under U.S. law; it's the same problem as Amazon prioritizing its AmazonBasics products in its search results also.

When you have one company that is basically the gateway to the internet globally, that raises a lot of concerns. So I think we need to be enforcing the antitrust laws. The cases that have been brought in Europe could also be brought under existing U.S. law, particularly the Android case, where Google said to phone manufacturers, "If you want to make an Android phone and you want the Play store,"—which you have to have in order to use an Android phone—"then you need to install our search app, our map apps, a bunch—32—apps as the default." And that is really no different than what Microsoft got in trouble for doing when it said, "If you want the Microsoft operating system, you need to get Internet Explorer, and you can't pre-install Netscape.

Reardon: And you need a Gmail account, which makes it even more—I mean, really, you're in their realm.

Hubbard: So, I think we need to mostly enforce the antitrust laws. Look at the acquisitions. Google is the leader in hundreds of kinds of acquisitions; that has allowed them to consolidate the [unintelligible].

Hal Singer: I want to focus on the threats to edge innovation that would occur from appropriation by the dominant platform. It's kind of weird—it's almost like a reverse free-riding syndrome, where the incumbent is actually stealing ideas from edge innovators and then

appropriating those ideas into the platform itself. And the economists would react to this by being concerned that, if you push down the rents, or the expected rents on the profits of the edge providers, you're going to see less innovative activities in the edge as a result.

In fact, you have some venture capitalists referring to the areas around the tech platforms as kill zones. There are some interesting studies concerning Crunchbase and PitchBook. I don't want to kill you with all the details, but they seem to suggest that the areas that are within the orbits of the tech platforms are experiencing a collapse in first financing, and that's not happening in other tech areas outside of the orbits of the tech platforms. That seems to suggest that there might actually be something there to the kill-zones idea.

With regard to a remedy, I'd like to borrow an idea from the 1992 Cable Act. I feel like we've been here before. Back in the late ’80s, there was a different dominant platform. Those were vertically integrated cable operators who decided that they were going to sit back and pick off the best ideas that were coming out of the edge. And Congress correctly decided that antitrust was not going to police these platforms, but instead you needed sectoral-specific regulation. And what happened is Congress created a forum in which independent cable networks could bring discrimination complaints against vertically integrated cable companies. I think the same idea could be extended into the tech platform range.

Here are the key elements of the idea: Congress would have to create, number one, a private right of action, so this would allow independent edge providers or producers, merchandisers on the Amazon platform, to come forward and bring a discrimination complaint against the tech platform.

The second thing, of course, is Congress would have to create a forum. You need to be able to go somewhere to file the suit, and one place that seems to be getting some currency is at the FTC’s ALJ. But you could also do this before an Article III judge.

Finally, number three, you need a new standard. I'm advocating a nondiscrimination standard, and a new evidentiary standard would be different from the evidentiary standard that currently prevails in an antitrust court.

And I think, fourth, if you brought up one of these complaints and you succeeded on the merits in front of a neutral fact-finder, you need the ability to achieve injunctive relief, that is to cut out the discrimination. You could also recover your lost profits, but you would not get treble damages.

My last thought is, how does this interact with antitrust enforcement? And I don't see the two as being mutually exclusive. A lot of times, the pushback I get is, "Well, Hal, you're gonna undermine the ability to go after the tech platforms using antitrust." I would point out that Comcast has been the defendant in an antitrust suit or two since Congress created this nondiscrimination regime for vertically integrated cabal operators. I think it's proof that this would

not shut down or foreclose in any way the ability of an antitrust agency to bring an antitrust action against a tech platform.

But I'll point out that my concerns with antitrust are threefold. Number one is: No private litigant would likely bring a case involving discrimination into an antitrust court. Given the current climate, the prospects of prevailing under the current [unintelligible] standard would be close to negligible.

Number two, I'm worried about these forms of mild discrimination. So in the case of the Google platform, Google isn't shutting out these independent content providers entirely. It's not a refusal to deal, it's much less than that. It's a milder form of discrimination, is how I say it. They're just inserting their own results in a OneBox above, which will grab your immediate attention; the independents are still showing up in the blue links, but they're showing them down the page. So you'd have to go in there and say, "This is tantamount to a refusal to deal." I'm just worried that it's not going to be recognized as something that's cognizable under antitrust.

And then the third thing is, even if you can get past these hurdles, I'm worried that antitrust moves too slow. I've written about this—I've looked at how long it takes for cases to be adjudicated under Section 2 of the Sherman Act, and I looked at every single case that was mentioned, in a now-retracted DOJ single-firm monopolization outline, and it took an average of about 36 months just to get the case adjudicated at the district court level. Of course, that's just the beginning. Then you're going to go to the appeals courts as well. If it takes three—and my personal experience in antitrust, which is where I practice, it's on the order of five or even seven years—if it takes that long to resolve the cases, then by the time we get there, innovation at the edge will be dead.

Gene Kimmelman: I'm always curious when I agree with Hal. But let me tell you why I'm gravitating there. We're talking Google, but I actually want to talk about it in the context of what we've just discussed about Facebook and Amazon as well, because there's obviously enormous sentiment in the room—a lot of sentiment—about breaking up the companies. And so I'll start off by saying, in a friendly audience, I think it's probably all of us who think it would be great if there were a lot more players in each of these markets. Just no question about it. But what I have done for more than 30 years of my career has been practical policy work around politics. And so, with that experience, I've got to tell you that I really worry about focusing too much about breaking up these companies, even if it would be wonderful if we had a lot more players in the market.

I cut my teeth on the breakup of AT&T in law school—I got thrown in on all that. It was very heady and exciting and wonderful. But I came in after 20 years of evidentiary fights, partly in regulatory bodies and partly in litigation, that led to that breakup. Twenty years, not just the three, five, or seven. It was an enormous amount of effort to get to a point where the Justice Department thought this was a bad thing that had to go. We think about it as wonderful. It almost didn't happen, because at the moment it happened, the new Baby Bell phone companies claimed that they needed $20 billion in rate increases in order to survive in this new competitive

environment. There were all kinds of questions about, "What am I gonna do with my phone, and who connects what, and who's responsible for it?" And then there were all these questions about, "Well, now we're gonna have more players. How do you do interconnection? How do you actually port numbers? What do you do?"

There was a bill introduced by the majority leader in the Senate to undo this within two years of the breakup. And if we had not had state regulators—*regulators*—denying almost all the rate increases, and an FCC that stepped in and actually figured out how to navigate through all these complex equipment, number, and interconnection issues, I'm not sure we would have the innovation that exploded from that. The public did not like it; it was messing with their daily lives. This is what is forgotten about that. That's the quintessential example of breakup.

So then you look at the state of a law. Look at the makeup of the Supreme Court today. If people are worried about the conservative jurisprudence of the last 30 or 40 years, which troubles me tremendously, I will suggest to you that it could get much worse with the current Supreme Court. If people are worried about where we were with Robert Bork's theories of antitrust—the Chicago School—we've been moving, little by little, incrementally away from some of those ideas. A couple of the people who just got on the Supreme Court to me are like Bork squared. And they are allied with three other votes I can almost certainly count. So bringing an antitrust case and putting it into that environment . . . really, really, very tricky. Which is not to say, don't use antitrust—I agree totally with Hal. I think we have to use it as a targeted tool. And we do have some targeted things that we can do, but in a breakup, you've got to really think about whether you have the kind of evidence to really pull that off. It's very, very difficult.

And on Facebook, I totally agree, by every bit of evidence we've seen, there's a massive violation of a consent decree, from everything we know. Here's what I don't know: What did the FTC itself sign off on in those compliance agreements, every year, that Facebook had to submit? Do they really have a case? I don't know. I don't know what the accounting review was. So again, from the outside, things often look very different than they look on the inside. But then also, if the violation was, "You really stole people's personal information, and you promised not to do so," if I were Facebook, I'd say, "Okay, we'll look into it. We're not gonna do that on WhatsApp anymore, we're not gonna do that on Instagram," if that's where the promises were. "You gonna break me up?"

There's no jurisprudence for any of that. So I'm not saying it's impossible. I just think we have to think really hard, when something like breakup sounds good and we'd like more players, about how you actually mechanically accomplish that. I really believe we've got to look at some of the ideas the panelists talked about. I was involved in the '92 Cable Act extensively. I think there are some good ideas and mechanisms that come out of that to look at discriminatory practices preferencing the exclusive deals that, maybe, are a more fruitful and practical set of tools to use with effect.

Hubbard: I think focusing on the AT&T breakup is a little different than talking about undoing anticompetitive mergers, right? People that are talking about having Facebook be broken up

from WhatsApp and Instagram, if they're talking about going back and undoing anticompetitive mergers, it's different from coming in and doing a breakup from the beginning.

Kimmelman: You're asking an agency that said there was no competitive problem to change its mind, so now you have to explain why you've changed your mind.

Hubbard: I'm just saying that distinguishes it from the AT&T [breakup], right? I mean, I don't actually don't know the history of AT&T [unintelligible].

Reardon: If you look at Amazon, that would fall into that camp where they seem to be all-encompassing. Google's had a lot of acquisitions, too, but how do you break that up?

Hubbard: I think that applies to Amazon, also. But for Facebook and for Google, you were talking about undoing anticompetitive acquisition, so with Google you're talking about DoubleClick, AdMob, YouTube—mergers that shouldn't have been allowed. I think that's a different legal climb than just going in and breaking up.

Kimmelman: So it is a different legal issue, but let's just talk about the practical business, which is, if Facebook . . .

[break in video]

Kimmelman: Have they shared information? Have they shared employees? Have they shared facilities? You have to look at the corporate structure and actually walk through this. And also, if I'm Facebook and I'm divesting 25 percent of my assets, I create a new company tomorrow that's not Instagram, I call it something else. It's about your pictures, and I'm using my platform to reach out to everybody. So again, it's not just like taking it to what it was before, number one, and number two, you have to go back and look at, who else is in the market? We've often talked about this as, "Let's put WhatsApp on the market or Instagram on the market and they're there by itself." Well, what happens when Apple buys one of them? No, let's have Comcast buy one of them. We were just told that they're not that big anymore, they're not that important anymore. They don't control as much data as Google. So, maybe Comcast can buy it up. You've got to have a whole antitrust framework then to prevent reconsolidation of a different form with market power that's adjacent to what you just were worried about.

Reardon: Which also happened after the breakup of AT&T.

Kimmelman: Exactly, exactly. We ended up with all these companies re-consolidating.

Pasquale: Just to concentrate on a point of agreement we started with, I totally endorse Hal's approach. I had a piece back in 2008 called "Internet Nondiscrimination Principles," where I tried to do some initial thinking about, if we really believe in net neutrality, what does search neutrality potentially look like? And I drew some direct parallels between certain net-neutrality standards and things that you would see if you brought those to other bottlenecks. I think the public

knowledge has actually used that term *bottleneck* in a very fruitful way, so to think about these bottlenecks is very important.

But to come to the idea about what's being broken up, I highly recommend a post by a guy named Ben Thompson on the blog called *Stratechery*. And he's no raging lefty. He's quite into markets, really trying to ensure market competition. He has these reflections on tbh. So Facebook bought this little social network, the teen positivity-polling app called tbh. I guess the structure of it is that—it's not like you can say, is this picture good or bad? It's like: Is this picture awesome or super awesome? So that's the positivity-polling app, which there's a high demand for for kids. Amongst all this concern about Instagram bullying—which, by the way, Facebook is not doing a good job of. I would also say, by the way, all these platforms, they're not doing a good job. I think we've got to start with that. As sort of a presumption of . . . something we've got to be really concerned about.

And so with this tbh thing, I think they bought it for $80 million, which was just under what the automatic HSR—Hart-Scott-Rodino—review would be . . . classic regulatory arbitrage. Given the context of that, Thompson talked about how there was this one hospital merger case where the FTC did go in after the merger and said, "Wait a second. You know, we're gonna have to unwind this thing." And by the way, the FTC seems really out for these doctors and hospitals or church organists, amazingly enough—some other groups that are really after that. But we've got to start thinking about this. Yeah, is it going to be a hard data question, to think about how to separate them? Oh sure, I think it could be. But on the other hand, as someone who's written extensively about health information exchanges and how the new health information works, probably it was a hard thing to separate those hospital systems out, right? So given that nearly all business is tech, we've got to stay away from the idea that there's something magical or special about the tech firms that renders them particularly resistant to separation. I think, with good enough people thinking about how to achieve that separation, we really could do it, and we really could separate Instagram and WhatsApp from Facebook, and I think we certainly should.

Singer: I think there are easy structural problems, and there are harder structural problems. So when we talk about spinning off WhatsApp or Instagram, I'd put that in the easy category. But there are folks, including Senator Elizabeth Warren, who are advocating for a structural separation that go beyond just rolling back the prior mergers. They want to put a pen around a platform's core mission and say that "Thou shalt not move outside the pen."

So let me give you some tricky questions with respect to Google. If search is the core, solving the solution to a math problem is outside of the core; it's content. I'm sure when Google vertically integrated into the math space, it made life miserable for a lot of independent math apps. No doubt. You have Maps, not to be confused with math, where Google has vertically integrated into supplying maps. You have dictionaries. And I put those into a bucket of what I call commoditized verticals. Not to denigrate what they're contributing, but the answer to a math problem doesn't seem like it would involve the same level of creativity or ingenuity as certain other types of content or verticals that Google could invade. So what concerns me is that, when

you move down the structural path, you're going to get into some very difficult questions as to where to draw the line. Should Google be barred from even doing these commoditized verticals that are arguably an improvement on the welfare of its users?

Pasquale: I think, if you look back to the types of commitments Google was proposing to Almunia when he was in charge of the European antitrust investigation, before Vestager took it over, they had these very rich rituals where they talked about what it would look like to have at least three non-Google properties in the top half of the search screen, as alternatives to the Google properties. Adam [unintelligible] has written about this, in terms of thinking about how that would look. And I think that's a good idea. I think we could have very good discussions about what's a commoditized vertical and what's not.

For example, with weather, there was a great app called Weather Smart, that was a really wonderful way of presenting the weather. Some people would say, "Oh, that's a commoditized vertical; you just get the weather in the first half of your Google screen." There's got to be room for a world in which maybe there are three other ways of presenting the weather. I've always found it frustrating . . . where's the humidity on Google [unintelligible]? So I think it's really not beyond the ken of regulators or others to think about whether there are there more creative ways to think about what is properly commoditized and what would be less so.

Reardon: One question I have that's come up a couple of times over a couple panels is this idea of what I'm gonna call net neutrality for content. Let's talk about that. Is that something that's doable? Is it needed?

Kimmelman: I think there needs to be a nondiscrimination standard for any of the dominant platforms. I don't think it's the same as net neutrality because I think search, by its very nature, is nonneutral. So if they're trying to give you some preferencing that relates to something—something you've chosen, something that they have identified by a number of combinations of your activities . . . it's a little more complicated than that, but there are fundamental principles here that we have applied across industries for many, many decades that should apply to tech as well. When you are dominant, you should not be able to favor yourself over others.

Antitrust is not a great tool for that; it is an extreme, when there are a set of factors that clearly show how that preferencing is undermining the competitive process. Hal pointed out earlier, there are a number of more subtle forms of discrimination that would concern us, and have concerned us in the video market. Whether you have independent programmers, whether you can preserve a marketplace of ideas—those are esoteric and quite difficult for antitrust to grapple with. If you couple strong antitrust enforcement with some form of nondiscrimination framework, I think that is the way we could proceed. I think Frank has some fabulous ideas, I just don't know how to get from here to there in the policy world that we live in, and certainly in the jurisprudential world. So they're very interesting ideas, I just don't know how to get there. Whereas here, if we've got some real concrete harms that people were talking about for last few hours—discrimination, favoritism, a variety things—if the facts are really there, I think that's the

case you bring before Congress to grapple with this at a moment when we are worried about the political danger of having a few large firms with this much economic power.

Hubbard: I wanted to point out that the remedy that the E.U. has required of Google, out of its Google Shopping case, was: Treat your competitors equal to how you treat yourself. It's essentially a nondiscrimination standard. Now, they're not doing a great job of enforcing it, unfortunately, but they got there with antitrust law, and a lot of people like to say how different E.U. antitrust law is from U.S. antitrust law. There are some differences, but I do believe that Google's preferencing of its own products and services in its search results is something that would be cognizable under U.S. antitrust law. And I want to quickly read to you from the leaked FTC memo, when they were investigating Google search practices. They said—this is a quote: "A natural and probable effect of Google's conduct is to diminish the incentives of vertical websites to invest in innovative content. In the alternative, Google's conduct may be condemned as a standalone violation of Section 5. Google has presented no sufficient justification for its conduct." So I do think it's illegal under existing standards.

Kimmelman: You're totally right, Sally, you're totally right. And why didn't the FTC do that? Someone's got to go ask Jon Leibowitz and his colleagues. However, again, let's look Europe. They have an open online shopping market. Leave aside how well they're enforcing it, and leave aside whether they have the hundreds of staff you would need to look at every claim of complaint and discrimination on that platform, because it all relates to the algorithms Frank's talking about that are highly complicated with Google's. It will be a regulatory structure in Europe, if they continue with it, but I worry that it's not going to work whatsoever. I worry we're six years too late. [Unintelligible] should have brought that case if he really had a case. I mean, this is a problem here, too. The timing is critical. Hal made this point earlier, that these things, they take forever to work through, and certainly the Department of Justice has no enforcement structure to deal with these kind of complaints.

I'll just use the other big case that we have with Section 2: Microsoft. If you look at the nondiscrimination requirements in the Microsoft case—they're unbelievably complicated. A lot of people were not sure how much they did, but they certainly deterred Microsoft for a while. But I don't think the Department of Justice did much of anything to actually try to implement that because it was way too complicated.

Singer: I just want to go back to your question, which was: What in the world does this have to do with net neutrality? And I would remind everyone that, if you go back to the 2010 Open Internet Order, the name of the standard that the FCC embraced to police acts of paid prioritization by internet search providers was the Nondiscrimination Standard. So this obviously has a lot to do with net neutrality. I realize that the concept of net neutrality means different things for different people, but at its core, there always was a nondiscrimination element to it. I'll note that Senator Franken, in his last speech, mentioned the notion of tech neutrality and bringing over some ideas from net neutrality.

I want to talk about how would it look, could it be implemented. Because I was on a panel with Google's antitrust counsel at the FTC hearings, and she asserted that it basically would be impossible. And I'm paraphrasing, but something like, "Hal wants to get into the algorithm and mess with it, and he has no idea what he's doing." She said it much more gracefully than that. And my response is, imagine that we were bringing a case in this hypothetical tribunal or forum that allowed independent providers discrimination claims and prevailed. What would the injunctive relief look like? Well, I've been thinking about it, and what I understand is that, when Google populates the OneBox, that limits its search results to only Google properties, Google-affiliated properties. In a paper, Tim Wu and Michael Luca basically tricked the Google algorithm into running, in its natural and beautiful state, but across the entirety of the web, and out popped a different set of ranked results. And then—this is kind of an interesting academic note—when they subjected students to the newly ranked results, they found that the engagement, as measured by click-through rates, was higher when you allow Google . . . you basically trick Google into producing its organic results from its natural algorithm.

So that's a long way of saying that we don't need to go in and mess with the algorithm per se. We would just need Google to run its algorithm over the entirety of the internet. And if it turns out, by the way, that Google properties won that race on the merits, by all means, they should be at the top of the OneBox. This should be a meritocracy, but the results should not turn entirely on whether or not you're affiliated with the platform.

Pasquale: That was a very, very elegant solution, to figure out what it would look like if you got rid of those. And I do think that, yeah, the preferencing of [Google's] own products is something that really does raise some difficult questions. We really have to start to think about how to get to a world where that is not acceptable. In terms of how the FTC decided its resolution of that case in 2013, I read an article saying that it failed to explain its inaction. I just feel like it was so poor. I'm so glad that Sally brought up the extent of the problem. The other sad thing is, even the minimal things that they thought that they were going to get out of Google—like, for example, less screening—apparently they haven't even really tried to enforce that.

Reardon: Which does sort of lead back to, who is going to be the enforcer? Should we make this an FCC thing, should we—

Pasquale: We are so far behind on the problem, we've got to just be pushing ahead on all cylinders. We can't be defeatist. I think that's the first thing. The second thing is that the FTC itself, I think, has a bit of Stockholm syndrome. I mean, so often, you get the sense where it's like, "We have so few resources. What can we do?" . . . They should ask for 10 times the resources. . . . They need 10 times the staff—at least 10 times. The companies' have gotten 10 times bigger. I'm saying—because right now, the culture at these agencies is just to pretend as if everything is being done as well as it can be done. And the CFPB is totally a new agency. I mean there's a totally new agency that could suit up. And I think the CFPB was a great example of totally rethinking some consumer protection angles that would not have been done by any of the existing [unintelligible].

Kimmelman: I totally agree—we may need a new agency. Because, just looking back at the algorithms, which might seem simple or not, this is dynamic. The moment you tell Google, "You're sharing this," they're changing the algorithm. You're not going to control what the corporate inputs are; you're going to have to be controlling on the back end of what is discrimination. And so it's going to need to be technical people who can monitor what is the new thing they're doing, that they will call innovation, that is getting gamed to try to benefit themselves. So I think you need a lot of people with expertise. I don't think the FTC and DOJ have that. I don't think the FCC has that. But I do think that we need to be cranking on all cylinders here, because I think these are serious problems. And the moment a company like that thinks it's coming under government oversight, they restructure what they look like—as you say, Alphabet. They make things that can be separated look like they are fully integrated; that's the story of AT&T and a number of other companies . . . Microsoft as well. And so you've got to be thinking about, like, how are you going to really try to [unintelligible].

Hubbard: I wanted to make clear that, when I was talking, that we can use antitrust—I wasn't saying we should *only* use antitrust. I also like Hal's proposal. I think we should use all the kinds of regulatory measures we can. And I also just really want to caution everyone from falling into the trap of, "It's too complicated for us to do anything." Look, in any context, when people say it's too complicated, that's always a rationalization to do nothing. We've been doing nothing long enough, and that's how we got where we are today. I just want people to not give in to that, which is a way that systems of power have all always argued for inaction.

Singer: I want to second that. I point to, how did Congress solve this problem in '92? They basically had the FCC's ALJ adjudicate discrimination complaints, and so an independent comes in and says, "I've been discriminated against on the basis of affiliation." They have to prove it; they have to show they've been harmed in a material way, unable to compete effectively as a result. And the relief is the end of the discrimination.

I don't want it to be real complicated. You don't need a new agency, you could put in an independent tribunal. But I actually think that the FTC's administrative law judge can handle these cases, with an important twist. Number one is that I don't want the cases to be solely brought by the FTC itself. That's the current set of rules right now, and it's completely wrong. The only complainant from the FTC's ALJ today is the FTC itself. That results in underenforcement. Now, I just want to give the independent its day in court. It doesn't mean they're going to win. But at least they'll have a day in court. And then, number two, we need a new evidentiary standard, and the ideal one for me would come from nondiscrimination.

Pasquale: I think that one of the things that really changed my mind about all of this—I think it goes back to 2011 or 2012—there was a little company called Foundem, which was a specialized search engine in England. And it was a husband-and-wife pair who were programmers. They were really excited about potentially being this new shopping vertical. And then they said, "Google killed our business." Several American legal academics who I deeply respected, when they heard about this story, said, "These people are pathetic. Their search engine is taking money from certain entities. That's exactly that kind of thing that should get

dunked on by Google. They're ridiculous, and that shows why search neutrality or search nondiscrimination is a bad idea."

Well, they came to the U.S. I spent three hours with them, just interrogating them, asking all sorts of questions. And they showed me these charts that just made it clear. All of a sudden, they were dropped out of the top Google results for certain product searches. And then, on top of that, when they tried to advertise on Google, they were told their price was going from five pence an ad to five pounds an ad. A hundred times the price. That isn't hard for the ALJ to understand or others to understand. At the very least, even if we can't stop the most subtle manipulation of machine learning, we can at least identify cases like that, cases close to that, and there's [unintelligible] agencies about that.

We've done this in health care fraud detection. Health care fraud—very complicated, to know exactly how many minutes somebody should spend on someone, how much something should cost, etcetera. Well, we invested the money. In Chapter 5 of my book *The Black Box Society*, I talk about how they gained enormous regulatory capacity there. That can be a model here as well.

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