Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins
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Introduction

The dystopian novel is a powerful literary genre. It has given us such masterpieces as *Nineteen Eighty-Four*, *Brave New World*, *Fahrenheit 451*, and *Animal Farm*. Though these novels often shed light on some of the risks that contemporary society faces and the zeitgeist of the time when they were written, they almost always systematically overshoot the mark (whether intentionally or not) and severely underestimate the radical improvements commensurate with the technology (or other causes) that they fear. *Nineteen Eighty-Four*, for example, presciently saw in 1949 the coming ravages of communism, but it did not guess that markets would prevail, allowing us all to live freer and more comfortable lives than any preceding generation. *Fahrenheit 451* accurately feared that books would lose their monopoly as the foremost medium of communication, but it completely missed the unparalleled access to knowledge that today's generations enjoy. And while *Animal Farm* portrayed a metaphorical world where increasing inequality is inexorably linked to totalitarianism and immiseration, global poverty has reached historic lows in the twenty-first century, and this is likely also true of global inequality. In short, for all their literary merit, dystopian novels appear to be terrible predictors of the quality of future human existence. The fact that popular depictions of the future often take the shape of dystopias is more likely reflective of the genre's entertainment value than of society's impending demise.

But dystopias are not just a literary phenomenon; they are also a powerful force in policy circles. For example, in the early 1970s, the so-called Club of Rome published an influential report titled *The Limits to Growth*. The report argued that absent rapid and far-reaching policy shifts, the planet was on a clear path to self-destruction:

> If the present growth trends in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years. The most probable result will be a rather sudden and uncontrollable decline in both population and industrial capacity.

Halfway through the authors' 100-year timeline, however, available data suggests that their predictions were way off the mark. While the world's economic growth has continued at a breakneck pace, extreme poverty, famine, and the depletion of natural resources have all decreased tremendously.

For all its inaccurate and misguided predictions, dire tracts such as *The Limits to Growth* perhaps deserve some of the credit for the environmental movements that followed. But taken at face value, the dystopian future along with the attendant policy demands put forward by works like *The Limits to Growth* would have had cataclysmic consequences for, apparently, extremely limited gain. The policy incentive is to strongly claim impending doom. There's no incentive to suggest "all is well," and little incentive even to offer realistic, caveated predictions.

As we argue in this Article, antitrust scholarship and commentary is also afflicted by dystopian thinking. Today, antitrust pessimists have set their sights predominantly on the digital economy—"big tech" and "big data"—alleging a vast array of potential harms. Scholars have argued that the data created and employed by the digital economy produces network effects that inevitably lead to tipping and more concentrated markets. In other words, firms will allegedly accumulate insurmountable data advantages and thus thwart competitors for extended periods of time. Some have gone so far as to argue that this threatens the very fabric of western democracy. Other commentators have voiced fears that companies may implement abusive privacy policies to shortchange consumers. It has also been said that the widespread adoption of pricing algorithms will almost inevitably lead to rampant price discrimination and algorithmic collusion. Indeed, "pollution" from data has even been likened to the environmental pollution that spawned *The Limits to Growth*: "If indeed 'data are to this century what oil was to the last one,' then—[it's] argue[d]—data pollution is to our century what industrial pollution was to the last one."

Some scholars have drawn explicit parallels between the emergence of the tech industry and famous dystopian novels. Professor Shoshana Zuboff, for instance, refers to today's tech giants as "Big Other." In an article called "Only You Can Prevent Dystopia," one *New York Times* columnist surmised:

> The new year is here, and online, the forecast calls for several seasons of hell. Tech giants and the media have scarcely figured out all that went wrong during the last presidential election—viral misinformation, state-sponsored propaganda, bots aplenty, all of us cleaved into our own tribal reality bubbles—yet here we go again, headlong into another experiment in digitally mediated democracy.
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> I'll be honest with you: I'm terrified . . . There's a good chance the internet will help break the world this year, and I'm not confident we have the tools to stop it.

Parallels between the novel *Nineteen Eighty-Four* and the power of large digital platforms were also plain to see when Epic Games launched an antitrust suit against Apple and its App Store in August 2020. Indeed, Epic Games released a short video clip parodying Apple's famous "1984" ad (which upon its release was itself widely seen as a critique of the tech incumbents of the time).

Similarly, a piece in the *New Statesman*, titled “Slouching Towards Dystopia: The Rise of Surveillance Capitalism and the Death of Privacy,” concluded that: “Our lives and behaviour have been turned into profit for the Big Tech giants—and we meekly click ‘Accept.’ How did we sleepwalk into a world without privacy?”

Finally, a piece published in the online magazine Gizmodo asked a number of experts whether we are “already living in a tech dystopia.” Some of the responses were alarming, to say the least:

> I’ve started thinking of some of our most promising tech, including machine learning, as like asbestos: … it’s really hard to account for, much less remove, once it’s in place; and it carries with it the possibility of deep injury both now and down the line.
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> . . . .
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> We live in a world saturated with technological surveillance, democracy-negating media, and technology companies that put themselves above the law while helping to spread hate and abuse all over the world.
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> Yet the most dystopian aspect of the current technology world may be that so many people actively promote these technologies as utopian.

Antitrust pessimism is not a new phenomenon, and antitrust enforcers and scholars have long been fascinated with—and skeptical of—high tech markets. From early interventions against the champions of the Second Industrial Revolution (oil, railways, steel, etc.) through the mid-twentieth century innovations such as telecommunications and early computing (most notably the RCA, IBM, and Bell Labs consent decrees in the US) to today’s technology giants, each wave of innovation has been met with a rapid response from antitrust authorities, copious intervention-minded scholarship, and waves of pessimistic press coverage. This is hardly surprising given that the adoption of antitrust statutes was in part a response to the emergence of those large corporations that came to dominate the Second Industrial Revolution (despite the numerous radical innovations that these firms introduced in the process). Especially for unilateral conduct issues, it has long been innovative firms that have drawn the lion’s share of cases, scholarly writings, and press coverage.

Underlying this pessimism is a pervasive assumption that new technologies will somehow undermine the competitiveness of markets, imperil innovation, and entrench dominant technology firms for decades to come. This is a form of antitrust dystopia. For its proponents, the future ushered in by digital platforms will be a bleak one—despite abundant evidence that information technology and competition in technology markets have played significant roles in the positive transformation of society. This tendency was highlighted by economist Ronald Coase:

> [I]f an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on a monopoly explanation, frequent.

"The fear of the new—and the assumption that 'ununderstandable practices' emerge from anticompetitive impulses and generate anticompetitive effects—permeates not only much antitrust scholarship, but antitrust *doctrine* as well." While much antitrust doctrine is capable of accommodating novel conduct and innovative business practices, antitrust law—like all common law-based legal regimes—is inherently backward looking: it primarily evaluates novel arrangements with reference to existing or prior structures, contracts, and practices, often responding to any deviations with "inhospitality." As a result, there is a built-in "nostalgia bias" throughout much of antitrust that casts a deeply skeptical eye upon novel conduct.

"The upshot is that antitrust scholarship often emphasizes the risks that new market realities create for competition, while idealizing the extent to which previous market realities led to procompetitive outcomes." Against this backdrop, our Article argues that the current wave of antitrust pessimism is premised on particularly questionable assumptions about competition in data-intensive markets.

Part I lays out the theory and identifies the sources and likely magnitude of both the dystopia and nostalgia biases. Having examined various expressions of these two biases, the Article argues that their exponents ultimately seek to apply a precautionary principle within the field of antitrust enforcement, made most evident in critics' calls for authorities to shift the burden of proof in a subset of proceedings.

Part II discusses how these arguments play out in the context of digital markets. It argues that economic forces may undermine many of the ills that allegedly plague these markets—and thus the case for implementing a form of precautionary antitrust enforcement. For instance, because data is ultimately just information, it will prove exceedingly difficult for firms to hoard data for extended periods of time. Instead, a more plausible risk is that firms will underinvest in the generation of data. Likewise, the main challenge for digital economy firms is not so much to obtain data, but to create valuable goods and hire talented engineers to draw insights from the data these goods generate. Recent empirical findings suggest, for example, that data economy firms don't benefit as much as often claimed from data network effects or increasing returns to scale.

Part III reconsiders the *United States v. Microsoft Corp.* antitrust litigation—the most important precursor to today's "big tech" antitrust enforcement efforts—and shows how it undermines, rather than supports, pessimistic antitrust thinking. It shows that many of the fears that were raised at the time didn't transpire (for reasons unrelated to antitrust intervention). Rather, pessimists missed the emergence of key developments that greatly undermined Microsoft's market position, and greatly overestimated Microsoft's ability to thwart its competitors. Those circumstances—particularly revolving around the alleged "applications barrier to entry"—have uncanny analogues in the data markets of today. We thus explain how and why the Microsoft case should serve as a cautionary tale for current enforcers confronted with dystopian antitrust theories.

In short, the Article exposes a form of bias within the antitrust community. Unlike entrepreneurs, antitrust scholars and policy makers often lack the imagination to see how competition will emerge and enable entrants to overthrow seemingly untouchable incumbents. New technologies are particularly prone to this bias because there is a shorter history of competition to go on and thus less tangible evidence of attrition in these specific markets. The digital future is almost certainly far less bleak than many antitrust critics have suggested and yet the current swath of interventions aimed at reining in "big tech" presume. This does not mean that antitrust authorities should throw caution to the wind. Instead, policy makers should strive to maintain existing enforcement thresholds, which exclude interventions that are based solely on highly speculative theories of harm.

Read the full white paper here.

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