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The Regulation of Foreign Platforms

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Abstract. In August 2020, the Trump Administration issued twin executive orders banning tech platforms TikTok and WeChat from the United States. These were not the first actions taken by the Trump Administration against Chinese tech platforms. But more than any other, the ban on TikTok sparked immediate outrage, confusion, and criticism.

This Article offers a new framework for thinking about national security restrictions on foreign tech platforms. A growing body of scholarship draws on principles from regulated industries, infrastructure industries, and public utilities to show how the regulation of tech platforms is not only viable but also has significant precedent and pedigree. Firms in infrastructure sectors—banking, communications, transportation, and energy—have long been subject to distinct and comprehensive regulatory regimes because they raise political-economy concerns distinct from those of ordinary tradable goods.

In many of these sectors, there is also a long history of legal restrictions on the foreign ownership of, control of, and influence over platforms. This may be surprising given the contours of the contemporary tech-platform debate. *Tech neoliberals* object to placing any restrictions on foreign tech platforms because regulations would threaten the open internet. *National security technocrats* advocate for a case-by-case assessment of dangers, narrowly tailored mitigation measures, and audits to ensure compliance. Both of these dominant paradigms suffer from a variety of conceptual and practical problems, and neither takes foreign tech platforms seriously as platforms, akin to platforms in other sectors.

This Article recovers the history of restrictions on foreign platforms in traditional regulated industries, critiques the dominant paradigms in the debate over foreign tech platforms, and offers an alternative: the platform-utilities paradigm. The platform-utilities approach recognizes that the regulation of platforms is important and legitimate given their distinctive political economy. Taking lessons and strategies from the history of platform restrictions, it suggests focusing on sectors before specific firms and applying

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structural separations rather than complex formulas for preventing national security harms. The platform-utilities approach would also require efforts at international interconnection and domestic public investments. The Article concludes by revisiting the case of TikTok with these lessons in mind.

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Introduction

In August 2020, the Trump Administration issued twin executive orders banning Chinese-owned tech platforms TikTok[1] and WeChat[2] from the United States.[3] These were not the first actions taken against Chinese tech platforms. The U.S. government, for example, had previously forced a sale of the Chinese-owned dating app Grindr.[4] And earlier that year, India banned TikTok and fifty-eight other Chinese apps.[5] But more than any other, the Trump Administration's ban on TikTok sparked immediate outrage, confusion, and criticism.[6] Some commentators attempted to identify the dangers that a ban might remedy: data collection on U.S. government employees, data collection on the general public, and the spread of disinformation.[7] Others questioned why some Chinese firms were banned and not others, noting that there was not a clear process for banning apps.[8] Still others observed that personal motives might be at play.[9] Users of the apps, as

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1. Exec. Order No. 13,942, 3 C.F.R. 412, 412-13 (2021) (prohibiting "any transaction by any person . . . subject to the jurisdiction of the United States, with ByteDance Ltd.," TikTok's parent company).
2. Exec. Order No. 13,943, 3 C.F.R. 414, 415 (2021) (prohibiting transactions involving WeChat).
3. A few months later, in January 2021, the Administration issued another executive order banning Alipay and other Chinese companies. Exec. Order No. 13,971, 86 Fed. Reg. 1249, 1250 (Jan. 8, 2021).
4. *See, e.g.*, David E. Sanger, *Grindr Is Owned by a Chinese Firm, and the U.S. Is Trying to Force It to Sell*, N.Y. TIMES (Mar. 28, 2019), https://perma.cc/3NP5-R4QE; Jay Peters, *Grindr Has Been Sold by Its Chinese Owner After the U.S. Expressed Security Concerns*, VERGE (Mar. 6, 2020, 1:26 PM EST), https://perma.cc/R854-66HU.
5. Dipayan Ghosh, *India's TikTok Ban Dispels the Myth of the "China Bogeyman,"* WIRED (July 7, 2020, 9:00 AM), https://perma.cc/AN9G-3UVD.
6. *See infra* Parts I.A-.B.
7. *See* Shirin Ghaffary, *Do You Really Need to Worry About Your Security on TikTok? Here's What We Know.*, VOX: RECODE (Aug. 11, 2020, 10:00 AM EDT), https://perma.cc/8HB7-BACV; *see also* Justin Sherman, *Unpacking TikTok, Mobile Apps and National Security Risks*, LAWFARE (Apr. 2, 2020, 10:06 AM), https://perma.cc/GBZ2-CND5 (discussing justifications for federal action prior to the executive order).
8. Ana Swanson, David McCabe & Jack Nicas, *Trump Administration to Ban TikTok and WeChat from U.S. App Stores*, N.Y. TIMES (Sept. 18, 2020), https://perma.cc/3TGD-5CSH (describing the views of cybersecurity expert Adam Segal).
9. Some noted that TikTok users registered for a Trump rally in Tulsa, Oklahoma, but intentionally did not attend, leaving the space emptier than expected. Abram Brown, *Is This the Real Reason Why Trump Wants to Ban TikTok?*, FORBES (Aug. 1, 2020, 2:03 PM EDT), https://perma.cc/9PYL-SMMS. Others speculated that a sale to Oracle, led by Trump supporter Larry Ellison, would not address security concerns but would be a boon for that firm. Michael Hiltzik, *Commentary: Did Oracle Offer a TikTok Deal to Serve Trump?*, L.A. TIMES (Sept. 14, 2020, 2:24 PM PT), https://perma.cc/5UMD-SVK5.

well as TikTok itself, brought lawsuits in federal court challenging the bans.[10] Part of the confusion was that the Committee on Foreign Investment in the United States (CFIUS), a group of government officials that reviews mergers for national security concerns, was already in the midst of a TikTok review.[11] After President Trump left office, the Biden Administration paused the bans.[12] It later revoked them, although it simultaneously ordered the Secretary of Commerce to consider data security threats from foreign adversaries' tech platforms when evaluating whether to prohibit or restrict foreign informational or communications technologies or services.[13]

This Article offers a new framework for thinking about national security restrictions on foreign tech platforms. Since the Trump executive orders, the debate over how to treat foreign tech platforms has largely been dominated by two paradigms. Each paradigm seeks a principled path forward rather than relying on expansive presidential discretion to ban foreign firms.[14] The first, *tech neoliberalism*, has been common among public commentators and opinion writers. Tech neoliberals object to placing any restrictions on foreign tech

10. *See* Complaint for Declaratory & Injunctive Relief ¶¶ 12, 14, U.S. WeChat Users All. v. Trump, No. 20-cv-05910 (N.D. Cal. Aug. 21, 2020), 2020 WL 4923982, ECF No. 1; Complaint for Injunctive & Declaratory Relief ¶ 8, TikTok Inc. v. Trump, No. 20-cv-02658 (D.D.C. Sept. 18, 2020), 2020 WL 5628983, ECF No. 1; Complaint for Injunctive & Declaratory Relief ¶¶ 4-8, Marland v. Trump, No. 20-cv-04597 (E.D. Pa. Sept. 18, 2020), ECF No. 1. For a helpful discussion of the lawsuits, see generally Contemporary Practice of the United States Relating to International Law, *United States Pursues Regulatory Actions Against TikTok and WeChat Over Data Security Concerns*, 115 AM. J. INT'L L. 124 (2021).

11. CFIUS was reviewing TikTok parent company ByteDance's acquisition of Musical.ly. *See* Taylor Walshe & Shining Tan, *TikTok on the Clock: A Summary of CFIUS's Investigation into ByteDance*, CTR. FOR STRATEGIC & INT'L STUD.: TR. CHINA HAND (May 13, 2020), https://perma.cc/U3RW-4B48. Indeed, when the U.S. Department of Commerce issued regulations following up on the WeChat and TikTok executive orders, the deadline for TikTok was set later than that for WeChat, presumably to account for the CFIUS investigation. *See* Press Release, U.S. Dep't of Com., Commerce Department Prohibits WeChat and TikTok Transactions to Protect the National Security of the United States (Sept. 18, 2020, 9:00 AM EDT), https://perma.cc/GEE5-5J6M.

12. *See* Stephanie Connor, *Biden Paused Trump's WeChat and TikTok Bans: Now What?*, JUST SEC. (Feb. 12, 2021), https://perma.cc/RM9B-G5JH.

13. Exec. Order No. 14,034, 86 Fed. Reg. 31,423, 31,424-25 (June 11, 2021). For further discussion of the Biden Administration's actions, see Part IV.C.2 below.

14. It is worth noting that the Trump executive orders are part of a long tradition of executive discretion regarding foreign control and investment. This tradition has its modern roots in the Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. §§ 4301-4336, 4338-4341), and now manifests in the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706. For a discussion of the latter as applied to TikTok, see Part IV.C.1 below. Of course, the choice of who acts differs from the substance of the action. The paradigms described here involve substantive questions, not merely institutional ones.

platforms because regulation would threaten "the open internet" and amount to taking a page from the authoritarian playbook.[15] Their approach channels the hardline free-trade and globalization approach that gained ground between the 1980s and the 2000s. A second camp seeks to maximize global openness as well, but it recognizes that foreign tech platforms may pose a risk to national security. Instead of nonregulation, therefore, these *national security technocrats* seek to identify the specific national security harms at issue and apply a case-by-case, narrowly tailored set of mitigation measures, coupled with a system of audits and monitoring to ensure compliance.[16] This approach, in broad strokes, is similar to the existing CFIUS review process.

Both paradigms, however, suffer from serious problems. While tech neoliberals are optimistic about harmony through global interconnectedness, the "open internet" is more imagined than real. Moreover, adherents fail to account for the serious liberty tradeoffs that their approach might require. National security technocrats, by contrast, face significant implementation and administrability issues that advocates neither discuss nor account for—issues that threaten to derail their entire enterprise.

Importantly, both camps also make a conceptual mistake. Neither one takes tech platforms seriously as platforms—as firms that have a distinctive political economy and thus have almost always been subject to special regulatory treatment, including foreign restrictions. Throughout history, policymakers and scholars have considered firms in many sectors—including banking, communications, transportation, and energy—special due to their political economy. Economically, firms in these sectors are often natural monopolies, facilitators of a range of downstream commercial activity, or subject to network effects. Politically, firms in these sectors play a critical role in society and can wield considerable power, implicating core democratic and national security interests. Firms in these sectors have therefore been treated differently than firms producing ordinary tradable goods.[17] Indeed, these firms have been subject to distinct regulatory regimes designed to address their specific economic and political dynamics.[18] Some refer to the above sectors as

15. *See infra* Part I.A.

16. *See infra* Part I.B.

17. It is worth noting, as Herbert Hovenkamp and Fiona Scott Morton have pointed out, that the Chicago school pushed the view that all markets are fundamentally similar rather than subject to different dynamics. *See* Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1846 (2020).

18. *Cf.* Fred Block, *Beyond the Commodity: Toward a New Understanding of Political Economy*, AM. AFFS., https://perma.cc/Z2W6-Y67J (archived Mar. 30, 2022) (making the distinction between the economics of commodities and sectors that are not commodities). For more on the regulatory regimes, see the discussion and notes in Part I.C below.

"public utilities," "regulated industries," or "infrastructure industries."[19] I will refer to them as *platforms* or *platform industries*, both to modernize and simplify usage and to connect their political-economy dynamics to those of tech platforms.[20] Part I below describes the dominant paradigms in tech-platform regulation and introduces the analogy between tech platforms and regulated industries.

Since the First Congress, the United States government has frequently placed restrictions on foreign ownership, control, and influence in platform industries.[21] Restrictions have not just been common in the banking, communications, transportation, and energy sectors; they emerged alongside these sectors and evolved with them. Restrictions on foreign control in banking date back to Alexander Hamilton's financial plan. They were a central aspect of the First and Second Banks of the United States, in addition to the National Bank Acts of 1863 and 1864, which remain the foundation for modern banking regulation.[22] Restrictions on the foreign ownership of broadcast and undersea cables emerged with the rise of radio communications in the early twentieth century, and these restrictions were strengthened in subsequent decades.[23] In the post–World War I era, the newest innovation in transportation—air travel—was regulated. Restrictions on foreign ownership in this sector drew on principles used in the maritime shipping context.[24] And in the energy sector, nuclear power has, since the first decade of its existence, had stringent restrictions on foreign ownership.[25] In each of these areas, Congress and the executive branch have, over time, modified restrictions on foreign ownership, influence, and control—strengthening and weakening restrictions in light of national security challenges and economic policy preferences. Part II describes restrictions in these four sectors, their justifications, their evolution, and important dynamics around their application and implementation up to the present.

From this history of restrictions, it is possible to identify commonly used regulatory strategies for addressing foreign control and influence. First and most importantly, restrictions on foreign influence in platform industries have not followed a case-by-case approach. Rather, general rules have applied to firms across the entire sector. In most sectors, federal regulators must give ex ante approval, via a license or charter, to a foreign platform before it can

19. *See infra* Part I.C.

20. *See infra* Part I.C; *see also infra* note 174 and accompanying text.

21. *See infra* Part II.A (describing banking restrictions).

22. *See infra* Part II.A.

23. *See infra* Part II.B.

24. *See infra* Part II.C.

25. *See infra* Part II.D.

operate in the United States. That approval is conditional on meeting sectoral regulatory standards and often requires corporations to have a U.S. subsidiary.[26] This enables review and remedy of both national security dangers and non–national security risks in the sector. Second, Congress has in some areas conditioned entry of a foreign platform on reciprocal treatment from the platform's home country.[27] Third, and perhaps most strikingly for modern observers, many policymakers saw the separation of ownership and control as a virtue rather than an agency cost (as is common in contemporary corporate law and governance). Restrictions on the amount of foreign investment, as well as mandates that corporations and directors be U.S. citizens, were legal requirements that sought to reduce foreign control and influence. Part III explores these commonly used strategies for regulating foreign platforms.

Drawing on this history, Part IV offers a different approach for thinking about national security restrictions on foreign tech platforms: a platform-utilities paradigm. Part IV first discusses the geopolitical, economic, and constitutional contexts of platform regulation. It then uses the platform-utilities paradigm to identify principles for regulating foreign tech platforms today. First, the platform-utilities paradigm suggests that restrictions on foreign platforms should operate at the sectoral level before targeting particular firms. While the communications, banking, transportation, and energy sectors have some shared political-economy dynamics, they each raise distinctive national security and democracy issues. For example, banking implicates issues of monetary sovereignty and financial stability, but telecommunications does not. Sectoral regulations are attentive to these dynamics. Such regulations have also generally been coupled with ex ante approvals to ensure that foreign platforms operating in the United States are prepared to comply with the overall regulatory system. Second, the platform-utilities paradigm would rely on structural-separation strategies—including geographic, governance, and activity-based separations—before looking to technocratic standards and auditing. Separation rules have been commonly used throughout U.S. history, and they are also generally considered more administrable than case-by-case mitigation measures.[28]

Part IV also briefly addresses two objections. First, the platform-utilities approach is not the same as "net nationalism."[29] Instead, the approach offers an

26. *See infra* Part III.A.

27. *See infra* Part III.B.

28. *See, e.g.*, Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 980, 1037, 1063-64 (2019) (describing the administrability benefits of structural separations).

29. *See* Tim Wu, *A TikTok Ban Is Overdue*, N.Y. TIMES (Aug. 18, 2020), https://perma.cc/ZN7P-B2K9 (defining "net nationalism" as an approach which views a "country's internet primarily as a tool of state power"); Ganesh Sitaraman & Tim Wu, *The*

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alternative to both laissez-faire and authoritarian control—one that encourages the creation of international standards and interconnection rules. In other words, regulation is neither authoritarian nor isolationist. Second, restrictions under the platform-utilities approach would inevitably mean an unclear number of reductions or delays in foreign capital investment. But this may not be much of a drawback (as it was at earlier times in American history). The United States is far wealthier than it once was, and public investment and public provision can serve as alternatives to foreign investment.

Part IV concludes by revisiting the orders against TikTok and other Chinese tech platforms. It describes the limits of executive action under the International Emergency Economic Powers Act (IEEPA) and CFIUS, and it argues that Congress could revise these statutes and establish a sectoral-restrictions regime via new legislation. In the absence of congressional action, presidential regulation of foreign platforms is also possible. Building on executive orders issued by the Trump and Biden Administrations, the Department of Commerce could adopt the platform-utilities approach via regulation.

By bringing the history of restrictions on foreign platforms to bear in the tech context, this Article makes three contributions. First, it documents and evaluates the long and continuing history of U.S. legal restrictions on foreign platforms outside of the tech sector.[30] It also demonstrates that the case-by-case technocratic approach that defines both CFIUS and contemporary tech-platform debates is not the only—or the conventional—strategy. There is a long tradition of sector-wide restrictions in platform industries throughout American history. Second, this Article offers a critique of the leading paradigms in the contemporary debate over foreign tech platforms, and in particular shows how administrability issues raise grave concerns about the technocratic approach. Third, this Article updates the traditional sectoral paradigm for the contemporary regulation of foreign tech platforms. In doing so, it contributes to a growing body of scholarship that connects tech platforms

Progressive Case for a TikTok Sale, WIRED (Sept. 18, 2020, 11:29 AM), https://perma.cc/23DC-HH2R (contrasting public regulation of internet platforms with "net nationalism").

30. That there are restrictions on foreign investment in these sectors has not gone completely unnoticed. One of the earliest trans-sectoral accounts is Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961), which sought to identify restrictions on foreign investment in an attempt to define corporate alienage. Just over thirty years later, Christopher Corr conducted a general review of investment controls in the United States. Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much Is Enough?*, 9 AM. U. J. INT'L L. & POL'Y 417 (1994). This Article builds on these earlier works and accounts for developments since 1994. Notably, these older analyses do not identify and evaluate particular strategies for restricting foreign platforms. And they do not, of course, evaluate restrictions with an eye toward foreign tech platforms.

to regulated industries, infrastructure industries, and public utilities—and draws on principles from those fields to show how utilities-style regulation of tech platforms is not only viable but also rests on strong precedent.[31]

Before turning to Part I, a few brief clarifications and caveats. The first is about terms. Throughout the Article, I use "platform" as a convenient catchall for monopolies, network industries, exchanges and marketplaces, public utilities, and other business lines that have historically been subject to public provision or systemic regulation because of their political-economy dynamics. As described in Part I.C below, this category has gone by many names, none of which are totally satisfying. The scope of this category has also been defined by analogy rather than deductively, contributing to the challenge. For present purposes, "platform" is as convenient a term as any other. Tech platforms are, in turn, a subset of platforms: technology firms with these political-economy characteristics. Tech platforms can therefore appear in different sectors (for example, Alipay in payments or TikTok in communications).

Second, I use "foreign" platform to encompass two distinct concepts. The first is a foreign business that seeks to operate within the United States; the second is the foreign investment in or ownership of a business that already operates within the United States. Each may pose different challenges from a national security perspective. But from a regulatory perspective, the legal tools for addressing these categories overlap. Scholars and policymakers thus speak frequently of "foreign ownership, control, and influence," or FOCI.[32] I use "foreign" as a shorthand.

More broadly, this Article looks at restrictions on foreign ownership, control, and influence, not at any policy that could have a direct or indirect effect on foreign operations in the United States. The Article therefore does not consider tax policy, tariff rates, or other generally applicable laws and policies that might affect foreign incentives to engage in U.S. commerce.

31. *See, e.g.*, MORGAN RICKS, GANESH SITARAMAN, SHELLY WELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTLITIES: LAW AND POLICY (forthcoming 2022) (manuscript at ch. 1) (on file with author); Khan, *supra* note 28, at 1037-52; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1641 (2018) [hereinafter Rahman, *The New Utilities*]; K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 234-35 (2018); *see also* Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://perma.cc/2LBC-V4FY (proposing the designation of large tech platforms as "platform utilities"); Dipayan Ghosh, *Don't Break Up Facebook—Treat It Like a Utility*, HARV. BUS. REV. (May 30, 2019), https://perma.cc/7LRL-7NM8; James Muldoon, *Don't Break Up Facebook—Make It a Public Utility*, JACOBIN (Dec. 16, 2020), https://perma.cc/5ZY9-DX47.

32. *See, e.g.*, *Foreign Ownership, Control, or Influence (FOCI)*, DEF. COUNTERINTELLIGENCE & SEC. AGENCY, https://perma.cc/Z7TQ-MDRN (archived Jan. 24, 2021).

Finally, it is beyond the scope of this Article to offer a detailed policy blueprint on how to regulate tech platforms in any particular sector (for example, banking or communications). Such a blueprint would require evaluating various policy considerations—national security issues, economic concerns, and democratic implications—in the sector and linking those considerations to the sector's broader political economy. A single article cannot cover that entire analysis. Claims of national security dangers will differ from sector to sector: The risks from foreign-owned communications platforms may not be the same as those from foreign-owned payment platforms. Indeed, part of the point of this Article is to suggest that policymakers and scholars should take a page from history by identifying national security dangers at the sectoral level and determining which generally applicable and administrable regulations can address those dangers.

I. Problems with Contemporary Paradigms

Since the Trump Administration's executive orders, commentators and scholars have sought a principled approach to regulating foreign tech platforms. They have generally clustered into two broad camps: tech neoliberals and national security technocrats. Each camp offers a paradigm for how to regulate tech platforms. Both, however, suffer from a range of conceptual and practical problems.

A. Tech Neoliberals

Neoliberalism is a view of political economy that preferences deregulation, liberalization, privatization, and austerity, with the aim of creating a system dominated by private market transactions.[33] This approach to political economy dominated public policy in the United States and Europe from the 1980s through the 2010s, with the high-water mark of economic integration coming in the late 1990s as commentators celebrated globalization.[34] With respect to foreign investment, neoliberals generally encourage the freer flow of capital across borders and downplay national security concerns.[35]

33. *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2-3 (2005); MANFRED B. STEGER & RAVI K. ROY, NEOLIBERALISM: A VERY SHORT INTRODUCTION 14 (2010); QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 2-3 (2018).

34. For an overview, see GANESH SITARAMAN, THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY, AND UNITE AMERICA 27-43 (2019). *See generally* GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA (2022) (offering a history of neoliberalism).

35. For an application of neoliberal policies to national security investment controls, see EDWARD M. GRAHAM & DAVID M. MARCHICK, INST. FOR INT'L ECON., US NATIONAL

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For technology, neoliberalism cautions against domestic regulation and international restrictions, a view best captured in John Perry Barlow's famous 1996 "Declaration of the Independence of Cyberspace."[36] Barlow called on the "governments of the industrial world" to "leave us alone," boldly stating that nation-states "have no sovereignty" in cyberspace.[37] His utopian proclamation announced that cyberspace would be a domain in which anyone could express their beliefs "without fear of being coerced into silence or conformity," and that governance would emerge from "ethics, enlightened self-interest, and the commonweal."[38] The only law of cyberspace, Barlow said, would be "the Golden Rule."[39]

Although the United States government did not adopt Barlow's declaration in any formal way, the American approach to "internet freedom" from the 1990s to 2016 often seemed to channel Barlow's vision. Jack Goldsmith has argued that the "internet freedom" conception comprised two principles.[40] The first was a commercial nonregulation principle, illustrated by the Clinton Administration's view that "governments must adopt a nonregulatory, market-oriented approach to electronic commerce."[41] The second was an anti-censorship principle, effectively pushing for "American-style freedom of speech and expression on the global internet."[42]

The contemporary tech-neoliberal approach appears primarily in popular commentary. Advocates seek to preserve the "open internet"—by which they mean a commercially and expressively unregulated internet around the globe.

SECURITY AND FOREIGN DIRECT INVESTMENT 42-46 (2006) (describing, in the congressional debate over the Exon–Florio Amendment, the camp seeking more open investment even against others' push for national security investment controls). For a more general account of the globalization agenda, see JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 3-22 (2002) (describing the drive for liberalization and its backlash).

36. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://perma.cc/8GYP-TG23. Barlow, of course, was not the only one worried about cyberspace regulation at this time. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (arguing that law based on geographic borders is infeasible and illegitimate given the cross-border nature of cyberspace). For an account that contextualizes these works and discusses counterarguments, see Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 317, 326-29 (2015).

37. Barlow, *supra* note 36 (capitalization altered).

38. *Id.*

39. *Id.*

40. JACK GOLDSMITH, THE FAILURE OF INTERNET FREEDOM 2 (2018), https://perma.cc/3PFP-3QUB.

41. *Id.* (quoting William J. Clinton & Albert Gore, Jr., *A Framework for Global Electronic Commerce*, WHITE HOUSE, https://perma.cc/Q4ZG-WVC6 (archived Jan. 23, 2022)).

42. *Id.*

The possibility of a national ban on foreign tech platforms is anathema to this worldview. After the TikTok and WeChat executive orders, tech neoliberals fiercely opposed the bans, declaring that they could "shatter the global internet,"[43] create a "splinternet,"[44] and threaten "the open internet."[45] These commentators noted that the orders "mark[ed] a departure from the traditional American techno-libertarian position on internet governance and free speech online."[46]

The tech-neoliberal paradigm, whether framed as the open internet or internet freedom, suffers from a variety of problems. First and foremost, the internet is not as "open" or "free" as popular commentators seem to think it is. TikTok itself demonstrates this. The app is not globally available: In China, ByteDance (TikTok's parent company) runs a different product called Douyin.[47] In the United States, reports allege that TikTok censors content, including mentions of Tiananmen Square,[48] and that it has moderated content to suppress posts by "ugly" people and the poor.[49] In 2018, after Chinese authorities criticized ByteDance for "unhealthy" content on one of its Chinese apps, the company's founder agreed to "strengthen party building" and increase the size of the content moderation team.[50] Indeed, the Department of Commerce concluded shortly after the TikTok ban that China would "exploit 'close ties' with ByteDance to further its foreign policy agenda," that the country's intelligence law allows Chinese intelligence agencies to "take control of" a China-based firm's facilities, and that ByteDance has more than 130 Communist Party members in management positions.[51]

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43. Robert Muggah & Rafal Rohozinski, *Trump's TikTok and WeChat Bans Could Shatter the Global Internet*, FOREIGN POL'Y (Aug. 14, 2020, 10:51 AM) (capitalization altered), https://perma.cc/SY2H-RQ8W.

44. *Id.*; *see also* Rob Lever, *WeChat, TikTok Ban Is Test for Open Internet, Free Expression*, BARRON'S (Sept. 18, 2020), https://perma.cc/42UM-T986 (to locate, select "View the live page").

45. Joss Fong & Christophe Haubursin, *The Bigger Stakes of the TikTok Debate*, VOX (Aug. 29, 2020, 9:32 AM EDT), https://perma.cc/7GSM-EVWS.

46. *Id.*

47. Louise Matsakis, *Does TikTok Really Pose a Risk to US National Security?*, WIRED (July 17, 2020, 3:10 PM), https://perma.cc/8UMU-EKZ2.

48. Alex Hern, *Revealed: How TikTok Censors Videos That Do Not Please Beijing*, GUARDIAN (Sept. 25, 2019, 12:00 AM EDT), https://perma.cc/L2SE-GJ2N.

49. Sam Biddle, Paulo Victor Ribeiro & Tatiana Dias, *Invisible Censorship: TikTok Told Moderators to Suppress Posts by "Ugly" People and the Poor to Attract New Users*, INTERCEPT (Mar. 15, 2020, 9:02 PM), https://perma.cc/8VHA-JKXR.

50. Li Yuan, *China's TikTok Blazes New Ground. That Could Doom It.*, N.Y. TIMES (Nov. 5, 2019), https://perma.cc/Y4BY-PDWJ.

51. TikTok Inc. v. Trump, 490 F. Supp. 3d 73, 78 (D.D.C. 2020) (quoting a Department of Commerce memorandum).

Internet regulations are not restricted to China. European regulations on privacy, competition, and speech are well-known, and other countries around the world have pursued a variety of regulatory measures against internet companies.[52] And despite its expansive rhetoric, the United States has also limited and monitored online speech, particularly as concerns about "internet security" have become more prominent.[53] Given the scope of data collection by the U.S. government, many countries view "the United States' 'hands-off' approach to the internet . . . [as] a mask for U.S. government manipulation and control."[54] Tech neoliberals may respond that their worldview is normative and that countries are wrong to limit or monitor what people say online. But it is worth noting that the tech-neoliberal project is unlikely to succeed. An open internet would definitionally require countries to adopt a nonregulatory posture. Instead, countries are going in the opposite direction.

A second problem is that the open-internet paradigm could functionally mean less freedom within the United States. Consider the case of a foreign tech platform that gains market dominance and then starts censoring content through its algorithm. The open-internet paradigm's merger of trade liberalization, nonregulation, and private ordering would be consistent with a private, foreign platform curtailing freedom in this manner. The antigovernment libertarianism of the "open internet" thus underrates the dangers of private governance and private tyranny.[55] The freedom of the open internet also poses dangers to freedom offline. A largely unregulated internet that enables foreign governments to manipulate information during elections, for example, threatens a free and democratic political process.[56]

Finally, the contemporary rhetoric of the open internet fails to recognize that internet governance is not a binary choice between fascism and total

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52. GOLDSMITH, *supra* note 40, at 5, 11-12; *see also* Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1822-34 (2012) (describing a wide range of countries' regulatory actions against Facebook).

53. GOLDSMITH, *supra* note 40, at 5-9.

54. *Id.* at 8.

55. For broad discussions of the dangers posed by tech companies, including dangers to democratic values, see generally, for example, SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (discussing surveillance and behavioral control); FRANKLIN FOER, WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH 56-77 (2017) (discussing the automation and homogenization of society); ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE (2019) (discussing the risks that Facebook poses to democracy, health, and the economy). On private companies acting like governments more generally, see ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37-74 (2017).

56. *See* S. SELECT COMM. ON INTEL., RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, S. REP. NO. 116-290, at 73-78 (2020).

nonregulation.[57] Commentators frequently make statements playing on the fear of authoritarianism: "The motivation for blocking TikTok in the U.S. is much different" from China's motivations, one writer has noted, "but [it] takes us to the same place—where the state determines what we can and cannot do on the internet."[58] The reality, of course, is that between total control and complete nonregulation there are a range of regulatory options. Indeed, every sector within the economy is subject to various legal restrictions, from common law rules of tort and property to criminal laws to taxes. The question, as always, is what set of legal restrictions should apply and when.[59]

B. National Security Technocrats

1. The general paradigm

The claim that bans on foreign tech platforms could turn the United States into its authoritarian competitors is not limited to adherents of the open-internet paradigm. National security–technology expert Samm Sacks, for example, has said that "shutting down" TikTok is a "terrible idea" and "dangerous precedent" that amounts to "taking a page from Beijing's playbook."[60] But instead of adopting the tech-neoliberal paradigm wholesale, Sacks and others advocate for a different paradigm: specific technocratic solutions to the particular national security dangers posed by foreign tech platforms.[61]

The general premise of this paradigm is similar to the tech-neoliberal approach: Global economic openness should be maximized. But national security technocrats recognize the serious concerns at stake and are therefore

57. In spite of the continuing rhetoric in the public sphere, scholars have long made this point. *See, e.g.*, JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 140-42 (2006) (describing the space "between the anarchy that governments are supposed to redress and the despotism that governments sometimes employ").

58. Michael Schuman, *Why America Is Afraid of TikTok*, ATLANTIC (July 30, 2020), https://perma.cc/GE3D-MSCL.

59. For an aligned position, see ANDREW KEANE WOODS, TECH FIRMS ARE NOT SOVEREIGNS 1 (Hoover Inst., Aegis Ser. Paper No. 1813, 2018), https://perma.cc/ET2Z-A5UH ("The question is not *whether* states can enforce their laws online, but *how* best to do this.").

60. Samm Sacks, Opinion, *Banning TikTok Is a Terrible Idea*, SUPCHINA (July 16, 2020), https://perma.cc/P2Z8-KDFQ.

61. *Id.* By "technocratic" I mean that this camp focuses on behavioral regulation and narrowly tailored standards, in contrast to a "structural" approach that focuses on clear, systemic, and structural rules. For the distinction between structural and technocratic approaches to law, regulation, and policy, see SITARAMAN, *supra* note 34, at 51-53. *See also* Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 657-58 (2006) (describing structural approaches).

willing to impose some restrictions on foreign companies. The guiding philosophy of this paradigm is that policymakers should make narrow, technical judgments about the national security risks at hand and carefully tailor mitigation measures in as targeted a fashion as possible.[62] A recent joint report of the Hoover Institution and American University written by nine distinguished scholars and experts—Sacks, Goldsmith, Gary Corn, Jennifer Daskal, Chris Inglis, Paul Rosenzweig, Bruce Schneier, Alex Stamos, and Vincent Stewart—accordingly calls for the identification of "specific threats" and a "targeted understanding" of dangers.[63] The report seeks to "ensure targeted, tailored responses" and "case-based analysis for individual cases."[64] Some commentators alternatively describe this approach as "a narrow, targeted approach," "a case-by-case, evidence-based approach," or "tailor[ing the] rulemaking process to . . . assess the security threats that specific . . . companies pose and then craft[ing] a careful policy in response to them."[65]

This focus on narrow tailoring leads technocratic reformers to make several policy recommendations. As an initial matter, they advocate for a case-by-case assessment of the national security threats posed by foreign tech platforms. Consider the Hoover–American report's approach, which "involves assessing the nature and weight to be accorded to the particular threat and subsequently balancing the mitigation of said threat against the nature and weight of a chosen response's potential collateral consequences."[66] The Hoover–American group thus endorses a balancing test that considers the necessity and proportionality of a restriction on a foreign tech platform, drawing on familiar concepts from international[67] and constitutional[68] law. Advocates would allow foreign tech platforms to operate in the United States only if the platforms follow certain regulations to mitigate any national

62. *See* Justin Sherman, *Building a Better U.S. Approach to TikTok and Beyond*, LAWFARE (Dec. 28, 2020, 10:25 AM), https://perma.cc/5T2X-BYMZ (advocating for a focus on specific problems, clearly defined risks, and cost–benefit analysis).

63. GARY CORN, JENNIFER DASKAL, JACK GOLDSMITH, CHRIS INGLIS, PAUL ROSENZWEIG, SAMM SACKS, BRUCE SCHNEIER, ALEX STAMOS & VINCENT STEWART, HOOVER INST. & AM. UNIV. WASH. COLL. OF L., CHINESE TECHNOLOGY PLATFORMS OPERATING IN THE UNITED STATES: ASSESSING THE THREAT 2 (2021), https://perma.cc/5QV4-KN89.

64. *Id.* at 5-6 (capitalization altered).

65. Matt Perault & Samm Sacks, *A Sharper, Shrewder U.S. Policy for Chinese Tech Firms*, FOREIGN AFFS. (Feb. 19, 2021), https://perma.cc/5WKZ-A89K (to locate, select "View the live page").

66. CORN ET AL., *supra* note 63, at 7.

67. *See generally* Adil Ahmad Haque, *Necessity and Proportionality in International Law*, *in* THE CAMBRIDGE HANDBOOK OF THE JUST WAR 255 (Larry May, Shannon Fyfe & Eric Ridder eds., 2018).

68. *See* Vicki C. Jackson, Feature, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096-121 (2015).

security threats. To the extent bans are permissible at all, in this model, they are a "last resort."[69]

To ensure compliance with these case-by-case restrictions on corporate behavior, national security technocrats argue for a system of auditing.[70] The basic idea is that government officials or independent third parties would review code,[71] conduct black-box tests on apps,[72] and verify how companies manage their data,[73] in addition to monitoring other conditions imposed by regulation. Proponents of this approach also advocate for generally applicable data collection and privacy reforms that apply to all companies.[74]

It is worth noting that the technocratic approach is, in many ways, an expansion of the approach that motivates the CFIUS process. In the 1980s, after the attempted foreign takeovers of Goodyear Tire (by a British "corporate raider") and Fairchild Semiconductor (by the Japanese company Fujitsu),[75] Congress passed the Exon–Florio Amendment to the Defense Production Act, codifying the process that CFIUS uses to review foreign investment in the United States.[76] CFIUS evaluates foreign investments, mergers, and takeovers by first assessing whether there are national security risks from foreign ownership or control. If there are such risks, CFIUS (1) determines whether they can be mitigated; and (2) negotiates an agreement on how the firm can address those risks.[77]

Interestingly, the debate over whether to pass Exon–Florio paralleled the contemporary debate over TikTok—and supporters of technocratic national security restrictions ultimately won out over those who supported "open investment."[78] No one seems to have discussed the possibility of sectoral restrictions at the time,[79] but this is not surprising. The Exon–Florio debate

69. CHINA STRATEGY GRP., ASYMMETRIC COMPETITION: A STRATEGY FOR CHINA & TECHNOLOGY 12 (2020), https://perma.cc/TQ4R-CVXG.

70. CORN ET AL., *supra* note 63, at 9; *see also* Kevin Roose, *Don't Ban TikTok. Make an Example of It.*, N.Y. TIMES (updated Aug. 14, 2020), https://perma.cc/4XDE-449R (arguing that the U.S. government should "pressure TikTok to submit regular audits of its data-collection practices" instead of banning the app).

71. CHINA STRATEGY GRP., *supra* note 69, at 13.

72. *Id.* at 13-14.

73. Sacks, *supra* note 60.

74. *See, e.g.*, CORN ET AL., *supra* note 63, at 9-10.

75. GRAHAM & MARCHICK, *supra* note 35, at 41-42.

76. JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 6-7 (rev. 2020).

77. *Id.* at 7-8; *see also* GRAHAM & MARCHICK, *supra* note 35, at 36.

78. GRAHAM & MARCHICK, *supra* note 35, at 41-46.

79. *See id.* (describing concerns about foreign takeovers of domestic companies more broadly during the debate over the Exon–Florio Amendment).

occurred after deregulation swept the "regulated industries" fields,[80] when the belief in trade liberalization was widespread and the belief in sectoral regulation was at a low point. The impetus behind the modern technocratic national security approach is similar to the idea behind CFIUS: a rebuttable presumption that sectors should be open to foreign firms.

2. Substantive administrability problems

Although their attempt to seek a middle path is admirable, contemporary national security technocrats face several challenges. In their desire to take a narrow, case-by-case approach, advocates have overlooked critical tradeoffs, alternative policy options, and downstream harms. Addressing these oversights is not simply a matter of adding additional factors to a balancing test. Rather, the oversights indicate a broader problem with the technocratic endeavor. The technocratic approach asks regulators to account for every possible risk and consequence in designing tailored mitigation measures. At the same time, the approach's focus on concrete and particular harms may lead regulators to undervalue systemic and potential harms. Getting the right substantive answer will thus prove extremely difficult.

Even though technocrats recognize the dangers inherent in global economic competition, they primarily see the challenge as a balancing act between national security and civil liberties on the one hand and economic competitiveness on the other.[81] As in other domains of regulatory policy, risk–risk tradeoffs are pervasive.[82] But national security technocrats do not fully account for such tradeoffs. Regulating tech platforms does present risks to individual rights and free expression.[83] But there are also individual-rights and free-expression risks if a foreign tech platform becomes a monopoly and privately censors or deprioritizes content. True, there may be economic costs that result from global restrictions.[84] But there can also be economic benefits that come alongside these restrictions. Indeed, trade restrictions have long been

80. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1324-25 (1998).

81. *See, e.g.*, Jonathan Hillman, *Pretending All Chinese Companies Are Evil Schemers Will Only Hurt the U.S. Economy*, WASH. POST (Nov. 8, 2019), https://perma.cc/M9H9-M5AX.

82. *See, e.g.*, John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, *in* RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 1-8 (John D. Graham & Jonathan Baert Wiener eds., 1997); David E. Pozen, *Privacy–Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 221-24 (2016).

83. CORN ET AL., *supra* note 63, at 8.

84. *Id.* ("[S]evering or modulating rich, free-flowing connectivity among diverse pools of perspective, talent, and research will almost certainly create headwinds to innovation. This will affect productivity, thereby reducing the size of the economic pie, apart from how shares within that pie are divvied up.").

a form of industrial policy used to foster domestic economic development and growth.[85] Policymakers have often coupled foreign restrictions with research-and-development spending to foster domestic innovation.[86] In addition, framing the problem with international restrictions as "reducing the size of the economic pie, apart from how shares within that pie are divvied up"[87] omits domestic tradeoffs that simply cannot be pushed aside. We cannot assume that distributional imbalances resulting from trade will be addressed after the fact: It is well-known that the political branches often fail to engage in post hoc wealth redistribution.[88] Finally, case-by-case assessments may lead to carefully tailored mitigation measures. But they may also be inconsistent between firms, leading to accusations (or the reality) of unfairness. The risks of an unlevel playing field and of abuses of executive power are also significant downsides.

National security technocrats have also ignored important alternatives to their proposed policies. Consider, for example, foreign-ownership bans. The Hoover–American report argues that countries are "levying restrictions on their digital markets and raising digital trade barriers to foreign firms," and the authors of the report fear that "American businesses will suffer if it becomes an increasingly common, accepted practice to kick out apps and other services based on the fact that they are foreign-owned."[89] Perhaps. But it is worth noting that China already blocks Facebook, Twitter, Pinterest, Reddit, and other applications.[90] And with respect to European countries, it is unclear why national security technocrats assume that bans will be tit for tat without

85. *See* TODD TUCKER, ROOSEVELT INST., INDUSTRIAL POLICY AND PLANNING: WHAT IT IS AND HOW TO DO IT BETTER 9, 15, 18-29 (2019), https://perma.cc/WLL5-9X3E; Ganesh Sitaraman, *Industrial Revolutionaries*, AM. PROSPECT (Sept. 10, 2020), https://perma.cc/D3R3-QC5X (describing the Hamiltonian tradition of utilizing tariffs and subsidies to further economic growth in the United States).

86. For discussions of research and development, see, for example, MARIANA MAZZUCATO, MISSION ECONOMY: A MOONSHOT GUIDE TO CHANGING CAPITALISM 49-56 (2021) (describing the importance of research and development generally); MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS 79-178 (2013) [hereinafter MAZZUCATO, THE ENTREPRENEURIAL STATE] (discussing investments in defense, technology, small businesses, drugs, and green energy).

87. CORN ET AL., *supra* note 63, at 8.

88. In the trade context, see Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 156 (2020). The post hoc redistribution approach is based on optimal-tax theory. For a general critique of this approach, see Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 502-04 (2022).

89. CORN ET AL., *supra* note 63, at 8; *see also* Perault & Sacks, *supra* note 65 (making this point with respect to both Chinese retaliation and European actions).

90. Paige Leskin, *Here Are All the Major US Tech Companies Blocked Behind China's "Great Firewall,"* BUS. INSIDER (updated Oct. 10, 2019, 9:23 AM), https://perma.cc/4VJL-JNVT.

considering a collaborative United States–European approach to restricting adversaries' tech platforms.[91]

Some technocratic reformers add that general restrictions might "lead to American companies getting shut out of markets where . . . Chinese companies operate, thereby ceding ground to Chinese or other companies to provide those services instead."[92] Matt Perault and Samm Sacks, for example, argue that the Trump Administration's ban preventing Huawei from using Google's operating system pushed the Chinese firm to develop its own operating system, which might use government subsidies to outcompete Google.[93] This concern again overlooks a variety of important policy options. The global competitiveness of U.S. companies is a function of many factors, including policy choices. The U.S. government could, for example, offer subsidies or incentives to other countries to choose American tech platforms or, alternatively, to avoid Chinese tech platforms. If given an economically attractive option, some countries may even prefer to avoid Chinese tech platforms if they are worried about surveillance or economic and political power.[94] This option, however, is strikingly absent from the technocrats' analysis. So too is the possibility that Chinese companies may prefer not to rely on U.S. technology platforms for fear of further entanglement with and dependence on U.S. firms.[95]

A technocratic approach also risks undervaluing systemic harms. For example, the Hoover–American report acknowledges that digital platforms can target individuals for espionage or influence operations, that big data sets can have intelligence and algorithmic value, and that big data sets can contribute to the economic success of a firm.[96] But when assessing the risks as part of a balancing test, the report states that the risk of data abuse "diminishes where the threat is based on general data collection considerations, which are more uncertain and diffuse."[97] Discounting the threats associated with broad data collection may be appropriate if one has already committed to a narrow, targeted approach. But this approach will consistently undervalue the systemic dangers noted above: intelligence about and influence over individuals and the population, the creation of market power, and the resultant political power.

91. The Hoover–American report makes note of alliances, but not when discussing the risk of reciprocal restrictions. *See* CORN ET AL., *supra* note 63, at 8-9.

92. *Id.* at 8.

93. Perault & Sacks, *supra* note 65.

94. *See, e.g.*, Dahlia Peterson, *How China Harnesses Data Fusion to Make Sense of Surveillance Data*, BROOKINGS: TECHSTREAM (Sept. 23, 2021), https://perma.cc/KSA3-4FGY.

95. *See* Julian Gewirtz, *The Chinese Reassessment of Interdependence*, CHINA LEADERSHIP MONITOR (June 1, 2020), https://perma.cc/G237-DP3K.

96. CORN ET AL., *supra* note 63, at 5-6.

97. *Id.* at 7.

Potential harms also present a problem for technocrats. Jennifer Daskal and Samm Sacks have argued that restrictions could be appropriate "when there is evidence that [Chinese firms] are working hand in hand with China's security or military establishment."[98] As an illustration, they offer a scenario where "the U.S. intelligence community probe into TikTok finds evidence that Beijing is using data gathered by the app to target Americans in national security positions."[99] But this illustration requires proof of *actual* national security harms before placing restrictions on the firm. The *future* possibility of targeting Americans is ignored. And at time two, when such restrictions would be adopted, it might be too late: The firm could have already collected massive amounts of data and built up its market power.

None of this should be particularly surprising. Indeed, similar problems persist in the CFIUS context. According to the Government Accountability Office (GAO), the Department of Defense has identified investments that raise national security concerns but are not addressed through the CFIUS process.[100] While Congress has broadened the scope of CFIUS's jurisdiction, the problem is not merely jurisdictional.[101]

The point is not that particular omissions and tradeoffs undermine the technocratic approach. National security technocrats could, of course, push regulators to account for these factors. The problem is that the factors one must consider are expansive and complex—from relationships with allies, to risk–risk tradeoffs, to systemic and potential harms. Substantively, this endeavor will be difficult to administer. And that is *before* considering the institutional challenges of administration.

3. Institutional administrability problems

National security technocrats want to put Chinese companies "under the microscope" and then "put in place really robust and enforceable rules about how they're using and retaining data."[102] The hope is that regulators will assess how platforms access data, how platforms protect data, and with whom

98. Jennifer Daskal & Samm Sacks, *The Furor over TikTok Is About Something Much Bigger*, SLATE (Nov. 8, 2019, 7:30 AM), https://perma.cc/9V4Z-4HFS.

99. *Id.*

100. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-494, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ACTION NEEDED TO ADDRESS EVOLVING NATIONAL SECURITY CONCERNS FACING THE DEPARTMENT OF DEFENSE 24-25 (2018).

101. For a history of CFIUS's amendments and expansions, see JACKSON, *supra* note 76, at 7-12. For an argument that CFIUS primarily highlights emergent national security issues for legislative deliberation, see David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 83-84 (2009).

102. *See* Roose, *supra* note 70 (quoting Samm Sacks).

platforms share data, and then "verify that the interests and rights of U.S. consumers will be protected."[103] But this paradigm might fail to achieve its national security goals based on institutional administrability problems. In short, a case-by-case system of audits and monitoring could fail to identify and remedy significant rule violations.

Broad-based standards and complex, multifactor formulas are less administrable than clear rules.[104] If a narrowly tailored approach is too difficult to implement effectively, then a clear rule—even if somewhat overinclusive—might be superior.[105] As far as I have found, however, technocrats do not consider this administrability drawback or assess the tradeoffs that it raises. They simply assume that a system of case-by-case restrictions and ex post auditing will work as they hope. But there are good reasons to believe that this assumption is wrong.

First is the problem of regulatory capture. The technocratic approach assumes that government regulators are not subject to pro-corporate or nonregulatory biases. This is not a sound assumption. There is a well-known revolving door between companies and the federal government,[106] and standard theories of capture suggest that government officials from industry—or those who seek to enter industry after government service—will be more likely to act in ways that benefit their former or future employers.[107] Even if laws were passed preventing the revolving door, regulators might find

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103. Sacks, *supra* note 60.

104. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562-63 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 957-58 (1995).

105. There are likely some who would support clear rules on a first-best theory, but this argument, which draws on the administrability challenges of the technocratic approach, is a second-best case for clear rules over complex formulas. *Cf.* R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11-12 (1956-1957) (stating that once one condition for Pareto optimality is unattainable, reaching the "second best" situation requires departing from all other original optimal conditions).

106. *See Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1428 & n.60 (1981) ("The term 'revolving door' refers to the phenomenon of individuals who move between government and the private sector and who are often regulators one day, regulated the next, and regulators again the day after.").

107. At least some empirical work demonstrates that the theory is borne out in practice. *See, e.g.*, Mehmet I. Canayaz, Jose V. Martinez & Han N. Ozsoylev, *Is the Revolving Door of Washington a Back Door to Excess Corporate Returns?* 3-4 (Koç Univ.–TÜSİAD Econ. Rsch. F., Working Paper No. 1507, 2015) (finding that "firms where current public officials are to become future employees outperform other firms" and that "having a revolver linkage to a government agency has a large and statistically significant positive effect on the value of government contracts obtained from that agency"); Mara Faccio, Shorter Paper, *Politically Connected Firms*, 96 AM. ECON. REV. 369, 369-70 (2006) (using a study of forty-seven countries to show a "significant increase in corporate value" when those involved in business enter politics).

themselves subject to "cultural capture."[108] Regulators may have ideological views that cut against regulation—imagine a regulator whose preference is the open-internet paradigm—or simply be part of an elite community in which they spend time with regulated parties.[109] Regulators suffering from these biases would systematically undervalue the necessity of regulation and adopt inadequate mitigation measures. Vague standards or complicated balancing tests amplify regulator bias: The more discretion that regulators have, the more space for personal biases to shape outcomes.

Moreover, the audit system on which the technocratic approach relies suffers from serious problems. The success of an audit system depends on regulators conducting regular audits, which in turn depends on funding, personnel, commitment to oversight, and independence. The weaker the monitoring, the more opportunity for regulatory failure. Success also depends on the willingness of regulators to bring enforcement actions when there are compliance failures. A failure to enforce ex post reduces the ex ante incentive to comply with restrictions. It is not obvious that regular auditing or regular enforcement will occur if policymakers adopt an audit approach to foreign tech platforms.

Indeed, there is evidence that regulators suffer from resource constraints and have already failed to engage in active, serious oversight of Chinese corporate ownership. A 2018 GAO report noted that officials at CFIUS member agencies believe "CFIUS staff levels may not be sufficient to complete committee functions."[110] Between 2011 and 2016 alone, the number of covered transactions reviewed by CFIUS increased by almost 55%, while staffing levels only increased by 11%.[111] In 2020, the Senate Homeland Security and Government Affairs Committee's Permanent Subcommittee on Investigations released a report documenting how the Department of Justice and the Department of Homeland Security had "exercised minimal oversight to safeguard U.S. telecommunications networks against risks posed by Chinese state-owned carriers."[112] The report found that even though the agencies entered into security arrangements with two Chinese state-owned carriers

108. James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 78-79, 96 (Daniel Carpenter & David A. Moss eds., 2014).

109. *Id.* at 75-76, 91.

110. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENTS OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 1 (2018).

111. *Id.* at 18-19.

112. STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 116TH CONG., THREATS TO U.S. NETWORKS: OVERSIGHT OF CHINESE GOVERNMENT-OWNED CARRIERS 2 (2020).

before 2010, they only conducted four site visits (two per carrier) in the ensuing decade—and three of those four visits took place from 2017 to 2018.[113] The report concluded that this failure to monitor "undermined the safety of American communications and endangered our national security."[114]

Regulators have also consistently failed to monitor and enforce national security restrictions on analogous commercial activity. Consider sanctions and money-laundering regulations, which are critical for combating terrorism, organized crime, drug trafficking, tax evasion, and corruption. These rules have been an important and salient part of national security policy since September 11 because of their value in preventing the financing of terrorist organizations.[115] In 2012, the Senate Homeland Security and Government Affairs Committee's Permanent Subcommittee on Investigations released a report on HSBC's involvement with money laundering, drugs, and terrorist financing.[116] That year, HSBC admitted to failures in its sanctions and anti–money-laundering (AML) programs that permitted transactions with sanctioned countries and allowed drug traffickers to launder hundreds of millions of dollars through the bank.[117] The Senate report found that HSBC's persistent failures were partly a function of weak oversight and enforcement from its regulator, the Office of the Comptroller of the Currency (OCC).[118] The OCC identified HSBC's failures to comply with statutory requirements as "matter[s] requiring attention" rather than legal violations, making eighty-three such findings over a five-year period "without once citing a legal violation of federal AML law."[119] The OCC showed "reluctance" to "make timely use of formal and informal enforcement actions."[120] And examiners often "muted . . . criticisms or weakened recommendations for AML

113. *Id.*

114. *Id.* The government has since committed to strengthening these efforts. *Id.*

115. For an overview, see generally JUAN C. ZARATE, TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE (2013) (describing how the Department of the Treasury used sanctions and anti–money-laundering rules post–September 11 to block the financing of terrorist organizations).

116. STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 112TH CONG., U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY (2012) [hereinafter HSBC CASE HISTORY].

117. Press Release, U.S. Dep't of Just., HSBC Holdings Plc. and HSBC Bank U.S.A. N.A. Admit to Anti–Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (updated May 22, 2015), https://perma.cc/3FD2-HYXA.

118. HSBC CASE HISTORY, *supra* note 116, at 8-10.

119. *Id.* at 9 (capitalization altered).

120. *Id.*

reforms."[121] From 2004 to 2010, the OCC "did not take any formal or informal enforcement action to compel [HSBC's U.S. affiliate] to strengthen its AML program."[122]

After such a significant failure in the banking context, one might expect regulators to have strengthened monitoring and enforcement across the board. But almost a decade later, in 2020, investigative journalists analyzing a leak of suspicious-activities reports from FinCEN (the U.S. Financial Crimes Enforcement Network) concluded that money laundering was still a significant problem. Reporters alleged that "even after they were prosecuted or fined for financial misconduct" a variety of major banks "continued to move money for suspected criminals."[123]

Part of the problem is that clear rules and total prohibitions, which had been common in the banking sector prior to deregulation, were eliminated in a drive to achieve greater efficiency.[124] At the same time, regulators questioned and weakened banking supervision.[125] Because of increasing complexity, the oversight that remained necessarily focused more on risk reduction than on compliance.[126] The result has been astonishing supervision and compliance failures, both inside and outside of the national security arena. For an example outside of the national security context, the third largest bank in the United States, Wells Fargo, opened millions of fraudulent checking and savings accounts despite being part of a closely supervised industry.[127]

The HSBC and Wells Fargo examples are not outliers.[128] Scholars who study enforcement, compliance, supervision, and monitoring have shown that

121. *Id.*

122. *Id.*

123. Jason Leopold et al., *The FinCEN Files*, BUZZFEED NEWS (Sept. 20, 2020, 1:01 PM ET), https://perma.cc/HRQ8-PRQU. For responses from the banks, see *Here Is How Banks Have Responded to the FinCEN Files Investigation*, BUZZFEED NEWS (Sept. 20, 2020, 10:01 AM), https://perma.cc/GK7F-RDD7.

124. *See* ARTHUR E. WILMARTH, JR., TAMING THE MEGABANKS: WHY WE NEED A NEW GLASS–STEAGALL ACT 148-95 (2020). *See generally* Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking,"* 63 U. MIA. L. REV. 1041 (2009) (describing how regulators watered down rules over time); Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265 (2013) (same).

125. Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 1016-17 (2021).

126. Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527, 1529-31 (2018).

127. Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://perma.cc/E3SN-ZE2T.

128. *See, e.g.*, Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1008-09 (2017) ("HSBC's history of compliance failures is neither remarkable nor unique. Many other corporate entities have similarly long lists evidencing

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these processes suffer from fundamental, systemic problems. It starts with the "commonly understood" view that perfect compliance is costly and inefficient.[129] In practice, "it is commonly accepted by scholars, regulators, and industry officials that 'perfect' compliance is not the ultimate goal of the compliance program."[130] Rather, compliance programs are designed with the goal that "firms take reasonable efforts to create systems and policies that will prevent the types of risks that the firm might reasonably be contemplated to confront."[131]

Even with this trimmed-down goal, practical problems abound. Resources are misaligned for ensuring high levels of compliance: Scholars have observed that "[f]iscal constraints simply make it impossible to monitor all private actions even for the most dangerous activities."[132] In the context of nuclear-plant safety, one scholar has noted that the federal government closely supervises "only 1-2% of all . . . activities."[133] A regulator may end up having to rely on employees to explain their actions, giving employees a chance to shape the regulator's perspective.[134] And internal compliance and supervision programs across sectors have problems, as many focus on "corporate policing" rather than "corporate architecture."[135] In other words, after a violation, firms strengthen their search for individual bad actors rather than pursuing structural reforms. Finally, the complexity of modern corporations means that management may not be able to supervise employees effectively.[136] Taking

noncompliance with legal and regulatory requirements across a variety of legal areas. All this leads to the question: Why has the government largely failed to sanction corporate repeat offenders as recidivists?" (footnotes omitted)).

129. Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 216 (2019). The argument itself was made decades ago. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 690-92 (1997).

130. Root, *supra* note 129, at 221.

131. *Id.*

132. Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 398-99 (2019).

133. *Id.* at 399.

134. *Cf. id.* at 406 (describing the complexity of organizations and the difficulty of compliance); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 266-74 (2020) (same).

135. Root, *supra* note 128, at 1049-51.

136. *See* Mark Roe, *London Whale Is the Cost of Too Big to Fail*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 25, 2013), https://perma.cc/76TK-NC2Z ("It is certainly believed by many on Wall Street and in Washington that banking behemoths such as JPMorgan that deal in complex financial products have become too big to manage effectively."); *see also* Jeremy C. Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 MINN. L. REV. 171, 173 (2019) ("A financial institution is [too big to manage] if its size

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these problems together, the deck is stacked against a monitoring and audit-centric regime.

After a legal violation, weak enforcement also means little incentive for major changes. In recent years, legal enforcement in the corporate-compliance context has focused more on collecting information than on prosecuting wrongdoers, even when there have been repeated infractions.[137] Rather than litigate, the Department of Justice and other regulators often enter deferred-prosecution agreements that include the use of a "corporate monitor" to investigate violations and recommend remedies.[138] In addition to providing a weaker deterrent than prosecution, the monitoring system can itself lead to undercompliance. Scholars have shown that "monitorships . . . are significantly less ambitious than government pronouncements behind them, and are at risk of not achieving their goals on any consistent basis."[139] Part of the problem is that incentives are not aligned to ensure effective compliance programs. Corporations want to do the minimum necessary; monitors want to write "credible report[s]" and preserve their ability to get future positions; and prosecutors are interested in closing cases.[140] But more broadly, scholars have shown that monitors end up—as with ex ante supervision and compliance regimes—focused more on "technical compliance with [the] policy and procedure requirements" of their monitoring programs than on achieving the aims of the law.[141] A leading contemporary scholar of compliance programs, Veronica Root Martinez, thus remarks: "Despite the existence of rules, standards, and mandates that require organizations to engage in efforts to adopt effective ethics and compliance programs, compliance failures have continued to occur."[142] The "effective compliance program," she observes, remains "elusive."[143]

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prevents executives, board members, and shareholders from effectively overseeing the firm, leading to excessive risk-taking and misconduct.").

137. Veronica Root Martinez, *The Government's Prioritization of Information over Sanction: Implications for Compliance*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 85, 86-87. *See generally* JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017) (discussing risk aversion, selection effects, culture, and other factors shaping the nonprosecution of corporate executives).

138. On monitors generally, see Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007); and Veronica Root, *The Monitor–"Client" Relationship*, 100 VA. L. REV. 523 (2014).

139. Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 682 (2009).

140. *Id.* at 728-29.

141. *Id.* at 729.

142. Root, *supra* note 129, at 214.

143. *Id.* at 212 (capitalization altered).

National security technocrats advocate for a case-by-case approach of narrowly tailored mitigation measures followed by oversight and audits. But technocrats completely ignore the extensive, predictable, and obvious failures of federal supervision, compliance, and monitoring programs. For those who believe that national security or democracy risks are so high as to require perfect compliance, the technocratic approach should be a nonstarter. Even those who are willing to accept some failures in compliance must, at a minimum, consider the risks of weak regulation and monitoring gaps. But they do not—and they certainly do not consider whether these risks overwhelm the potential benefits of narrow tailoring.

Finally, technocratic reformers have not accounted for the fact that their approach will make regulatory monitoring and compliance increasingly difficult over time. American public policy is defined, some commentators have argued, by "kludgeocracy."[144] A kludge is a "clumsy but temporarily effective solution to a particular fault or problem."[145] A policy system that relies on "kludgey" solutions is a complicated one, and it raises compliance costs for both the government and the governed.[146] The technocratic approach is likely to be a kludgey one. As the thicket of case-by-case restrictions grows denser and wider, it could become increasingly costly for companies to navigate their operations and partnerships, and it will be increasingly challenging for regulators to monitor each bespoke compliance regime. It may be that, as administrability becomes more costly over time, the efficacy of the technocratic approach therefore decreases. This too is a drawback, and it is one that technocratic reformers do not consider.[147]

C. The Public and Its Platforms

Both the tech-neoliberal and national security–technocrat approaches also suffer from a significant conceptual problem: They do not treat tech platforms as platforms. When considering the desirability and design of foreign

144. STEVEN M. TELES, NEW AM. FOUND., KLUDGEOCRACY: THE AMERICAN WAY OF POLICY 1 (2012), https://perma.cc/77AZ-3LBQ.

145. *Id.*

146. *Id.* at 2.

147. All of these challenges are based on the costs and benefits of the regulatory system itself. They omit the costs and benefits of the regulatory regime to regulated (and potentially regulated) firms, which are commonly understood as tradeoffs between rules and standards. *See supra* note 104 and accompanying text. It is worth noting, however, that firms do not have clear notice under a case-by-case system of whether they are likely to be restricted or what restrictions are likely to be placed on them. Those who are interested in maximizing global openness might thus prefer a clear rule to a fuzzy standard so as to minimize uncertainty for foreign investors who would not be subject to national security restrictions.

restrictions, their unspoken conceptual framework is that of ordinary tradable goods—not of businesses subject to a distinctive set of political-economy dynamics.

Firms in a number of sectors—most notably banking, communications, transportation, and energy—have long received special regulatory treatment due to their political economy. Together, these sectors are often referred to as "regulated industries," "infrastructure industries," "public-service corporations," or "public utilities."[148] They are also referred to simply as "infrastructure," in part because they facilitate downstream activity.[149] Economically, activities in many of these sectors are distinguished by "high sunk costs, high barriers to entry, and increasing returns to scale"[150] due to network effects.[151] Because of network effects and high capital investment, businesses within these sectors are often natural monopolies for which unit costs decrease with increases in output.[152]

The regulation of firms in these sectors differs from the regulation of firms offering tradable goods. Economic concerns about platform operators (like a railroad) leveraging power over platform users (like a producer shipping goods via the railroad) have led to structural-separation rules banning infrastructure industries from owning and operating business lines that use their infrastructure.[153] More generally, these sectors have been subject to

148. *See generally, e.g.*, RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES IN A NUTSHELL (4th ed. 1999); RICHARD J. PIERCE, JR., GARY D. ALLISON & PATRICK H. MARTIN, ECONOMIC REGULATION: ENERGY, TRANSPORTATION AND UTILITIES (1980); G. LLOYD WILSON, JAMES M. HERRING & ROLAND B. EUTSLER, PUBLIC UTILITY REGULATION (1938); 1 BRUCE WYMAN, THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT (1911). Although banking is not usually included in regulated-industries textbooks, it is considered to be a regulated industry. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 372 (1963) ("[B]anking is a highly regulated industry critical to the Nation's welfare . . . ."); Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1166 (2012) ("Congress believed that stability and growth of the infrastructure industries—including banking, securities, energy, communications, and transportation—were essential if the United States was to enjoy national economic recovery."); Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 767-70; Alan M. White, *Banks as Utilities*, 90 TUL. L. REV. 1241, 1243 (2016).

149. In the words of Brett Frischmann, they are resources that "enable, frame, and support a wide range of activites in our lives." BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 4 (2012).

150. Rahman, *The New Utilities*, *supra* note 31, at 1642.

151. A network effect exists when an increased number of nodes, users, or participants improves the value of a platform. *See* DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 35, 63-65 (2008).

152. WILLIAM K. JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES 50 (2d ed. 1976).

153. Khan, *supra* note 28, at 980.

extensive regulatory control. "Public control of one type or another," according to William Jones, "has accompanied the development of virtually all the natural monopoly industries."[154] In some cases—as with the U.S. postal system—there is a public monopoly with government ownership and operation.[155] In other cases—as with banking—the state outsources a sovereign function like money creation and subjects it to regulation.[156] In still other cases, firms may be subject to special requirements including nondiscrimination and universal-service obligations, rate regulation, entry restriction, and federal corporate chartering.[157] Indeed, contrary to the commonly held view that the United States does not have federally chartered corporations, national banks are chartered by the federal government.[158]

Part of the reason for these expansive regulatory systems—or for direct public ownership and operation—is that regulated industries are considered essential to political, economic, and social life. As the Supreme Court noted in *Munn v. Illinois*, "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."[159] The fact that regulated industries were of public consequence justified greater regulation (to ensure that the industries achieved public purposes), but so too did the danger that these industries would give private actors excessive power. Regulation emerged not only in the context of discriminatory pricing and special dealing,[160] but also against a backdrop of political corruption and influence.[161] The political power of economic monopolies was understood as a potential threat to representative democracy

154. JONES, *supra* note 152, at 22-23; *see also id.* at 52 ("With respect to the natural monopoly industries here considered, unregulated private firms are quite rare.").

155. RICKS ET AL., *supra* note 31 (manuscript at ch. 6).

156. *See* Ricks, *supra* note 148, at 759, 765-66; Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1158-61 (2017).

157. *See, e.g.*, PIERCE & GELLHORN, *supra* note 148, at 165, 217, 234, 251; JONES, *supra* note 152, at 25-26.

158. *See* Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1362-63 (2021). In early America, special corporate charters authorized the creation of turnpikes, bridges, and canals. These charters often regulated rates and terms of operation. *See* JONES, *supra* note 152, at 25-26.

159. 94 U.S. 113, 126 (1877). For a discussion of the public-utility idea's history and *Munn*'s importance, see William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139, 146 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

160. *See generally* S. REP. NO. 49-46, at 182-98 (1886) (describing discriminatory pricing in the railroad sector).

161. *See generally* JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865-1900 (2007) (describing corruption during the Gilded Age and pressures for reform); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 174-82 (2014) (same).

itself, and it was a foundational motivation for both economic regulation and political reform.[162]

Scholars and policymakers have increasingly argued that tech platforms are similar to traditional regulated industries.[163] Tech platforms are vital to communication and commerce, facilitate downstream activity, and exhibit network effects that tend toward consolidation.[164] They also pose significant dangers. Economically, platforms are gatekeepers that can prevent other firms from accessing channels of commerce and communication.[165] Platforms can leverage power over downstream commercial uses to push out competitors and stifle innovation.[166] And they can exploit information collection and access to benefit themselves competitively.[167] Politically, platforms have considerable power to advance ballot initiatives,[168] lobby the government,[169] and even threaten entire countries if they object to proposed regulations.[170] Tech platforms in the communications sector can spread disinformation and propaganda that sow doubt as to the legitimacy of democratic institutions.[171] Tech platforms in the financial sector can prevent access to the economy. And platforms that collect data can be used for mass surveillance, behavioral modification, and social control.[172] One scholar has even observed that

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162. *See* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 54-77 (2017); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 161-85 (2017).

163. *See* sources cited *supra* note 31.

164. *See* Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325, 325-31 (2018).

165. *Id.* at 326-28.

166. Khan, *supra* note 28, at 1052-55, 1066-67; *see also* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 780-83 (2017); Frank Pasquale, *From Territorial to Functional Sovereignty: The Case of Amazon*, LAW & POL. ECON. PROJECT (Dec. 6, 2017), https://perma.cc/ND27-W3F8 ("They are no longer market participants. Rather, in their fields, they are market makers, able to exert regulatory control over the terms on which others can sell goods and services.").

167. Khan, *supra* note 164, at 329-30; Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1502 (2020) (book review).

168. Chris Mills Rodrigo, *California Voters Approve Measure Exempting Lyft, Uber from Labor Law*, THE HILL (Nov. 4, 2020, 2:51 AM EST), https://perma.cc/XC4E-554F (noting that Uber, Lyft and other firms spent more than $200 million on a favorable initiative, as compared with $20 million raised by the opposition).

169. Lauren Feiner, *Facebook Spent More on Lobbying than Any Other Big Tech Company in 2020*, CNBC (updated Jan. 22, 2021, 11:41 AM EST), https://perma.cc/9QNA-7QTM (noting that the five biggest tech companies spent over $61 million on lobbying in 2020).

170. Kerry Flynn, *Facebook Bans News in Australia as Fight with Government Escalates*, CNN BUS. (updated Feb. 19, 2021, 4:25 AM ET), https://perma.cc/AE7F-HQ5F.

171. S. SELECT COMM. ON INTEL., RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, S. REP. NO. 116-290, at 73, 76-77 (2020).

172. ZUBOFF, *supra* note 55, at 136, 293, 306-07.

powerful tech platforms "increasingly . . . challeng[e] the primacy of governments."[173] Given these dynamics, it is helpful to draw lessons from the history of platform regulation.

To modernize and simplify the clunky language of "regulated industries," "infrastructure industries," and "public utilities," I use *platform* as an alternative.[174] This usage also connects longstanding regulated sectors to contemporary tech platforms. The boundary question of what precisely constitutes a platform is (and has always been) difficult: The category has developed via an analogical process, not a deductive one. Historically, the platform debate centered on whether a firm was "affected with a public interest" such that it required utility-like regulation.[175] Today, scholars instead identify a variety of factors relevant to determining whether something is sufficiently analogous to other platforms. These factors can include: (1) "the extent to which the entity serves as a central exchange or marketplace for the

173. Kristen E. Eichensehr, *Digital Switzerlands*, 167 U. PA. L. REV 665, 667 (2019).

174. Of course, "platform" is also a loaded term. But there is little to be gained from a debate over labels. The important point is there is a family of industries that are subject to political-economy dynamics distinct from those that characterize tradable goods. Each sector has its own specific dynamics, of course, but the sectors need to be referenced together in some way. "Regulated industries" runs the risk of conflating "regulation" as it is commonly understood with the term of art applying to these sectors. "Infrastructure industries" conjures images of roads and bridges more than telecommunications and banking. "Public utilities" calls to mind water and electricity, but not usually airlines or financial exchanges. There is no ideal term, but in other work my coauthors and I use the phrase "networks, platforms, and utilities" (NPUs), which we believe best captures the field. *See generally* RICKS ET AL., *supra* note 31 (describing the field of NPU law, including tech platforms). For this Article, I simply use "platform," as it captures a fair bit of what is involved: foundational value upon which other activity is built, and in modern times, an understanding that platforms are often functional monopolies and benefit from network effects. For scholarship distinguishing between networks, infrastructure, and platforms, see Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 143-45 (2017). Even in Cohen's account, however, these three concepts are overlapping and related.

I do not, however, mean to suggest that the definition of platform is limited to the narrow economic usage associated with two-sided markets. *See, e.g.*, Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 990-94 (2003); Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 645-46 (2006). At the same time, the conventional definition of two-sidedness in the economics literature seems to cover some firms in platform industries (as well as a wide range of other businesses). Alas, an account of the relationship between the economics literature and the history of regulated-industries law is beyond the scope of this Article.

175. *Compare* Munn v. Illinois, 94 U.S. 113, 132 (1877) (holding that a grain elevator was affected with a public interest), *with* New State Ice Co. v. Liebmann, 285 U.S. 262, 277 (1932) (holding that an ice company was not affected with a public interest). For a broader discussion of classification challenges and the changing meaning of "platform," see generally Novak, *supra* note 159.

transaction of goods and services"; (2) "the extent to which the entity is essential for downstream productive uses"; (3) "the extent to which the entity derives value from network effects"; and (4) "the extent to which the entity serves as infrastructure for customizable applications by independent parties."[176] Despite inevitable boundary questions, it is striking that, based on these political-economy features, tech platforms are categorically different from tradeable goods.[177]

Still, when it comes to foreign restrictions, neither tech neoliberals nor national security technocrats pay much attention to the distinctive political economy that defines some technology firms. As a result, these groups have failed to see that there is another paradigm available for regulating foreign tech platforms: the traditional paradigm for regulated industries. As Paul Dempsey has observed, "Foreign ownership restrictions have long been imposed in a number of infrastructure industries in the United States."[178] Indeed, when the United States negotiates bilateral investment treaties with foreign countries, it regularly exempts some industries from provisions requiring "national treatment" (that is, equivalent treatment of U.S. and foreign firms) in order to comply with these longstanding legal restrictions.[179] Categorizing tech platforms as platforms—as firms subject to distinctive political-economy dynamics—suggests an alternative path forward.

176. Khan, *supra* note 28, at 1081-82. Other factors might include the ability of a firm to operate on its platform as a competitor; the ability of a firm to control access to its platform; and the extent to which a competitor cannot reasonably duplicate the platform. For another set of factors, see RICKS ET AL., *supra* note 31 (manuscript at ch. 1).

177. This is not to say that tradable goods cannot implicate national security concerns and thus warrant various kinds of restrictions or remedial policies. It is only to say that the optimal regulatory regime for those goods may differ from the regime that governs platform industries.

178. Paul Stephen Dempsey, *The Disintegration of the U.S. Airline Industry*, 20 TRANSP. L.J. 9, 32 (1991). In her epic two-volume history of foreign investment in the United States, Mira Wilkins puts it this way:

> U.S. public policies in four other sectors—(1) communications (radio and cables), (2) transportation (principally shipping), (3) energy (mainly oil), and (4) banking—did mark [foreign direct investment] for special treatment. . . . These four strategic sectors were associated directly or indirectly with "national defense"—with the defense of national sovereignty. These were sectors "affected with a public interest," wherein Americans saw themselves as still excessively "dependent," at least in some aspects.

MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES, 1914-1945, at 95 (2004) (footnote omitted).

179. *See, e.g.*, U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY 7, 19 (2012), https://perma.cc/8EC8-USLP (outlining the exemption); Free Trade Agreement, S. Kor.–U.S., Annex I: Schedule of the United States, June 30, 2007, https://perma.cc/W2JJ-AEVY (listing exemptions for atomic energy, air transportation, securities, and radio licenses, among other things).

II. A History of Restrictions on Foreign Platforms

Due to their distinctive political economy, platforms have frequently been subject to restrictions on foreign ownership and control. This Part reviews the history of restrictions on foreign ownership, control, and influence over platforms operating in the United States.[180] Americans have long understood certain sectors to raise special economic, political, and national security concerns, and they have consequently tried to restrict foreign control in these sectors. The following Subparts examine in detail the history of restrictions on foreign ownership in banking, communications, transportation, and energy. This detailed sector-by-sector analysis shows that restrictions were conventional throughout American history and that these restrictions evolved over time.

A. Banking

Since the 1790s, federal banking law has restricted foreign influence to prevent harm to the U.S. financial system and economy. At the time of the Founding, the newly independent United States needed capital from rich countries in Europe,[181] even as many believed foreign capital was "dangerous."[182] The legal regime that emerged allowed the entry of foreign capital while insulating the United States from foreign influence and control. In his second report on public credit, Alexander Hamilton made the case for a national bank and included a recommendation that "[n]one but a Stockholder *being a citizen of the United States*, shall be eligible as a Director."[183] Hamilton imagined that a citizenship requirement would advance national aims both because it would "guard against a foreign influence insinuating itself into the Direction of the Bank" and because "Directors will usually be composed of

180. I exclude some restricted areas, such as public lands, that are arguably not platforms. Public lands are publicly owned and may have scarce resources that are essential to commerce, but they are not services. On public lands generally, see WILKINS, *supra* note 178, at 102 (describing reciprocity restrictions on leases of U.S. public lands to oil companies under the Mineral Leasing Act). *See also* Mineral Leasing Act, ch. 85, 41 Stat. 437 (1920) (codified as amended in scattered sections of 30 U.S.C.).

181. *See, e.g.*, MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914, at 48 (1989) ("The description of America's foreign obligations provides a snapshot of a new nation with new needs that required aid from the 'capital-rich' countries of the old world.").

182. *Id.*

183. ALEXANDER HAMILTON, FINAL VERSION OF THE SECOND REPORT ON THE FURTHER PROVISION NECESSARY FOR ESTABLISHING PUBLIC CREDIT (REPORT ON A NATIONAL BANK) (1790), *in* 7 THE PAPERS OF ALEXANDER HAMILTON 305, 336 (Harold C. Syrett & Jacob E. Cooke eds., 1963) (emphasis added).

some of the most discreet, respectable and well informed citizens."[184] When the First Bank of the United States was founded in 1791, its statute included a provision virtually identical to the one Hamilton suggested.[185] The act incorporating the Second Bank of the United States included a similar provision, barring anyone but a "stockholder, resident citizen of the United States" from serving as a director.[186] It also announced that "[n]o stockholder, unless he be a citizen of the United States, shall vote in the choice of directors."[187]

These provisions became one of the central flashpoints of the "Bank War" in the 1830s.[188] Jacksonian Democrats argued that foreign stockholders wielded too much influence over the Second Bank of the United States. In his message vetoing reauthorization of the Bank, President Andrew Jackson emphasized foreign influence.[189] Beyond discussing the extent of foreign investment and foreign profits, Jackson made two arguments about the citizenship restrictions described above. First, although he acknowledged that foreign stockholders were prohibited from becoming directors or voting in director elections, he noted that their exclusion shrunk the voting pool of stockholders, thereby concentrating control over the Bank in a small number of U.S. citizens.[190] Second, Jackson argued that citizenship restrictions on control were insufficient because the Bank's directors would inevitably be responsive to the interests of major stockholders. This, he thought, would prove particularly problematic in a time of war:

> Should the stock of the Bank principally pass into the hands of the subjects of a foreign country, and we should unfortunately become involved in a war with that country, what would be our condition? Of the course which would be pursued by a Bank almost wholly owned by the subjects of a foreign power, and managed by those whose interests, if not affections, would run in the same direction, there can be no doubt. All its operations within, would be in aid of the hostile fleets and armies without; controlling our currency, receiving our public monies, and holding thousands of our citizens in dependance, it would be more formidable and dangerous than the naval and military power of the enemy.

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184. *Id.* at 328, 332.
185. Act of Feb. 25, 1791, ch. 10, § 7, 1 Stat. 191, 193 ("None but a stockholder, being a citizen of the United States, shall be eligible as a director.").
186. Act of Apr. 10, 1816, ch. 44, § 11, 3 Stat. 266, 271.
187. *Id.*, 3 Stat. at 274.
188. On the Bank War, see generally BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 326-450 (1957); PAUL KAHAN, THE BANK WAR: ANDREW JACKSON, NICHOLAS BIDDLE, AND THE FIGHT FOR AMERICAN FINANCE (2016); and ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR (1967).
189. *See* PRESIDENT JACKSON'S VETO MESSAGE 5 (Philadelphia, Mifflin & Parry 1832), https://perma.cc/A27V-L4UB.
190. *Id.* at 6.

> If we must have a Bank with private stockholders, every consideration of sound policy, and every impulse of American feeling, admonishes us it should be *purely American.* Its stockholders should be composed exclusively of our own citizens, who at least ought to be friendly to our own government, and willing to support it in times of difficulty and danger.[191]

In Jackson's account, citizen directors would be influenced by foreign stockholders' interests, even if those interests ran counter to American national interests during a conflict.

Daniel Webster's response to Jackson is illuminating.[192] Webster rebutted the wartime scenario by noting that the Bank was reauthorized after the War of 1812, in part because the United States benefits from using foreign capital toward its war aims.[193] Webster also reiterated that foreign stockholders could not serve as directors or vote on director selection. According to Webster, this created a situation that was "to the disadvantage of the foreign stockholder" who "ha[d] parted with the control over his own property."[194]

Webster argued that the separation of ownership and control, as we would call it today, was not an agency problem but a virtue. The separation of ownership and control meant that foreign owners would not have control over the Bank of the United States, and therefore would not be able to harm U.S. interests during a time of crisis. If the interests of foreign stockholders conflicted with those of the United States, directors with allegiance to the United States would not pursue the interests of stockholders. This same logic appears to undergird Hamilton's analysis as well. The founders of American finance wanted to attain the benefits of foreign investment while retaining national control over bank operations.

This basic theory—the separation of ownership and control—continued to define federal banking law after the Bank War of the early Republic. During the Civil War, Congress passed the National Bank Acts of 1863 and 1864, establishing a national currency system and the basic framework for federal banking law that exists to this day. When Congress passed the National Bank Act of 1863, it mandated that for any national bank, "every director shall, during his whole term of service, be a citizen of the United States."[195] The following year, when Congress revised that statute, it retained the provision

191. *Id.* at 6-7.

192. SPEECH OF THE HON. DANIEL WEBSTER, IN THE SENATE OF THE UNITED STATES, ON THE PRESIDENT'S VETO OF THE BANK BILL (n.p., 1832), https://perma.cc/8ZND-KNQ5.

193. *Id.* at 13.

194. *Id.* at 12.

195. National Bank Act of 1863, ch. 58, § 39, 12 Stat. 665, 676, *repealed by* National Bank Act of 1864, ch. 106, § 62, 13 Stat. 99, 118.

without modification.[196] The provision did, however, spark some debate in 1864. One congressman proposed striking the requirement on the ground that citizenship had no bearing on the ability to serve as a bank director.[197] Representative Thaddeus Stevens defended the provision against that challenge and others.[198] He argued that the provision was "no provision . . . against foreigners, but simply against foreigners who design to live and do business in the country without ever becoming subject or owing allegiance to the Government."[199] Stevens wanted bank directors to renounce their "allegiance to a foreign Power" upon naturalization as U.S. citizens.[200] Regarding a potential noncitizen director, Stevens said:

> [W]hy should he come here with his large capital and govern the whole monetary interests of the country? He might be enabled in that way, without having any sympathy with us, without owing any allegiance to the Government, to enter into competition which would materially control the welfare of the nation. I object to it.[201]

Stevens was concerned that foreign control over American finance would negatively affect the country's interests. Like Webster, Stevens believed that separating ownership and control would address the problem. Banking law has retained the separation of ownership and control as a means of protecting domestic interests from foreign influence. Indeed, the citizenship requirement originally in the National Bank Act of 1863 remains on the books with only minor stylistic revisions.[202]

At the same time, the framework for regulating foreign banks has shifted significantly since the late nineteenth century. Although nationally chartered banks were limited to citizen directors, the dual systems of federal and state banking meant that foreign banks could find their way into the country under state law. In the early twentieth century, several states severely restricted foreign banking.[203] But most states loosened their requirements after World

196. National Bank Act of 1864 § 9, 13 Stat. at 102 (codified as amended at 12 U.S.C. §§ 71-73, 75-76).

197. CONG. GLOBE, 38th Cong., 1st Sess. 1339 (1863) (statement of Rep. James S. Brown).

198. Other proposed revisions would have allowed those eligible for military service and those intending to obtain U.S. citizenship to serve as directors. *See id.* at 1340-41.

199. *Id.* at 1339 (statement of Rep. Thaddeus Stevens).

200. *Id.* at 1340.

201. *Id.*

202. *See* 12 U.S.C. § 72 ("Every director must, during his whole term of service, be a citizen of the United States . . . .").

203. Some states, like New York and Illinois, virtually prohibited foreign bank branching. *See* WILKINS, *supra* note 178, at 109-10. Other states adopted burdensome supervision requirements. Massachusetts, for example, required licensing of any foreign bank or corporation that wanted to do business in the commonwealth and implemented annual bank examinations. *Id.* at 110; Act of May 3, 1906, ch. 347, § 1, 1906 Mass. Acts 319, 319.

War II.[204] Foreign banking operations in the United States began to explode in the 1970s, with more than four times as many market entrants in that decade as in the 1960s.[205] The increase in foreign banking was a function of at least three factors: (1) the depreciations of the dollar in 1971 and 1973; (2) increased congressional attention to the risks of foreign banking, which pushed foreign banks to rush into the United States before regulation; and (3) federalism-based regulatory loopholes.[206] Prior to 1978, foreign banks operating under state law could avoid the federal ban on interstate branch banking, the Bank Holding Company Act, the Glass–Steagall regime, and federal supervision.[207]

Faced with increasing foreign influence in the banking sector, Congress passed the International Banking Act of 1978 (IBA).[208] The IBA's general goal was "national treatment," meaning that foreign and domestic banks should be subject to as similar of a regulatory regime as possible.[209] This was partly to ensure that U.S. national banks would not face unfair competition from foreign banks that were subject only to state banking regulations.[210] As part of these changes, the IBA watered down the citizenship provision of the National Bank Act of 1864 by empowering the Comptroller of the Currency to "waive the requirement of citizenship in the case of not more than a minority of the total number of directors."[211] Note, however, that this liberalizing provision still ensured that a majority of directors would be U.S. citizens.

204. FARAMARZ DAMANPOUR, THE EVOLUTION OF FOREIGN BANKING INSTITUTIONS IN THE UNITED STATES: DEVELOPMENTS IN INTERNATIONAL FINANCE 115 (1990).

205. *Id.* at 119.

206. *Id.* at 61, 118-19.

207. John C. Dugan, Mark E. Plotkin, Keith A. Noreika & Michael Nonaka, *Forms of Entry, Operation, Expansion, and Supervision of Foreign Banks in the United States*, *in* REGULATION OF FOREIGN BANKS AND AFFILIATES IN THE UNITED STATES 1, 9-12 (Randall Guynn, Mark Plotkin & Ralph Reisner eds., 6th ed. 2012); Kathleen J. Woody, *The International Economic Implications of Deregulating the U.S. Banking Industry*, 31 AM. U. L. REV. 25, 26 & n.4, 29-33 (1981).

208. Pub. L. No. 95-369, 92 Stat. 607 (codified as amended in scattered sections of 12 U.S.C.).

209. National treatment is a common principle in international trade and investment law. For a discussion of national treatment, see John H. Jackson, *National Treatment Obligations and Non-tariff Barriers*, 10 MICH. J. INT'L L. 207, 208-09 (1989) (describing the history and contours of national treatment in the trade context). On how U.S. bilateral investment treaties and free-trade agreements exempt some of the platforms described in this Article from national-treatment rules, see note 179 above.

210. Dugan et al., *supra* note 207, at 9. As an illustration of this principle, the Riegle–Neal Act, Gramm–Leach–Bliley Act, and Dodd–Frank Act all applied a variety of changes to both foreign and domestic banks. *Id.* at 21.

211. *See* IBA § 2, 92 Stat. at 608 (codified as amended at 12 U.S.C. § 72). The amended provision now also allows the Comptroller to waive a residency requirement that had previously been applied. 12 U.S.C. § 72.

But even with national treatment as the aim, Congress and the Federal Reserve still adopted tailored regulations for foreign banks. The Foreign Bank Supervision Enhancement Act of 1991,[212] for example, requires review by the Federal Reserve Board of Governors before any foreign bank can open a branch (or acquire control or ownership of a commercial lending company) within the United States.[213] Under the Act, the Board must ensure that a foreign bank is "subject to comprehensive supervision or regulation on a consolidated basis . . . in its home country."[214] In making this determination, the Board may consider (1) whether the bank's home government has approved its entry into the United States; (2) the resources and experience of the bank; and (3) the bank's risk to the stability of the U.S. financial system, among other factors.[215] This review takes place before the bank receives a charter from the OCC.[216]

Foreign banks also face specific retail-banking regulations. A foreign bank with a U.S. subsidiary can offer retail accounts with deposit insurance, but the U.S. bank must be capitalized separately from its foreign parent.[217] If a foreign bank seeks to open a branch in the United States such that the branch is a "legal and operational extension of its parent foreign bank," the 1991 Act prevents the branch from having retail accounts below the deposit insurance maximum.[218] Branches of foreign banks are thus limited to wholesale banking.[219] These restrictions protect ordinary U.S. retail customers, ensuring that depository banks are insured by the Federal Deposit Insurance Corporation.

Congress also subjects foreign acquisitions of U.S. banks to scrutiny. Under the Bank Holding Company Act of 1956 (BHCA), the Federal Reserve Board must preapprove any corporate acquisition of a U.S. bank or bank holding company.[220] The BHCA does not define a foreign government as a "company," however, meaning that bank acquisitions by foreign governments do not fall

212. Pub. L. No. 102-242, 105 Stat. 2286 (codified as amended in scattered sections of 12 U.S.C.).

213. *See* 12 U.S.C. § 3105(d)(1) ("No foreign bank may establish a branch or an agency, or acquire ownership or control of a commercial lending company, without the prior approval of the Board.").

214. *Id.* § 3105(d)(2).

215. *Id.* § 3105(d)(3); *see also* 12 C.F.R. § 211.24(c) (2021).

216. 12 U.S.C. § 3102 (noting that foreign banks may establish branches with the approval of the Comptroller of the Currency, and that the Comptroller must include any conditions the Board imposes if it approves an application from a foreign bank).

217. Dugan et al., *supra* note 207, at 50.

218. *Id.* at 20-21, 20 n.67, 51.

219. *Id.* at 51.

220. *See* 12 U.S.C. § 1842.

within the BHCA's preapproval provisions.[221] This odd fluke means that foreign government–owned banks are possibly subject to less regulation than U.S. banks.

In the early 1990s, John LaWare, a governor of the Federal Reserve Board, identified three ways in which this loophole could be abused. First, foreign banks might have competitive advantages over domestic banks, particularly with respect to nonbank activities. Foreign governments that own banks and nonbanks (such as nationalized airlines) violate the separation of banking and commerce, the maintenance of which was one of the central purposes of the BHCA.[222] Second, "a foreign government–owned bank" might pursue the home country's national interests rather than acting in the best interests of the enterprise itself.[223] Third, a foreign government–owned bank might have funding advantages because the foreign government is "willing to provide funding at below market cost . . . [and] accept lower levels of profitability."[224] The Federal Reserve responded to these concerns by treating state-owned enterprises—which are usually separately incorporated—as "companies" under the BHCA.[225] Because this interpretation of the BHCA was a change from past practice, the Federal Reserve also issued a permanent BHCA exception for foreign government–controlled businesses that conduct a majority of their business outside the United States and do not have a U.S. bank subsidiary.[226] This loophole was "invoked frequently during the financial crisis of 2008 as sovereign wealth funds and other sovereign corporate entities sought to make capital investments in U.S. and international financial institutions."[227]

After the 2008 financial crisis, the primary international-banking reform came from the Federal Reserve. In 2014, the Federal Reserve required foreign banks to create Intermediate Holding Companies (IHCs) for their

221. Luigi L. De Ghenghi, John L. Douglas, Randall D. Guynn & William L. Taylor, *Foreign Bank Acquisitions of U.S. Banks and Thrifts*, *in* REGULATION OF FOREIGN BANKS AND AFFILIATES IN THE UNITED STATES, *supra* note 207, at 279, 295-96.

222. *The Non-proliferation of Weapons of Mass Destruction and Regulatory Improvement Act of 1992: Hearing on H.R. 4803 Before the H. Comm. on Banking, Fin. & Urban Affs.*, 102d Cong. 115 (1992) (statement of John P. LaWare, Member, Board of Governors of the Federal Reserve System).

223. *Id.* at 117.

224. *Id.* at 118.

225. De Ghenghi et al., *supra* note 221, at 296. For a discussion of the BHCA's application to state-owned enterprises, see generally Joseph Arkins, Note, *The Application of the U.S. Bank Holding Company Act to Instrumentalities of Foreign Governments*, 13 FORDHAM INT'L L.J. 524 (1989-1990).

226. De Ghenghi et al., *supra* note 221, at 297.

227. *Id.* at 297-98.

subsidiaries.[228] IHCs were, in turn, subject to regulatory requirements (such as stress tests and other forms of risk mitigation and management) that did not previously apply to foreign banks.[229] Notably, however, the IHC mandate included only foreign-bank *subsidiaries*, not foreign-bank *branches*.[230] Foreign banks have predictably shifted their resources toward the latter, less regulated form.[231]

In recent years, some scholars have suggested further strengthening territorial regulation of foreign financial institutions. The IHC regulations continue to leave open a loophole for foreign branches in the United States. In addition, foreign banks are "investing heavily in capital markets instruments," using their U.S. operations as "a source of funding for their parent companies," and relying "increasingly on volatile, short-term wholesale financing."[232] Jeremy Kress notes that these issues create "unwarranted financial stability and national security risks," and he argues for what he calls "subsidiarization": a requirement that foreign banks operate through U.S.-chartered—and thus U.S.-regulated—subsidiaries.[233]

B. Communications

Communications platforms—including radio, satellite, and undersea cables—have long been subject to restrictions on foreign control, ownership, and influence. Foreign restrictions began with the Radio Act of 1912.[234] But their origins go back almost a decade earlier, to the 1904-1905 Russo–Japanese War. At the time, Japan's stunning naval victories were attributed to the country's superior wireless communication system.[235] President Theodore Roosevelt believed that wireless communication would be essential to future naval operations, and he worried that interference from private transmissions could impede military actions.[236] Roosevelt established a commission to investigate the matter, and the commission recommended placing wireless communications "under full Government supervision," with the Navy managing operations not just to serve the government but also for "public

228. Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations, 79 Fed. Reg. 17,240, 17,242 (Mar. 27, 2014) (codified at 12 C.F.R. pt. 252).
229. Jeremy Kress, *Domesticating Foreign Finance*, 73 FLA. L. REV. 951, 975-77 (2021).
230. *Id.* at 974-76.
231. *Id.* at 978-79.
232. *Id.* at 970-71.
233. *Id.* at 1007.
234. Ch. 287, § 2, 37 Stat. 302, 303 (repealed 1927).
235. J. GREGORY SIDAK, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS 16 (1997).
236. *Id.* at 16-17.

economy and efficiency."[237] A standard, nationwide system would prevent private monopoly, ensure regulation in the public interest, and promote national defense.[238]

Despite increasing interference with naval communications, Congress did not take up the commission's suggestion.[239] Instead, Congress passed the Radio Act, which mandated radio licenses and restricted them to U.S. citizens or companies incorporated in the United States.[240] The Act also restricted the wavelengths that civilian operators could use, as well as the times at which they could use their radios (to ensure smooth naval communications).[241] Importantly, the Act did not mention foreign investment in or ownership of a U.S. corporation operating a radio station, and the Attorney General interpreted the Act to permit these forms of foreign ownership and control.[242] After World War I broke out, two German-owned radio stations communicated with German navy vessels in violation of President Woodrow Wilson's neutrality proclamation.[243] The Navy took control of those stations,[244] and it operated the nation's radio stations when the United States entered the war.[245]

When the war ended, the government seemed prepared to return radio to private hands.[246] But the Navy feared relinquishing its newfound radio monopoly for two reasons. The first was the recent German experience.[247] The second was that privatization would leave control with the British Marconi Wireless Telegraph Company, which faced no significant U.S. competition.[248]

237. R.D. EVANS, H.N. MANNEY, A.W. GREELY, WILLIS L. MOORE & JOSEPH L. JAYNE, INTER-DEPARTMENTAL BD. ON WIRELESS TELEGRAPHY, REPORT OF THE INTER-DEPARTMENTAL BOARD APPOINTED BY THE PRESIDENT TO CONSIDER THE ENTIRE QUESTION OF WIRELESS TELEGRAPHY IN THE SERVICE OF THE NATIONAL GOVERNMENT (1904), *in* 1 DOCUMENTS IN TELECOMMUNICATIONS POLICY 2, 10-11 (John M. Kittross ed., 1977). The Navy was the predominant force behind radio restrictions in part because it was the leading customer of wireless radio in the early twentieth century. Radio enabled ships to stay in touch with each other. SIDAK, *supra* note 235, at 11-12.

238. SIDAK, *supra* note 235, at 18.

239. *Id.* at 18-21.

240. Radio Act of 1912, ch. 287, §§ 1-2, 37 Stat. 302, 302-03 (repealed 1927).

241. *Id.* §§ 1, 2, 4, 37 Stat. at 302-04, 306; SIDAK, *supra* note 235, at 23-24.

242. Radio Commc'n—Issuance of Licenses, 29 Op. Att'y Gen. 579, 580-81 (1912).

243. James G. Ennis & David N. Roberts, *Foreign Ownership in US Communications Industry: The Impact of Section 310*, 19 INT'L BUS. LAW. 243, 243-44 (1991).

244. *Id.* at 244.

245. WILKINS, *supra* note 178, at 95-96.

246. *See id.* at 96.

247. Vagts, *supra* note 30, at 1517.

248. WILKINS, *supra* note 178, at 95.

Inventor Guglielmo Marconi offered the Navy the chance to buy his wireless technology at the turn of the century, but the Navy balked at his requirement that communications be limited to Marconi systems only.[249] A Marconi monopoly, the Navy believed, would be doubly problematic because the British already had dominance in undersea cables.[250] After failing to persuade Congress to let it retain exclusive control of radio, the Navy instead pushed General Electric to buy out the shares of Marconi of America (the British company's domestic subsidiary) and create the Radio Corporation of America.[251] The new U.S. company required officers and directors to be U.S. citizens, capped foreign stock at 20%, and mandated that at least one member of the Navy sit on the board.[252]

In 1927, Congress passed another Radio Act. This one created the Federal Radio Commission (FRC), authorized the FRC to license radio companies, and added a 20% limit on foreign stockholding to the restrictions from the 1912 Act.[253] A few years later, the Secretary of the Navy commented that the law "intended to preclude foreign dominance of American radio" and that the United States had learned from the "foreign dominance of cables and the dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during the [First] World War."[254] But the Act contained a loophole allowing foreign companies with U.S. subsidiaries to obtain radio licenses.[255]

Less than a decade later, the Communications Act of 1934 reshaped regulation in the communications sector.[256] During debate over the bill, the military sought to further restrict foreign ownership based on a range of

249. SIDAK, *supra* note 235, at 13. Critically, Marconi understood that radio communication was a system, and that if it remained an integrated system he would be able to reap monopoly profits. *Id.* at 14.

250. *Id.* at 14.

251. WILKINS, *supra* note 178, at 96-97.

252. *Id.* at 97; SIDAK, *supra* note 235, at 53.

253. Radio Act of 1927, ch. 169, §§ 3, 5, 12, 44 Stat. 1162, 1162, 1164, 1167 (repealed 1934); *see also* 47 U.S.C. § 310(b)(3) ("No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by . . . any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country . . . .").

254. WILKINS, *supra* note 178, at 292 (alteration in original) (quoting a 1932 letter from the Secretary of the Navy).

255. SIDAK, *supra* note 235, at 64. "Faced with that loophole, Congress made repeated efforts to tighten . . . restrictions to effect [the Act's] purpose." *Id.* at 64-68.

256. *See* Communications Act of 1934, ch. 652, §§ 1, 2, 303, 310, 48 Stat. 1064, 1064-65, 1082-83, 1086 (codified as amended at 47 U.S.C. §§ 151-52, 303, 310).

national security concerns.[257] Arguments for "a more relaxed approach to foreign ownership," meanwhile, focused on the challenges of compliance, potential trade consequences, and a sense that regulation was "unnecessary in view of presidential war powers."[258] The final legislation continued to restrict foreign ownership. The Act barred the new Federal Communications Commission (FCC) from granting licenses to (1) aliens or their representatives; (2) foreign governments or their representatives; (3) corporations organized in foreign countries; (4) corporations with aliens as officers or directors; and (5) corporations with more than 20% foreign-owned stock.[259] Importantly, section 310 of the Act also added a provision that addressed *indirect* ownership. If doing so would serve the "public interest," the FCC could refuse a license to "[a]ny corporation directly or indirectly controlled" by a parent corporation with (1) a foreign officer; (2) more than 25% foreign directors; or (3) more than 25% foreign-owned stock.[260]

As noted, there were concerns about foreign ownership and control of undersea cables during this same period. In the late nineteenth century, the (in)famous banker and financier Jay Gould "thundered against the foreign cable monopoly,"[261] and he sought to build his own undersea cables to "promote national independence, break the European monopoly, and lower artificially rigged rates."[262] In 1900, Congress passed a law prohibiting foreign cables from landing in Alaska.[263] And in 1921, it passed the Cable Landing Licensing Act, which authorized the President to revoke or withhold a license for a foreign cable company if doing so would help achieve reciprocal treatment for American firms abroad.[264] The 1921 Act was in line with Congress's broader aim of promoting trade reciprocity.[265] And the Act is still relevant: The FCC

257. John J. Watkins, *Alien Ownership and the Communications Act*, 33 FED. COMMC'NS L.J. 1, 6-7 (1981).

258. *Id.* at 7.

259. Communications Act of 1934 § 310(a)(1)-(4), 48 Stat. at 1086.

260. *Id.* § 310(a)(5), 48 Stat. at 1086; *see also* WILKINS, *supra* note 178, at 795 n.51.

261. WILKINS, *supra* note 181, at 576 (quoting JULIUS GRODINSKY, JAY GOULD: HIS BUSINESS CAREER, 1867-1892, at 279 (1957)).

262. *Id.*

263. Act of May 26, 1900, ch. 586, 31 Stat. 205, 206 (repealed 1997).

264. Cable Landing Licensing Act, ch. 12, § 2, 42 Stat. 8, 8 (1921) (codified as amended at 47 U.S.C. § 35) (providing that the President may revoke or withhold a license if doing so would "assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries").

265. *See, e.g.*, Reciprocal Tariff Act, ch. 474, 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. §§ 1351-1354).

has used its statutory authority to deny undersea-cable landing to foreign governments based on a lack of reciprocal treatment.[266]

Decades after the 1934 Act, when communications moved into space, Congress passed the Communications Satellite Act of 1962, which created the Communications Satellite Corporation (COMSAT) to administer the U.S. satellite system.[267] COMSAT was publicly authorized and served as a private monopoly, owned in part by communications companies and subject to common-carrier regulations.[268] Under the Act, directors had to be U.S. citizens[269] and foreign ownership was limited to 20%.[270]

Prior to deregulation, the FCC evaluated the public-interest requirement for radio licenses[271] by considering whether a foreign director's country of origin "historically had friendly relations with the United States";[272] whether the licensed facility controlled content or acted as a common carrier;[273] whether the applicant had valuable expertise;[274] and whether a foreign party would control telecommunications operations.[275] During that same period the FCC addressed a variety of questions related to control, including how to treat partial ownership, different classes of stock, convertible instruments, debts, partnerships, irrevocable trusts, consultants, and special covenants.[276]

When Congress passed the deregulatory Telecommunications Act of 1996, it largely preserved restrictions on foreign ownership.[277] After the Act's

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266. *See, e.g.*, Fr. Tel. Cable Co., 71 F.C.C.2d 393, 403-05 (1979) (denying a license to a French government–controlled carrier because France would not grant reciprocal landing authority to U.S. companies).

267. Communications Satellite Act of 1962, Pub. L. No. 87-624, §§ 301, 305, 76 Stat. 419, 423, 425 (expired 2001, 2005).

268. Legislation Note, *The Communications Satellite Act of 1962*, 76 HARV. L. REV. 388, 391-92 (1962). On the monopoly, see, for example, Michael Schrage, *Comsat's Long Monopoly on Satellites Said Ending*, WASH. POST (Oct. 1, 1983), https://perma.cc/U66K-DQCX.

269. Communications Satellite Act of 1962 § 303(a), 76 Stat. at 423 (expired 2000).

270. *See id.* § 304(d), 76 Stat. at 425 (expired 2000).

271. *See supra* note 260 and accompanying text (describing section 310 of the Communications Act of 1934).

272. *See, e.g.*, Vt. Tel. Co., 10 FCC Rcd. 9337, 9337 (1995).

273. Data Gen. Corp., 2 FCC Rcd. 6060, 6060 (1987).

274. Hous. Int'l Teleport, Inc., 2 FCC Rcd. 1666, 1666 (1987).

275. Int'l Tel. & Tel. Corp., 67 F.C.C.2d 604, 604-05 (1978). For a longer discussion of these factors, see SIDAK, *supra* note 235, at 132-34.

276. SIDAK, *supra* note 235, at 142-55.

277. The Act did, however, eliminate restrictions on foreign citizenship for directors and officers. Prior to the Act, the law barred licensees with foreign directors or officers. It also restricted licensees whose parent companies had foreign officers or at least 25% foreign directors. *See supra* notes 259-60 and accompanying text. The Act removed these provisions without explanation. *See* Telecommunications Act of 1996, Pub. L.
footnote continued on next page

passage, however, the FCC increasingly liberalized these restrictions. In 1997, the FCC announced that members of the World Trade Organization (WTO) would presumptively qualify for broadcast licenses under section 310.[278] In 2001, the FCC further noted that WTO members enjoyed "a rebuttable presumption that competitive concerns" would not be raised by their licensure, affirming the Commission's commitment to encouraging international competition among WTO members.[279]

In 2013, the FCC "clarifie[d]" its position that it would review foreign licensing requests on a "case-by-case basis" after evaluating "whether the public interest would be served by permitting the requested foreign ownership."[280] Despite the FCC's emphasis on the plain text of section 310, some in the communications industry viewed the clarification as a loosening of foreign-ownership restrictions.[281] Commentators noted that prior to the decision, section 310's restrictions were "viewed as all but absolute."[282] In 2016, the FCC explicitly stated that section 310 allowed for full foreign ownership.[283] In January 2017, the FCC allowed aggregated foreign ownership of up to 49% for Univision.[284] One month later, the FCC for the first time granted a license to a fully foreign-owned broadcast station.[285]

No. 104-104, § 403(k), 110 Stat. 56, 131-32 (codified at 47 U.S.C. § 310(b)). On the lack of explanation, see SIDAK, *supra* note 235, at 81-82.

278. This was pursuant to the WTO's Basic Telecommunications Agreement, which sought to deregulate and liberalize regulated monopolies in the telecommunications sector. Rules & Policies on Foreign Participation in the U.S. Telecomms. Mkt., 12 FCC Rcd. 23,891, 23,893-94, 23,911-17 (1997).

279. Voicestream Wireless Corp., 16 FCC Rcd. 9779, 9790 (2001).

280. Commission Policies and Procedures Under the Communications Act, Foreign Investment in Broadcast Licensees, 78 Fed. Reg. 75,563, 75,563, 75,567 (Dec. 12, 2013).

281. *See, e.g.*, David Oxenford, *FCC Allows More than 25% Foreign Ownership of Broadcast Stations—Instructions for Investors Are to Be Developed*, BROAD. L. BLOG (Nov. 22, 2013), https://perma.cc/T4T5-SZEL.

282. *Id.*

283. *See* Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licensees, 81 Fed. Reg. 86,586, 86,587 (Dec. 1, 2016) (codified at 47 C.F.R. pts. 1, 25, 73-74).

284. Univision Holdings, Inc., 32 FCC Rcd. 6, 13 (2017).

285. David Oxenford, *FCC Approves for the First Time 100% Foreign Ownership of US Broadcast Stations*, BROAD. L. BLOG (Feb. 24, 2017), https://perma.cc/N7SP-QH9N; Frontier Media, LLC, 32 FCC Rcd. 1427, 1431 (2017). Notably, in 2020, President Trump issued an executive order creating a new interagency committee to (1) advise the FCC on national security concerns arising during licensing; and (2) propose mitigation measures to address those concerns. *See* Exec. Order No. 13,913, 3 C.F.R. 324, 325 (2021), *reprinted in* 47 U.S.C. § 154 note.

C. Transportation

Foreign investment in some areas of the transportation sector—especially rail—was common throughout American history. But in other areas, like shipping and air transportation, restrictions on foreign ownership, control, and investment were instituted from the start. In the shipping sector, the First Congress placed the highest duties on foreign-built ships; lower duties on foreign-owned but U.S.-built ships; and the lowest duties on U.S.-owned, U.S.-built ships.[286] Congress also placed a significant toll on ships transporting goods between points within the United States unless the ships were U.S. built and owned,[287] a precursor to modern cabotage rules. Foreign vessels transporting goods between U.S. ports were banned in 1817.[288] And an 1825 Act permitted corporations to register vessels contingent on an oath that "no part of such . . . vessel . . . [was] owned by any foreigner."[289] With these rules in place, by the time of the Civil War, the U.S. Merchant Marine fleet was formidable.[290]

But during the Civil War, merchant shipowners fearful of Confederate attacks shifted from U.S. flags to neutral white flags. After the war, the white-flag ships were not allowed to reflag. The result was a weakening of the U.S. Merchant Marine.[291] Foreign shipping interests increasingly became a concern during the Gilded Age and the Progressive Era. Texas Governor James Stephen Hogg, an opponent of foreign investments in railroads, land, and shipping, declared that "[t]he American merchant-marine stands by the side of the monopoly of transportation held within the dogmatic, avaricious grasp of England."[292] Foreign control meant "favoritism to foreign enterprise, delays and irregularities in the transport of U.S. exports, higher freight charges for Americans, and disclosure to their European rivals of America's customers abroad—all of which put [U.S.] merchants at a disadvantage."[293] Foreign vessels supplied U.S. operations during the Spanish–American War and when Teddy

286. Act of July 20, 1789, ch. 3, § 1, 1 Stat. 27, 27 (repealed 1790) (noting that ships "built within" the United States and "belonging wholly to a citizen or citizens" were taxed at six cents per ton, while ships built in the United States but "belonging wholly, or in part, to subjects of foreign powers" were taxed at thirty cents per ton); *id.* (imposing a tax of fifty cents per ton on "all other ships or vessels").

287. *Id.* § 3, 1 Stat. at 27-28 (repealed 1790) (imposing a fifty-cent-per-ton tax). This was, of course, a precursor to the Jones Act. *See infra* note 297 and accompanying text.

288. Act of Mar. 1, 1817, ch. 31, § 4, 3 Stat. 351, 351.

289. Act of Mar. 3, 1825, ch. 99, § 5, 4 Stat. 129, 129.

290. Michael Webert, Note, *Ownership and Control: A Red Herring in the Decline of the Merchant Marine*, 44 TRANSP. L.J. 107, 110 (2017).

291. *Id.* at 110-11.

292. WILKINS, *supra* note 181, at 576 (quoting James Stephen Hogg).

293. *Id.*

Roosevelt's "great white fleet" circumnavigated the globe.[294] During the Boer War, shipping rates soared because British vessels abandoned U.S. shipping to support Great Britain's war effort.[295] On the eve of World War I, the United States' domestic shipping fleet was weak, requiring a rebuild of the Merchant Marine.[296]

After World War I, Congress took action with the Jones Act.[297] In the lead-up to the Act, the U.S. Shipping Board reported that foreign governments and foreign citizens owned and were operating U.S. vessels through foreign-held U.S. corporations. "[T]he corporations are in fact but 'dummies,'" the Board wrote, "ostensibly held by American citizens but in reality a 'camouflage' to the foreign ownership."[298] To combat this problem, the Board "recommended a 100% U.S. citizen ownership requirement for corporations owning vessels in the coastwise trade."[299] Laws in 1916 and 1918 had already placed restrictions on foreign ownership and control, requiring that a "controlling interest" in certain ships be owned by citizens.[300] The Jones Act further tightened those rules, raising the citizen-ownership share to three-fourths and applying the citizenship requirement to coastal cargo shipping "between points in the United States."[301] These provisions remain on the books.[302]

In recent years, the federal government has directly confronted difficult questions of foreign investment and control under the Jones Act. Coastal shipping regulations limit foreign ownership to 25% in all classes of stock and

294. Webert, *supra* note 290, at 111.

295. *Id.*

296. *Id.*

297. Ch. 250, 41 Stat. 988 (1920) (codified as amended in scattered sections of 15 and 46 U.S.C.). For a discussion of the Jones Act, see generally JOHN F. FRITTELLI, CONG. RSCH. SERV., RS21566, THE JONES ACT: AN OVERVIEW (2003), https://perma.cc/6Q5R-T5RK.

298. Constantine G. Papavizas, *Public Company Jones Act Citizenship*, 39 TUL. MAR. L.J. 383, 389 (2015) (quoting S. REP. NO. 66-573, at 7 (1920)).

299. *Id.*

300. The 1916 Act required a majority of American shareholders for corporate citizenship and prohibited transferring vessel ownership to foreigners during wartime. Shipping Act of 1916, ch. 451, §§ 2, 9, 39 Stat. 728, 729-31 (codified as amended at 46 U.S.C. §§ 50501-50502, 56101, 57109). The 1918 Act defined a "controlling interest" as one that, in the words of Detlev Vagts, was "free from trusts or control by noncitizens through any arrangement, understanding, or other means." Vagts, *supra* note 30, at 1505-06; *see* Act of July 15, 1918, ch. 152, § 2, 40 Stat. 900, 900 (codified as amended at 46 U.S.C. §§ 50501-50502).

301. Jones Act §§ 27, 38, 41 Stat. at 999, 1008 (codified as amended in scattered sections of 46 U.S.C.).

302. *See* 46 U.S.C. § 50501.

apply to both corporations and their parent entities.[303] The relevant regulators, the U.S. Coast Guard and the Maritime Administration (MARAD) within the Department of Transportation, have adopted different interpretations of this principle. The strictest approach is the "tracing rule," by which every corporation up the ownership chain must meet the 75% threshold.[304] MARAD has also used the "fair inference rule," accepting U.S. mailing addresses as a fair inference of domestic ownership.[305] While the Coast Guard has "rejected the fair inference rule as an administrative matter," its regulations allow it to presume the accuracy of documents affirming that a shipping company meets the requirements of the Jones Act.[306]

The central problem, of course, is that it is difficult to determine the nationality of shareholders. Beneficial owners' identities are often kept secret, and mutual funds may have thousands of investors at any given time.[307] Take the case of Trico Marine. In 2011, the Coast Guard discovered that Trico Marine was not in compliance with foreign-ownership rules.[308] Trico Marine responded that it participated in Seg-100, a Depository Trust Corporation program designed to facilitate compliance by designating shares as foreign and holding them in a segregated account.[309] The Coast Guard refused to accept Seg-100 participation as sufficient given evidence that Trico Marine had "at one point exceed[ed] sixty percent" foreign ownership.[310] In response to the outcry from shippers, the Coast Guard issued a public notice in 2012 listing ways (including Seg-100) that companies could comply with investment restrictions and stating that it would consider good-faith compliance efforts in its determinations.[311]

303. 46 C.F.R. §§ 67.31(a), (d), 67.39(c) (2020); *see also id.* § 67.35(c) (partnerships); *id.* § 67.36(c) (trusts).

304. *See* Papavizas, *supra* note 298, at 391-92.

305. *Id.* at 393-94.

306. *Id.* at 394.

307. Daniel Michaeli, Note, *Foreign Investment Restrictions in Coastwise Shipping: A Maritime Mess*, 89 N.Y.U. L. REV. 1047, 1062-66 (2014).

308. *Id.* at 1048.

309. Memorandum from Timothy V. Skuby, Acting Dir., Nat'l Vessel Documentation Ctr., to Kevin Cook, Rear Admiral, U.S. Coast Guard 18-19 (Jan. 12, 2011) [hereinafter Skuby Memorandum], https://perma.cc/9FJ8-JLYQ; Michaeli, *supra* note 303, at 1068-69.

310. Michaeli, *supra* note 307, at 1070; Skuby Memorandum, *supra* note 309, at 8, 19-20.

311. Mechanisms of Compliance with United States Citizenship Requirements for the Ownership of Vessels Eligible to Engage in Restricted Trades by Publicly Traded Companies, 77 Fed. Reg. 70,452, 70,453 (Nov. 26, 2012). Compliance mechanisms included using the Seg-100 system, monitoring Securities and Exchange Commission filings, adding provisions to organizational documents, communicating with non-objecting beneficial owners, analyzing registered stockholders, and using dual-stock certificates. *Id.*

As with inland and coastal shipping, there are also restrictions on foreign ownership and control in air transportation. Under federal law, an air carrier must have a "certificate of public convenience and necessity," which the Secretary of Transportation can issue only to a U.S. citizen.[312] Citizen is defined as (1) an individual citizen; (2) a partnership where all partners are citizens; or (3) a corporation organized under U.S. law for which the president and two-thirds of the board and other managing officers are citizens, actual control is by citizens, and 75% of voting shares are owned or controlled by citizens.[313] The origin of these provisions is the Air Commerce Act of 1926,[314] which barred foreign aircraft from flying over the United States without permission and reserved air traffic within the United States to registered U.S. aircraft.[315] Only U.S. citizens—which the Act defined identically to the above, except that for corporations there was no actual control requirement and 51% of voting stock needed to be owned or controlled by citizens—were eligible for registration.[316]

Both national security and economic concerns motivated these foreign restrictions. In the early days of air travel there was fear that, if foreign entities controlled U.S. aircraft, the military would not have enough airplanes or pilots in the event of an emergency.[317] Restrictions on foreign ownership not only helped to "protect[] a fledgling domestic industry," but also ensured that the industry remained in American hands.[318] Restrictions also ensured that foreign companies did not get federal subsidies: In the 1920s, airlines were subsidized heavily by the Post Office's airmail program.[319] The Civil Aeronautics Act of 1938 continued to restrict foreign ownership and influence, adding that foreign carriers were forbidden to gain control of U.S. carriers "in any manner whatsoever."[320] It also raised the ownership requirement for corporate citizenship to 75% of shares, in line with the analogous provision of the Jones

312. 49 U.S.C. § 41102(a).

313. *Id.* § 40102(a)(15).

314. Ch. 344, §§ 3(a), 6, 9(a), 44 Stat. 568, 569, 572-73.

315. Vagts, *supra* note 30, at 1519.

316. Air Commerce Act of 1926 §§ 3(a), 9(a), 44 Stat. at 569, 573.

317. *See* John T. Stewart, Jr., *United States Citizenship Requirements of the Federal Aviation Act—A Misty Moor of Legalisms or the Rampart of Protectionism?*, 55 J. AIR L. & COM. 685, 689 & n.16 (1990) (citing *Inquiry into Operations of the United States Air Services: Hearing Before the H. Select Comm. of Inquiry into Operations of the U.S. Air Servs.*, 68th Cong. 527 (1925) (statement of Major General Mason M. Patrick, Chief of the Army Air Service)).

318. *Id.* at 689.

319. *See, e.g.*, Air Mail Act, ch. 128, § 4, 43 Stat. 805, 805 (1925); F. ROBERT VAN DER LINDEN, AIRLINES AND AIR MAIL: THE POST OFFICE AND THE BIRTH OF THE COMMERCIAL AVIATION INDUSTRY 10-11 (2002).

320. Civil Aeronautics Act of 1938, ch. 601, § 408(a)(4), 52 Stat. 973, 1001.

Act.[321] The Federal Aviation Act of 1958[322] and the Airline Deregulation Act of 1978[323] did not change these restrictions.

Although the 1978 Act did not reform foreign-ownership restrictions, the deregulatory ideology of the era brought efforts to liberalize international airline operations. The federal government entered into eleven bilateral air-transportation agreements between 1978 and 1980, opening U.S. markets to specific foreign countries.[324] The 1992 Open Skies initiative sought to reduce restrictions on capacity, entry, and code sharing across borders.[325] By 2006, nearly eighty countries had some type of Open Skies agreement with the United States.[326] These efforts, however, did not include changes to investment or cabotage rules, which were still mandated by statute.

Over the next few decades, opponents of deregulation raised political-economy concerns about the air-transportation sector. They worried that foreign carriers could become monopolies; that foreign-government subsidies could mean predatory pricing to push out American carriers; that foreign investment would mean "partial nationalization" by foreign governments; that the United States would not be treated reciprocally; and that market power would mean downward pressure on wages.[327] They also raised national security concerns. Despite its status as a global superpower, the United States could still need to increase airplane capacity in a war or other emergency.[328]

321. *Id.* § 1(13), 52 Stat. at 978; Jones Act, ch. 250, § 38, 41 Stat. 988, 1008 (1920) (codified as amended at 46 U.S.C. §§ 50501-50502).

322. Pub. L. No. 85-726, § 101(13), 72 Stat. 731, 737-38 (codified as amended at 49 U.S.C. § 40102(a)(15)).

323. Pub. L. No. 95-504, § 2, 92 Stat. 1705, 1705 (codified as amended in scattered sections of 18 and 49 U.S.C.).

324. Angela Edwards, Comment, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?*, 9 EMORY INT'L L. REV. 595, 605 (1995).

325. Defining "Open Skies," Order No. 92-8-13, Docket No. 48130, at 1, 3, 5, app. (Dep't of Transp. Aug. 5, 1992) (final order), 1992 WL 204010, at *1-3, app. at *5-6; *see also* Defining "Open Skies"; Order Requesting Comment, 57 Fed. Reg. 19,323, 19,323 (May 5, 1992).

326. Josh Cavinato, Note, *Turbulence in the Airline Industry: Rethinking America's Foreign Ownership Restrictions*, 81 S. CAL. L. REV. 311, 316-17 (2008).

327. Dempsey, *supra* note 178, at 40-41; Seth M. Warner, Comment, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 312 (1993); Edwards, *supra* note 324, at 633.

328. *See* Dempsey, *supra* note 178, at 41 (describing aviation and national security needs). It is worth noting that the United States needed to activate the Civil Reserve Air Fleet program during the Iraq and Afghanistan conflicts and in the final days of the U.S. presence in Afghanistan. *See* CONG. BUDGET OFF., ISSUES REGARDING THE CURRENT AND FUTURE USE OF THE CIVIL RESERVE AIR FLEET 1 (2007), https://perma.cc/VH7X-WEJZ; Paulina Villegas, *Airlines Will Help the Afghan Evacuation Through a Post-WWII Program. Here's How It Came to Be.*, WASH. POST (Aug. 22, 2021, 10:33 PM EDT), https://perma.cc/9BZE-E5JK; HEIDI M. PETERS, CONG. RSCH. SERV., IN11731, AFGHANISTAN EVACUATION:

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Without a domestically owned and controlled airline industry, the federal government would be forced to seize foreign private property in the event of such an emergency or war.[329]

Federal regulators also found themselves trying to determine how to assess foreign ownership and control. In the 1940 *Uraba* case,[330] the Civil Aeronautics Board (CAB) concluded that the citizenship provision of the Civil Aeronautics Act of 1938 intended for air carriers to be citizens "in fact, in purpose, and in management. The shadow of substantial foreign influence may not exist."[331] Fifteen years later, the CAB opined that "control" was a multifarious concept that required looking at both formal and informal factors. "[C]ontrol does not depend upon the ownership of any specific quantum of stock," the Board said.[332] Rather, what mattered was the "amount of power and influence necessary to give one company actual domination or substantial influence over another."[333] The Board saw that control could be indirect: "[P]ower over another company's stock through affiliates, through close business associates with the same interests, or power over stock holdings exercised in combination with other factors bearing pressure upon the company sought to be dominated may spell corporate control . . . ."[334] It ultimately concluded that "the term 'control' embraces every form of control and may cover a wide variety of situations of fact."[335] Importantly, this broad understanding of control persisted well into the deregulatory era in opinions from the Department of Transportation.[336]

THE CIVIL RESERVE AIR FLEET (CRAF) AND THE DEFENSE PRODUCTION ACT (DPA) 1-3 (2021), https://perma.cc/P5FN-G26X.

329. *See* Dempsey, *supra* note 178, at 41.

330. Uraba, Medellin & Cent. Airways, 2 C.A.B. 334 (1940).

331. *Id.* at 337.

332. E.-Colonial Control Case, 20 C.A.B. 629, 634-35 (1955).

333. *Id.* at 635.

334. *Id.*

335. *Id.*

336. Warner, *supra* note 327, at 307 n.226, 308 n.228; *see* Intera Arctic Servs., Inc., Order No. 87-8-43, Docket No. 44723, at 5 (Dep't of Transp. Aug. 18, 1987) (final order), 1987 WL 111258, at *3 ("[Foreign influence] need not be continually exercisable on a day-to-day basis. If persons other than U.S. citizens, individually or collectively, can significantly influence the affairs of [a U.S. air carrier], it is not a U.S. citizen . . . ."); Page Avjet, 102 C.A.B. 488, 489-90 (1983) ("In examining the control aspect for purposes of determining citizenship, we look beyond the bare technical requirements to see if the foreign interest has the power—either directly or indirectly—to influence the directors, officers or stockholders. We have found control to embrace every form of control and to include negative as well as positive influence; we have recognized that a dominating influence may be exercised in ways other than through a vote." (footnote omitted)); Acquisition of Nw. Airlines by Wings Holdings, Inc., Order No. 89-9-51, Docket No. 46371, at 4-5 (Dep't of Transp. Sept. 29, 1989) (consent order), 1989 WL

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After September 11, Congress added a requirement that air carriers must be "under the actual control" of U.S. citizens,[337] and federal regulators continued to support a totality-of-the-circumstances test when reviewing questions of control.[338] Congress remained committed to this restrictive approach, even when the Department of Transportation tried to water down the control requirement so that foreigners could control economic decisions so long as safety and security decisions remained with U.S. citizens.[339] Nearly 200 members of Congress co-sponsored a bill objecting to the policy, and relevant House committee chairs and ranking members wrote a letter to that same effect.[340] The proposed rule was ultimately withdrawn.[341]

D. Energy and Power

Certain types of power production have also long been restricted to U.S. citizens. The Federal Water Power Act, later codified as part of the Federal Power Act,[342] allowed the Federal Power Commission (now the Federal Energy Regulatory Commission) to issue licenses for "constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works"—but only to U.S. citizens, corporations, and governments.[343] The Geothermal Steam Act of 1970 likewise restricted geothermal lessees to U.S. citizens, corporations, and governments.[344] The

256026, at *3 ("Analysis [of control] has always necessarily been on a case-by-case basis, as there are myriad potential avenues of control. The control standard is a de facto one—we seek to discover whether a foreign interest may be in a position to exercise actual control over the airline, i.e., whether it will have a substantial ability to influence the carrier's activities.").

337. Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 807, 117 Stat. 2490, 2588 (2003) (codified as amended at 49 U.S.C. § 40102); *see* 49 U.S.C. § 40102(a)(15)(C).

338. *See, e.g.*, Citizenship of DHL Airways, Inc., Order No. 2004-5-10, Docket No. OST-2002-13089, at 8 (Dep't of Transp. May 13, 2004) (order declining review), 2004 DOT Av. LEXIS 404, at *22. For a discussion, see Bimal Patel, *A Flight Plan Towards Financial Stability—The History and Future of Foreign Ownership Restrictions in the United States Aviation Industry*, 73 J. AIR L. & COM. 487, 495-97 (2008).

339. Cavinato, *supra* note 326, at 320-23.

340. Patel, *supra* note 338, at 498-99.

341. *Id.* at 499.

342. Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended in scattered sections of 16 U.S.C.); RICHARD J. CAMPBELL, CONG. RSCH. SERV., R44783, THE FEDERAL POWER ACT (FPA) AND ELECTRICITY MARKETS 1-2 (rev. 2017), https://perma.cc/UHY3-FWC2.

343. Federal Water Power Act § 4(d), 41 Stat. at 1065-66 (codified as amended at 16 U.S.C. § 797).

344. Geothermal Steam Act of 1970, Pub. L. No. 91-581, § 16, 84 Stat. 1566, 1571 (codified as amended at 30 U.S.C. § 1015).

Atomic Energy Act of 1954 (AEA) made it illegal to possess, transfer, or use a nuclear facility (or nuclear material for medical or research purposes) without a license.[345] The Act also prohibited issuing a license when the applicant was "owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government," or when issuance would be "inimical to the common defense and security or to the health and safety of the public."[346]

An early proposal for nuclear regulation would have capped foreign investment at 5% and required all officers and directors to be U.S. citizens, but the proposal did not make it into the final AEA.[347] Opponents of the proposal noted that other statutes (like the Communications Act of 1934) had higher thresholds for foreign ownership, that it would be difficult to prevent foreigners from purchasing 5% of stock, and that it would be hard for a company to monitor whether foreigners were purchasing its stock.[348]

The approach of the Nuclear Regulatory Commission (NRC) has been to require a license for every nuclear-reactor owner, not just the operator, with no de minimis exception.[349] Although foreigners cannot have a direct ownership share in a nuclear facility, they can invest indirectly through an "ownership interest in a U.S. company which, in turn, holds a minority ownership interest in such a . . . facility."[350] The NRC's Standard Review Plan bars an applicant with a foreign parent company from receiving a license "unless the Commission knows that the foreign parent's stock is largely owned by U.S. citizens, and certain conditions or 'special arrangements' are imposed."[351] The NRC considers five additional factors in situations of partial ownership:

> (1) the extent of the proposed partial ownership of the reactor; (2) whether the applicant is seeking authority to operate the reactor; (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies;

345. Atomic Energy Act of 1954, ch. 1073, sec. 1, §§ 101-104, 68 Stat. 919, 936-38 (codified as amended at 42 U.S.C. §§ 2131-2134).

346. *Id.* sec. 1, §§ 103(d), 104(d), 68 Stat. at 937-38 (codified as amended at 42 U.S.C. §§ 2133-2134).

347. Katherine J. Palmer, Comment, *The Nuclear Regulatory Commission and Foreign Ownership of Commercial Nuclear Power Plants in the United States*, 28 DUQ. L. REV. 295, 298 (1990).

348. *Id.*

349. JOHN E. MATTHEWS, GOUD P. MARAGANI & ESTHER K. PARK, MORGAN LEWIS & BOCKIUS, LLP, FOREIGN INVESTMENT IN U.S. NUCLEAR REACTORS: MITIGATION MEASURES TO OVERCOME STATUTORY ROADBLOCK 2 (2009), https://perma.cc/EM3E-ZSR9.

350. *Id.* at 3.

351. Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,355 (Sept. 28, 1999).

> (4) whether the applicant would have any access to restricted data; and (5) details concerning ownership of the foreign parent company.[352]

The NRC has explicitly rejected the idea of a "safe harbor" for ownership and control because of the "limitless creativity involved in formulating corporate structures and arrangements."[353] The NRC has also noted that while its decisions generally do not turn on the applicant's country of origin, the "broader required finding of non-inimicality to the common defense and security may be based, in part, on the nation involved."[354]

In practice, this means that the NRC has evaluated and directed specific ownership and governance structures. For example, the NRC approved the transfer of the Vermont Yankee and Three Mile Island reactors to AmerGen, a company that was half owned by British Energy (a Delaware company 100% owned by a British parent) and half owned by PECO (a U.S. firm).[355] The NRC approved the proposal because it included a variety of restrictions on control, including that the CEO, chief nuclear officer, chairman of the management committee, and other officers would be U.S. citizens and that PECO would have ultimate control over nuclear safety and regulatory issues.[356] Notably, the NRC allowed for British Energy and PECO to have an equal number of seats on the management committee and permitted the president of AmerGen to be a British citizen.[357]

III. Common Types of Foreign-Platform Restrictions

The history of restrictions on foreign platforms shows that Congress has taken a variety of approaches to addressing the problems of foreign ownership, control, and influence. Three primary strategies emerge from the above analysis: (1) ex ante approvals (charters, licenses, and corporate citizenship requirements); (2) conditional entry and reciprocity requirements; and (3) governance strategies based on the separation of ownership and control. These three strategies have been remarkably stable despite changing national security needs and shifts in views on economic policy. But they have not been without their difficulties. This Part organizes and discusses the strategies and tools that Congress has used to restrict foreign platforms, and it identifies implementation challenges based on the evolution of these restrictions.

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352. *Id.* at 52,358.

353. *Id.* at 52,356.

354. *Id.* at 52,357.

355. MATTHEWS ET AL., *supra* note 349, at 7-8.

356. *Id.* at 8.

357. *Id.* at 8-9.

A. Ex Ante Approvals

Perhaps the most notable feature of the history above is that banking, communications, transportation, and energy all require federal regulators to license or charter a foreign actor before it can operate within the United States. This ex ante process has a variety of benefits. First, it prevents foreign control, operation, investment, or influence from taking place without prior approval. Rather than having to address harm after the fact, regulators can prevent injury from occurring in the first place. Second, it allows regulators to condition entry not only on the mitigation of *particular* national security risks, but also on compliance with generally applicable *sectoral* regulations. Related to federal licensing requirements are citizenship requirements, which call for corporations to be organized in the United States and have U.S. citizenship, however defined. Citizenship requirements bring foreign firms within the realm of United States law. If a multinational corporation wants to operate within the United States, for example, it must do so through a U.S. subsidiary subject to U.S. regulation.

Ex ante approvals in platform industries differ from national security reviews by CFIUS in important ways. The CFIUS process can take place before or after a merger occurs. Indeed, in the case of TikTok, CFIUS review was initiated after ByteDance's acquisition of Musical.ly.[358] Had ByteDance not purchased Musical.ly, but instead simply introduced TikTok to the U.S. market, it would not have triggered CFIUS review.[359] Other Chinese firms that were targets of executive orders—like WeChat and Alipay[360]—have not been subject to the CFIUS process for this reason.

CFIUS review is also focused on national security concerns, not on general regulatory compliance. Compare the CFIUS process to ex ante approvals in the banking sector. A foreign bank needs to get approval from the Federal Reserve and the OCC before it can operate within the United States.[361] This enables federal banking regulators to consider not only the fact that the bank is foreign, but also how the bank's structure, practices, and operations might impact U.S. financial stability and monetary policy. Regulators ensure that foreign banks will comply with rules designed to address concerns particular to the finance sector.[362] Importantly, these rules apply to all banking firms, not just a single firm that raises national security concerns.

358. *See* sources cited *supra* note 11.

359. *See infra* notes 458-60 and accompanying text.

360. *See supra* notes 1-3 and accompanying text.

361. *See supra* Part II.A.

362. These concerns, which themselves are related to national security, economic stability, and democracy, are what motivated domestic rules in the first place.

B. Conditional Entry and Reciprocity

In some cases, Congress has conditioned the operation of foreign platforms in the United States (for example, cable landings) on reciprocal treatment from the parent country.[363] The logic of reciprocity is twofold. First, the perceived national security risks of entry into the United States are relatively low. (If the national security risks of entry were high, the government would not permit entry even if the foreign country offered reciprocal treatment to U.S. firms.) Second, the government believes that domestic firms can succeed without protection and would benefit from the availability of foreign markets.

In the contemporary context, reciprocal treatment could justify outright bans on at least some Chinese tech platforms. Tim Wu has noted that "the foreign equivalents of TikTok and WeChat—video and messaging apps such as YouTube and WhatsApp—have been banned [in China] for years," and that the country "keeps a closed and censorial internet economy at home while its products enjoy full access to open markets abroad."[364] Wu and others have observed that one-sided attempts at tech-platform reciprocity—in hopes that American open markets would encourage liberalization in China—have failed to change Chinese behavior.[365] Observers of Chinese politics have also noted that China is deliberately pursuing a policy of "indigenization" (reshoring and domesticating essential industry) to reduce the leverage that the United States gets from economic interdependence.[366] Continued one-sided openness is thus unlikely to succeed if the goal is reciprocity. As Wu concludes, "[T]here is . . . such a thing as being a sucker."[367]

C. Governance Rules and the Separation of Ownership and Control

Since the time of the First Bank of the United States, statutes have placed limitations on corporate governance and investment, including corporate citizenship requirements, prohibitions on foreign directors, and partial bans on foreign shareholding. In some cases, including the Second Bank of the United States, the government has also barred foreign investors from voting for directors.[368] These provisions rely on the separation of ownership and control, using that division to safeguard national security interests.

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363. *See supra* notes 264-66 and accompanying text.

364. Wu, *supra* note 29.

365. *Id.*; Kurt M. Campbell & Ely Ratner, *The China Reckoning: How Beijing Defied American Expectations*, FOREIGN AFFS. (Mar./Apr. 2018), https://perma.cc/M3XP-GZPW (to locate, select "View the live page").

366. Gewirtz, *supra* note 95.

367. Wu, *supra* note 29.

368. *See supra* note 187 and accompanying text.

Citizenship rules have generally taken two forms: requirements that corporations have U.S. citizenship (and charters or licenses) and requirements that directors be U.S. citizens.[369] Comments from both Hamilton and Stevens suggest these rules were originally intended to serve as proxies for national security reliability.[370] As proxies, of course, the rules are necessarily overbroad and underinclusive. U.S. citizens could be influenced, directly or indirectly, by foreign interests. And non–U.S. citizens might not be influenced by foreign interests at all. Some may even be more hostile to foreign adversaries than U.S. citizens: Imagine, for example, a person who fled an authoritarian country for the United States due to fear of persecution.

At the same time, citizenship provisions may have some ancillary legal benefits. Procedurally, service of process can be difficult if a defendant has no physical presence in the United States.[371] Being able to serve process is especially important in the context of tech platforms, since tech firms could easily operate in the United States without any physical presence or personnel in the country. In addition, some U.S. laws—such as IEEPA,[372] which is the source of power for many economic sanctions,[373] and the Foreign Corrupt Practices Act of 1977 (FCPA)[374]—apply only against U.S. persons.[375]

A second category of governance rules can be grouped together as relying on the separation of ownership and control. Specifically, U.S. law has frequently tried to isolate foreign ownership from corporate decisionmaking: Statutes and regulations have limited permissible amounts of foreign investment, removed foreign investors' ability to vote for directors, and restricted foreign investors' access to corporate information.

369. Note that there is an important difference between directors and officers. Directors manage the company, comprise its board, and hire officers. *See* DEL. CODE ANN. tit. 8, §§ 141-142 (2021). To the extent there are fears that a noncitizen startup founder would not be able to run her company, one could imagine the founder acting as CEO but not serving on the board.

370. *See supra* notes 184, 201 and accompanying text.

371. *See, e.g.*, United States v. Pangang Grp. Co., 6 F.4th 946, 951 (9th Cir. 2021) (describing the government's inability to serve process on a group of Chinese companies and amendments to the Federal Rules of Criminal Procedure in response).

372. *See* 50 U.S.C. § 1702(a)(1)(A).

373. CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTIONS, AND USE 17 (rev. 2020), https://perma.cc/8EKQ-GW67.

374. The FCPA applies to issuers of securities, U.S. citizens and businesses, and foreign entities while in U.S. territory. *See* 15 U.S.C. §§ 78dd-1 to -3.

375. Note also: If corporations and directors are not U.S. citizens, they are citizens of another country. And they can be subject to the laws of their home country, just as U.S. citizens abroad can be subject to U.S. laws. *See generally* CHARLES DOYLE, CONG. RSCH. SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2016), https://perma.cc/X65E-VUZC (discussing laws that apply extraterritorially).

Andrew Verstein has recently shown that separating ownership and control for national security purposes is a pervasive practice in the defense sector. Verstein calls this approach "national security corporate governance," and he has found that the Defense Security Service (DSS)—a division of the Department of Defense—applies it to "some 13,000 entities," mostly "military contractors with some degree of foreign ownership."[376] The DSS seeks to "effectively exclude the shareholder . . . from . . . influence over the corporation's business or management,"[377] and it works to ensure that contractors are "organized, structured, and financed so as to be capable of operating as . . . viable business entit[ies] independent from [their] foreign owner[s]."[378] In accomplishing these goals, the DSS considers (1) the identity of the foreign investor (including its relationship with the U.S. government); (2) the foreign investor's ability to influence the company; (3) whether the foreign investor has more than 5% ownership or a 10% voting interest; and (4) the management and past compliance of the investee.[379] Investees are regularly prohibited from sharing IT services and physical locations with the foreign investor, and they are often required to appoint outside directors (usually former generals or admirals) and limit the information provided to inside directors representing foreign interests.[380]

Despite its long pedigree for platform industries and its widespread use in the defense sector today, the strategy of separating ownership and control presents important challenges. First, many corporate lawyers and scholars believe that shareholder primacy is the "end of history for corporate law" and that separating ownership and control is an agency problem that needs to be solved (rather than a virtue to be exploited).[381] The extensive history of separating ownership and control is a manifest challenge to these theories, but the success of the shareholder-primacy agenda[382] complicates separation as a

376. Andrew Verstein, *The Corporate Governance of National Security*, 95 WASH. U. L. REV. 775, 777, 792 & n.79 (2018). Since Verstein's article, the DSS has been reorganized as the Defense Counterintelligence and Security Agency. *See New Agency Name, Acting Director*, DEF. COUNTERINTELLIGENCE & SEC. AGENCY (June 24, 2019), https://perma.cc/2Y6R-KXVZ.

377. *Id.* at 777 (alterations in original) (capitalization altered) (quoting a sample DSS proxy agreement).

378. *Id.* at 796-97 (quoting U.S. DEP'T OF DEF., DoD 5220.22-M, NATIONAL INDUSTRIAL SECURITY PROGRAM OPERATING MANUAL § 2-303(b)(2) (2006)).

379. *Id.* at 794.

380. *Id.* at 797-801.

381. On the "end of history," see generally Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001). The classic work on the agency problem is Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

382. *See* Hansmann & Kraakman, *supra* note 381, at 439.

national security strategy. As David Yosifon has observed, shareholder primacy "may compel directors" to act in a manner that is contrary to the national interest.[383] In 2013, then-Chancellor of the Delaware Court of Chancery Leo Strine observed that directors of global companies who lack knowledge of foreign operations and interests would not satisfy their duty of loyalty under Delaware law.[384] Yosifon suggests that this interpretation of the duty of loyalty might push corporations to choose more foreign nationals as directors, and at least one study has found that "firm internationalization relates to the internationalization of the corporate boardroom."[385] American companies also seem to understand the conflict between the national interest and shareholder interests. When an activist shareholder tried to get Monsanto's directors to take an oath to support and defend the U.S. Constitution, Yosifon reports, Monsanto petitioned the Securities and Exchange Commission to exclude the proposal, claiming that it would violate Delaware law by interfering with the directors' exercise of their fiduciary duties.[386]

Second, even without shareholder primacy, economic incentives might subject U.S. firms to foreign influence. Although feelings of patriotism could render U.S. directors less likely to give critical technologies to foreign investors or governments, directors seeking business opportunities may still find it advantageous to work with U.S. adversaries. As a result, directors might be subject to indirect and informal pressures or take actions that are not in the national interest. For example, lucrative market-access offers might lead U.S. firms to accept the policies of adversarial countries. Partial foreign ownership might also create pressure on U.S. directors or investors to accede to foreign interests. During discussions about the U.S. tech company Oracle buying a stake in TikTok in 2020, one commentator argued that partial ownership by Oracle would not help because Oracle would lack a financial incentive to scrutinize TikTok's practices.[387] Its fortunes would be tied up in TikTok's success.

Third, it may be difficult to separate ownership and control because of the indirect influence that owners have over directors. This is a challenge that

383. David G. Yosifon, *Is Corporate Patriotism a Virtue?*, 14 SANTA CLARA J. INT'L L. 265, 266 (2016).

384. *Id.* at 287-88 (citing *In re* Puda Coal, Inc. S'holders Litig., No. 6476-CS, 2013 Del. Ch. LEXIS 338 (Del. Ch. Feb. 6, 2013)).

385. *Id.* at 288; Lars Oxelheim, Aleksandra Gregorič, Trond Randøy & Steen Thomsen, *On the Internationalization of Corporate Boards: The Case of Nordic Firms*, 44 J. INT'L BUS. STUD. 173, 186, 190 (2013).

386. Yosifon, *supra* note 383, at 290.

387. Jordan Schneider, *TikTok Train Wreck: Current Deal Solves Nothing and Won't Hold*, CHINATALK (Sept. 21, 2020), https://perma.cc/VKL9-W6DP.

President Jackson recognized in the nineteenth century and the CAB observed in the twentieth.[388] Modern commentators note that directors might be chosen because they are known to be compliant (even if they are admonished not to be);[389] they might be influenced by the possibility of further capital infusions from a foreign investor;[390] or they might fear getting a "reputation for being uncooperative," which could prevent their appointment to other boards.[391] Outside directors whose careers have been in the military might also not know much about how to run a company, leading them to defer to inside directors or managers.[392]

Finally, if some amount of foreign investment is allowed, there is the practical problem of determining how much investment is too much. The history of foreign-investment restriction shows a range of views on where to draw the line: any investment, 5%, 25%, 50%. Strikingly, the United States has generally not pursued outright bans on foreign investment, even as it has sometimes prohibited foreign directors and mandated U.S. corporate citizenship. Total bans on investment were, however, debated throughout American history. Jackson advocated for complete U.S. ownership of a national bank, and the Navy wanted to retain its radio monopoly after World War I.[393] So why did the United States allow foreign ownership in some sectors?

There appear to be three reasons. The first is that the country needed capital investment for much of its history.[394] This pushed political leaders to find ways to enable foreign investment while limiting foreign control. Second, many political leaders did not see foreign investment as an issue. Hamilton and Webster's views on foreign influence are a good example. Both focused on the problem of control, and both believed that separating ownership and control

388. *See supra* notes 191, 332-35 and accompanying text.

389. *See, e.g.*, Verstein, *supra* note 376, at 815 ("Outside Directors may be difficult to remove, but the foreign investor gets to nominate the initial batch of directors or proxy holders, and they are presumably adept at vetting candidates for their responsiveness to the investors' objectives.").

390. *See, e.g.*, Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345, 1366 (2008) ("So long as the portfolio company knows what the [sovereign wealth fund] wants, the portfolio company's desire for future equity capital on favorable terms may allow the [fund] to influence the portfolio company's behavior despite its lack of voting rights.").

391. Verstein, *supra* note 376, at 815; *see also id.* at 819 (explaining that it is common for an outside director to serve on multiple boards).

392. *See id.* at 807-08; *see also* Roberta Romano, *The Sarbanes–Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1529-33 (2005) (summarizing research on the effectiveness of independent boards).

393. *See supra* notes 191, 246-48 and accompanying text.

394. *See* WILKINS, *supra* note 178, at 294.

would resolve any concerns.[395] This may have been because of the distance between Europe and the United States and the limited means of communication at the time. It is hard to imagine U.S. directors getting timely direction from foreign investors during a crisis. But perhaps political leaders simply believed that U.S. citizens would not betray the country in time of war or emergency. Finally, there was the problem of administrability. Political leaders frequently, and particularly in the early twentieth century, worried about how hard it would be for a firm to determine whether its shares ended up in foreign hands.[396]

These concerns still find voice today. Advocates for trade liberalization emphasize the value of foreign capital.[397] Others note that the key issue is control, and that policymakers can reduce the control foreign investors have over corporate decisions.[398] Still others note that it is administratively difficult to identify foreign shareholders given beneficial-ownership secrecy and the rise of institutional investors and mutual funds.[399] Even programs like Seg-100 that attempt to classify stock ownership as foreign are not perfect solutions.[400]

* * *

In sum, the historical record shows that policymakers would be well-advised to think carefully about whether, how, and which governance rules will address the national security dangers in a particular sector. Policymakers will need to consider the use of citizenship as a proxy; the importance of U.S. jurisdiction over firms; the amount of influence that is concerning (including direct influence through investment and indirect influence); and the ways to measure the quantum of foreign investment. In some sectors, entire aspects of a business might be highly sensitive, warranting multiple overlapping prohibitions. In other sectors, justifications for restriction may be weaker. Importantly, there are administrability costs to requiring firms to set up separate governance institutions, to prohibiting some directors (but not others) from gaining access to business information, and to calculating precise

395. *See supra* notes 183-84, 193-94 and accompanying text.

396. WILKINS, *supra* note 178, at 294.

397. *Cf.* Martin G. Malsch, *The Purchase of U.S. Nuclear Power Plants by Foreign Entities*, 20 ENERGY L.J. 263, 263, 280 (1999) (noting that the "foreign interest in U.S. nuclear plants is . . . part of a natural tendency for capital markets to become global" and arguing that the NRC's approach to foreign ownership is "unduly restrictive").

398. *See* Gilson & Milhaupt, *supra* note 390, at 1362-65. Gilson and Milhaupt have proposed "vote suspension" for certain foreign investors, akin to the rule put in place for the Second Bank of the United States. *See id.* at 1352-53; *supra* note 187 and accompanying text.

399. *See, e.g.*, Palmer, *supra* note 347, at 297-98 (energy); Malsch, *supra* note 397, at 265 (energy); Michaeli, *supra* note 307, at 1062-66 (maritime shipping).

400. *See supra* notes 308-10 and accompanying text.

amounts of foreign investment. General prohibitions would not require as significant of a monitoring apparatus as the DSS or bespoke CFIUS mitigation measures.

IV. How to Regulate Foreign Tech Platforms

As we have seen, platforms have long been recognized as having public importance and a distinctive political economy. This recognition has led to special regulatory regimes for platforms as compared to ordinary tradable goods. The history of foreign-platform restrictions in the United States demonstrates that regulation is not taking a page from an authoritarian playbook, as some have argued, but is in fact common in American law. This record also offers guidance and lessons for how to regulate foreign tech platforms. It points the way toward a different approach, one that can be called the platform-utilities paradigm.

This Part first offers some reflections on the geopolitical, economic, and constitutional context in which foreign-platform restrictions are adopted. It then identifies the key regulatory features of the platform-utilities paradigm. The Part concludes by revisiting TikTok and other Chinese apps.

A. The Context of Foreign Restrictions

1. Economics and geopolitics

Based on the history of foreign restrictions in the United States, it is clear that geopolitical and economic contexts shaped the adoption and scope of foreign-platform restrictions. We can think of this history as operating in three broad stages. As Mira Wilkins, the leading chronicler of the history of foreign investment, has noted, the United States for its first 150 years was in a situation of "political independence but . . . economic dependence."[401] The United States desperately needed foreign capital to build infrastructure and expand commerce, and it was not yet producing enough wealth to meet its capital demands.[402] At the same time—particularly in its first few decades—the country was vulnerable. It was unclear whether the American experiment would succeed, and the possibility of foreign influence breaking up or undermining the new nation was real.[403] The restrictions built into the national-bank statutes reflected this poverty and vulnerability. The First and

401. WILKINS, *supra* note 181, at 28.

402. *Id.* at 48.

403. *See* DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 4 (2003) (describing fractures and vulnerabilities at the time of the founding).

Second Banks of the United States sought to attract foreign capital (to address the country's relative poverty) and to restrict foreign control of operations (to address the country's relative vulnerability).

The Progressive Era and the New Deal were the second stage. Many important foreign-platform restrictions—including on radio and broadcast communications, cable landing, air transport, maritime shipping, and water power—were put into effect during this period. This was a period in which the United States had considerably more wealth and influence than before, even if it was not yet willing to take on the role of the world's leading power.[404] But it was also a period of fierce geopolitical and economic competition. The country had just been through World War I, and leaders reflected on how seemingly peaceful platforms had been—and could be—used for military purposes.[405] The interwar period also saw an increasing emphasis on "total war," the mobilization of a country's entire economic, social, and political apparatus (not just its military) for battle.[406] In the context of significant American power, fierce great-power competition, and recognizable dangers, restrictions on foreign platforms were not only common but were regularly strengthened. In radio communications and shipping, for example, Congress both established and increased domestic-ownership requirements during this period.[407]

In the post–World War II era, and particularly in the period immediately after the Cold War, the United States was extremely wealthy and a global superpower.[408] In this economic and geopolitical context, fears of foreign influence did not disappear completely, but they were reduced.[409] For example, rather than pass new laws restricting foreign ownership in entire sectors, Congress passed the Exon–Florio Amendment in 1988 and pursued foreign-investment reviews on a case-by-case basis.[410] At the same time, some restrictions on foreign platforms (such as broadcast stations and power plants)

404. *See* CHARLES A. KUPCHAN, ISOLATIONISM: A HISTORY OF AMERICA'S EFFORTS TO SHIELD ITSELF FROM THE WORLD 19-20 (2020); STEPHEN WERTHEIM, TOMORROW, THE WORLD: THE BIRTH OF U.S. GLOBAL SUPREMACY 15-46 (2020).

405. *See, e.g.*, *supra* notes 253-54 and accompanying text.

406. WILLIAM C. MARTEL, VICTORY IN WAR: FOUNDATIONS OF MODERN MILITARY POLICY 52-53, 71 (2007) (describing the rise of total-war theories in the interwar period).

407. *See supra* Parts II.B, II.C.

408. Charles Krauthammer, *The Unipolar Moment*, FOREIGN AFFS., https://perma.cc/Y4EM-BVZ2 (archived May 3, 2022) (to locate, select "View the live page").

409. American military and economic primacy, coupled with a neoliberal mood in economic policy, likely contributed to this shift.

410. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (codified as amended at 50 U.S.C. § 4565); JACKSON, *supra* note 76, at 7-8.

were weakened by administrative action.[411] Commentators in virtually every area called for the liberalization of existing restrictions, often citing the supposed inevitability of globalization and the absence of national security concerns.[412]

Perhaps the central question regarding restrictions on foreign platforms is a contextual one that follows on this history: Is the United States in a position of relative security, or is it in a position of fierce competition and potential danger? Supporters of the open-internet paradigm play down the dangers, citing the benefits of the free flow of trade and capital. National security technocrats recognize that there are dangers but prefer narrow remedies. An approach that considers sectoral restrictions—that treats platforms distinctly from tradable goods or other investments—is one that reflects broader concerns about the dangers to national security, democracy, and the economy.

2. The constitutional context

When considering the viability and design of sectoral restrictions, it is important to take the constitutional context into account. In many cases, restrictions on foreign tech platforms are unlikely to raise constitutional concerns. Congress has expansive powers to regulate foreign commerce under the Constitution: Article I, Section 8 gives Congress the power to "regulate commerce with foreign nations," to "lay and collect taxes, duties, imposts and excises," and to make any laws "necessary and proper" to execute its constitutional authority.[413] As a result, there is little doubt that Congress can place restrictions of various types on foreign commercial activity.

Despite expansive congressional power, foreign governments and foreign companies may have due process rights.[414] Of course, the central question is what process is due, and foreign states can be treated differently than foreign

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411. *See supra* notes 278-79, 355-57 and accompanying text; *see also supra* notes 283-85 and accompanying text.

412. *See, e.g.*, Ian M. Rose, Note, *Barring Foreigners from Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1188-89, 1224-31 (1995) (on telecommunications); Malsch, *supra* note 397, at 264, 279-80 (on nuclear energy); David T. Arlington, Comment, *Liberalization of Restrictions on Foreign Ownership in U.S. Air Carriers: The United States Must Take the First Step in Aviation Globalization*, 59 J. AIR L. & COM. 133, 135-39 (1993) (on airlines); Arkins, *supra* note 225, at 525-26 (on banking).

413. U.S. CONST. art. I, § 8, cls. 1, 3, 18. For a discussion with application to trade law, see Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 590-97 (2019).

414. Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 637-38 (2019).

companies.[415] In any case, the D.C. Circuit recently found that a foreign-owned U.S. company had due process rights when it brought a CFIUS-related takings claim against the government.[416]

The First Amendment also potentially constrains the government's power to regulate platforms. The Supreme Court has held that Americans have a right to receive information from foreign speakers, and that even the government's "undisputed power to control physical entry of mail into the country" is not unlimited when it comes to speech.[417] At the same time, the Court has generally held that the government "may exclude foreign citizens from activities that are part of democratic self-government in the United States," including "voting, serving as jurors, working as police or probation officers, or teaching at public schools."[418] It has also upheld restrictions on the entry of aliens, even when exclusion was based on their ideological views.[419]

The U.S. District Court for the District of Columbia's 2011 opinion in *Bluman v. Federal Election Commission*,[420] authored by then-Judge Brett Kavanaugh, is instructive on how the Supreme Court might handle a First Amendment case evaluating restrictions on foreign platforms. The *Bluman* plaintiffs were foreign citizens within the United States who wanted to donate to an election campaign and challenged the prohibition on noncitizen donations as unconstitutional under the First Amendment.[421] Judge Kavanaugh noted that there was a dispute over the applicable level of scrutiny, with Bluman arguing for strict scrutiny (given the First Amendment interests at stake) and the government suggesting rational basis review (given the national security interests at issue).[422] Notably, Judge Kavanaugh found that the relevant provision "passes muster even under strict scrutiny."[423] The Supreme Court, he observed, "has drawn a fairly clear line: The government

415. *See id.* (arguing that "foreign states and private foreign corporations are on equal due process footing," but noting that "a long line of lower court cases [has drawn] a constitutional distinction between them").

416. Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 758 F.3d 296, 302, 325 (D.C. Cir. 2014).

417. Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972) (citing Lamont v. Postmaster Gen., 381 U.S. 301 (1965)).

418. Bluman v. FEC, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

419. *Kleindienst*, 408 U.S. at 754, 767-68, 770. For a discussion of the many laws in American history that have placed restrictions on entry, see Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 728-33 (1985); and Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1552-53 (2010).

420. 800 F. Supp. 2d 281.

421. *Id.* at 282-83; *see* 52 U.S.C. § 30121(a).

422. *Bluman*, 800 F. Supp. 2d at 285.

423. *Id.*

may exclude foreign citizens from activities 'intimately related to the process of democratic self-government.'"[424] The Supreme Court affirmed the decision without any discussion.[425]

It is quite possible—although far from certain—that the Supreme Court would uphold restrictions on foreign tech platforms involved in cross-border communications. The constitutionality of any such restriction will depend on the degree of the government's interest, including the strength of its concerns about democratic self-government, and the specific details of the regulation adopted. On the whole, given Congress's expansive foreign-commerce powers and the constitutionality of restricting foreign involvement in the democratic process, there is little reason to prematurely curtail debate on regulating foreign tech platforms for constitutional reasons. The constitutionality of any regulation is likely to depend on its design.

B. Toward a Platform-Utilities Paradigm

Given the history of foreign restrictions on platforms in the banking, communications, transportation, and energy sectors, it is possible to develop a different approach to regulating foreign tech platforms. The platform-utilities paradigm starts from the premise that tech platforms implicate important national security, democracy, and economic concerns, akin to those that affect platforms in traditional regulated industries. Exercising regulatory control over such platforms to ensure that those platforms serve the public interest is therefore desirable and legitimate. This alternative paradigm starts with generally applicable sectoral rules and structural separations rather than case-by-case determinations and bespoke regulatory compliance programs. It also involves close attention to international cooperation to set standards for interconnection, and to public investment and public options to complement private investment.

1. Sectors before firms

The history of platform regulation is largely a history of sectoral, rather than case-by-case, requirements. Different sectors of the economy warrant regulation according to their own particular risks and requirements. Even though they share some political-economy dynamics, banking, telecommunications, transportation, and energy all raise different considerations with respect to sovereignty, economics, democracy, and public interest.

424. *Id.* at 287 (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984)).

425. Bluman v. FEC, 565 U.S. 1104 (2012) (mem.).

Under a platform-utilities approach, Congress or the executive branch would consider adopting (or adapting) sector-specific regulations for foreign technology platforms. The tech platforms targeted by President Trump's executive orders are not all in the same sector. TikTok, for example, is a communications platform, and concerns about foreign influence like those that animated the early Radio Acts may be relevant.[426] Meanwhile, Alipay is a payment system, and issues of monetary sovereignty and financial-system stability, such as whether there could be a "run on the bank," may be critical. Whether foreign restrictions are necessary—and if so, what type—will likely differ from sector to sector. Note that this is different from an approach saying there should be a set of rules for all "tech platforms." Although tech platforms may require common rules (for example, restrictions on data collection and sharing), "tech platform" regulations are not a complete answer because tech platforms operate within different sectors. The better approach would be to have a set of trans-sectoral rules on data, privacy, and related issues, in addition to sector-specific regulations on those issues and others.[427]

This sector-first approach differs considerably from the approach taken by leading technocratic reformers. Under the latter approach, firms would be considered on a case-by-case basis, with mitigation measures narrowly tailored to address particular national security concerns. A clearer rule focused on sectors has important benefits. First, it is more administrable: It would not require making and monitoring individualized rules or guidelines. Second, it creates predictability and notice for firms within each sector on how to comply, rather than placing them at the mercy of shifting executive branch personnel. Sector-wide rules are therefore more likely to prevent the abuse of executive discretion than a case-by-case approach. Third, a sectoral approach would create a level playing field across firms. Rules for a sector would not just apply to Alipay, but to all foreign payment apps; not just to TikTok, but to all foreign video-sharing apps.

Some technocratic reformers believe that U.S. and foreign firms should receive identical treatment when it comes to data.[428] A sectoral approach might—but would not necessarily—take that approach. It may well be that foreign influence in a certain sector is particularly dangerous and justifies

426. *See supra* note 254 and accompanying text.

427. Some agencies are already picking up this latter task and thinking about fulfilling their mission as applied to new technologies. *See* Rory Van Loo, Symposium Essay, *Technology Regulation by Default: Platforms, Privacy, and the CFPB*, 2 GEO. L. TECH. REV. 531, 531 (2018). For a suggestion that platforms in the financial sector could be regulated as public utilities, see Dirk A. Zetzche, William A. Birdthistle, Douglas W. Arner & Ross P. Buckley, *Digital Finance Platforms: Toward a New Regulatory Paradigm*, 23 U. PA. J. BUS. L. 273, 334-35 (2020).

428. *See, e.g.*, Sacks, *supra* note 60.

differential treatment. The national-treatment exceptions discussed above[429] show that such a policy would have longstanding precedent. But even some degree of differentiation (for example, distinguishing between foreign and domestic[430]) is preferable to a case-by-case approach from a uniformity perspective. Whether there is a single rule or two sets of rules, firms are on a more level playing field than they would be in a system where each firm is subject to bespoke regulatory requirements.

Finally, the sectoral approach in other platform domains has historically been coupled with ex ante licensing or chartering processes (that is, mandatory approval from federal regulators before foreign firms can operate within the United States). Compliance with sectoral regulations, as confirmed by the government before entry, can indirectly and independently mitigate foreign-ownership concerns. Sectoral regulations in platform industries have often been adopted to prevent the abuse of economic and political power. To the extent that those fears motivate worries about foreign ownership, generally applicable sectoral regulations could help alleviate them.

None of this is to say that firms will not raise unique questions requiring tailored restrictions. But under the platform-utilities approach, case-by-case restrictions would not be the starting point. Generally applicable sectoral regulations would come before firm-specific rules.

2. Structural separations

The history of platform regulation is also filled with examples of structural separations, as opposed to technical balancing tests and complex formulas. In light of administrative and oversight failures in key national security areas,[431] supporters of a platform-utilities paradigm would advocate for a default rule of structural separation rather than case-by-case, complex regulations. Structural separations would likely be overinclusive rather than perfectly tailored, but this is a deliberate tradeoff. Their clarity makes them easier to administer. There are a number of structural-separation strategies that policymakers could adopt, and these strategies can be broken down into three categories: (1) geographic separation; (2) governance separation; and (3) activity separation. Of course, not all of these strategies will be necessary, relevant, or desirable in every sector.

The first option is geographic separation. To start at the extreme end of the spectrum, one could imagine a total ban on foreign firms in a given sector.

429. *See supra* notes 179, 208-16 and accompanying text.

430. Another possibility is distinguishing between "adversary" and "nonadversary" countries. This possibility is discussed in note 471 and the accompanying text below.

431. *See supra* Part I.B.3.

Domestically, the banking sector featured geographic bans on interstate bank branching until the early 1990s;[432] a similar rule could of course exist internationally. Conditional entry and reciprocity rules might also lead to total bans, as Tim Wu has noted.[433] A total ban would require fully domestic ownership for certain tech platforms, and it would mean that foreign tech platforms could only operate in the United States if they sold their U.S. lines of business to U.S. investors. A rule requiring U.S. corporate citizenship or a U.S. subsidiary is another geographic-separation rule: It seeks to separate the parent company from the subsidiary and may be accompanied by a requirement of a separate U.S. board of directors.

The separation of ownership and control is an example of governance separation. Under this approach, the government could require directors to be U.S. citizens or independent of foreign investors by means of foreign-voting restrictions (as with the Second Bank of the United States) or government approval (as with the DSS).[434] Foreign investment could also be limited to a specified percentage. The aim, as we have seen, is to reduce the influence of foreign actors in firms' governance regimes. In general, clear rules (for example, requirements of U.S. corporate citizenship and a prohibition on foreign investment) will be simpler and more administrable than complex, more narrowly tailored rules (for example, government approval of outside directors or partial bans on foreign investment).

Separations based on corporate activities are a third category. The historic separation of platforms and commerce provides one example.[435] As Lina Khan has shown, platform companies in a range of sectors have long been prohibited from owning both the platform and firms that traffic on the platform.[436] For example, under the Hepburn Act, railroads were barred from owning companies that moved goods along the rails.[437] Similarly, policymakers could prohibit foreign companies from entering into certain platform lines of business but permit their entry into commerce on relevant platforms. Policymakers could bar foreign ownership of an e-commerce platform like Amazon Marketplace, for example, but still allow the sale of foreign goods on the site. This would enable foreign tech companies to operate within the

432. *See* Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101(a), 108 Stat. 2338, 2339 (codified as amended at 12 U.S.C. § 1842). For a history and assessment of bank branching prior to the Riegle–Neal Act, see generally Douglas H. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133 (1981).

433. *See supra* Part III.B.

434. *See supra* notes 187, 380 and accompanying text.

435. *See* Khan, *supra* note 28, at 1037-52.

436. *Id.*

437. Hepburn Act, ch. 3591, § 1, 34 Stat. 584, 584-86 (1906) (codified as amended in scattered sections of 49 U.S.C.).

United States, but not if they also operate related platforms. Another example of an activity-based structural separation, from the banking context, is the now-repealed Glass–Steagall regime. Glass–Steagall required the separation of investment banks, depository banks, and insurance companies.[438] This regime, as Lev Menand has written, was "simple and broad, easy to enforce and hard to dodge, politically salient and durable."[439]

Activity-based separation rules are more administrable than rules policing particular conduct, particularly when there are concerns about leveraging power from one business line to another. Note that requiring firms to spin off new businesses to comply with activity-based separation rules is not a significant administrability concern. As Rory Van Loo has shown, private sector spin-offs are extremely common, including for large, complex firms.[440]

There are also weaker forms of separation rules. These rules do not create complete separations, but rather leave the corporate entity intact and establish internal firewalls to prevent influence across different lines of business. The best example of this kind of divide comes from the banking sector. After the 2008 financial crash, there were proposals in the United States to bring back the Glass–Steagall regime.[441] In the United Kingdom, in contrast, advocates proposed a system they called "ring-fencing."[442] Ring-fencing involved separating functions completely, but *within* a financial institution. Business lines—depository and investment banking, for example—would be completely separate and prohibited from cross-subsidizing one another. But the firm as a whole would still retain both lines of business.[443]

In the technology context, some have proposed a system of weak separations—essentially a ring-fencing model—for tech platforms. Kevin Xu, for example, has suggested that ByteDance adopt a system of role-based access and control under which its Chinese personnel would have no access to the financial information, technical information, code, and data of its U.S. business lines.[444] The U.S. operations would be completely siloed; engineers across the two countries would not even be able to share insights or review code for bugs

438. WILMARTH, *supra* note 124, at 121-48.

439. Menand, *supra* note 126, at 1549.

440. Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1959 (2020).

441. *See, e.g.*, Press Release, Sen. Elizabeth Warren, Senators Warren, McCain, Cantwell and King Introduce 21st Century Glass–Steagall Act (July 11, 2013), https://perma.cc/P6QP-W8LD.

442. Steven L. Schwarcz, *Ring-Fencing*, 87 S. CAL. L. REV. 69, 70 (2013).

443. *Id.* at 78-79.

444. Kevin Xu, *Can ByteDance Build Trust?*, INTERCONNECTED (June 18, 2020), https://perma.cc/WC36-YFCL.

and errors.[445] The main economic downside of a ring-fencing approach is that it may not be worth it for a company to go through the trouble of firewalling its business lines. Indeed, the firm might prefer to spin off a subsidiary. The main regulatory downside is that ring-fencing is more difficult to oversee compared to strong separation via a sale or spin-off.

In general, structural separations are likely to prove more administrable than ex post rules addressing problematic behavior. This does not mean, of course, that behavioral regulations are unnecessary. But the platform-utilities approach would start with clearer, structural rules.

3. Standards and interconnection

One of the main objections to structural separations, and especially outright bans, is that such rules are an unprecedented form of "net nationalism" that replicates the actions of authoritarian countries. This argument makes little sense. Restrictions are not unprecedented. As we have seen, they go back to the origins of the U.S. banking system and the earliest days of broadcast radio, maritime shipping, air transportation, and nuclear energy. They are also not designed to promote the interests of the governing party or the President. Indeed, because they are ex ante, generally applicable rules, they make it less likely that a specific president or party will abuse power under the guise of national security. This distinguishes foreign restrictions from tools in the authoritarian playbook. More importantly, it is simply incorrect to think that the only regulatory options are laissez-faire and authoritarianism. American political economy operates between these two extremes.

Restrictions on foreign tech platforms also do not mean isolationism. Rather, they mean global interconnection organized through transparent policies based on domestic and national security goals. The United States has an exclusively federal government–run postal service that prohibits both private and foreign carriage of mail,[446] but it is still possible to send a letter to the United States from Britain, France, or virtually anywhere else. Global financial transactions and communications are possible even with restrictions on foreign platforms in both sectors. Historically, global interactions have been possible because of standards and interconnection rules. A full history is beyond the scope of this Article, but there are international legal regimes and

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445. *Id.*

446. RICKS ET AL., *supra* note 31 (manuscript at ch. 6) (describing the law of the postal system, including the postal monopoly).

agreements governing transportation,[447] communications,[448] banking,[449] and energy production and transmission.[450] Each regime and agreement enables cross-border interaction while preserving "policy space" for domestic regulation.[451]

A platform-utilities approach would incorporate an agenda that sets standards internationally and ensures interconnection between countries. With close allies in some sectors, this might mean shared regulatory standards that make it easy for foreign firms to comply with U.S. regulations and obtain U.S. licensure. In other areas it might mean geographically limited firms, each regulated by their own government, with interconnection rules that enable cross-border flow. Ultimately, governments would still have the policy space they need to protect their national values and interests. But increased attention to international standards will be essential.

4. Public investment and public provision

If restrictions on foreign investment in a given sector are essential to preserving national security, such rules would naturally mean less foreign investment in U.S. tech platforms. It is unclear how detrimental this would be, especially given that there is considerable wealth within the country. But it is worth noting that the federal government has historically tried to address the investment problem through public investment and public provision. The New Deal involved the public financing and building of power plants, including major hydroelectric dams.[452] During the First and Second World

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447. *See, e.g.*, Convention for the Unification of Certain Rules Regarding International Transport, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11; Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. No. 13,038, 2242 U.N.T.S. 309.

448. *See, e.g.*, Constitution of the Universal Postal Union, July 10, 1964, 16 U.S.T. 1291, 611 U.N.T.S 7; *About International Telecommunication Union (ITU)*, INT'L TELECOMM. UNION, https://perma.cc/7634-TXFL (archived Feb. 23, 2022).

449. *See, e.g.*, DANIEL K. TARULLO, BANKING ON BASEL: THE FUTURE OF INTERNATIONAL FINANCIAL REGULATION 1-14 (2008) (discussing the Basel international-banking standards); DAVID ZARING, THE GLOBALIZED GOVERNANCE OF FINANCE 46-61 (2020) (same); *see also SWIFT History*, SOC'Y FOR WORLD INTERBANK FIN. TELECOMM., https://perma.cc/B226-2HZH (archived Feb. 23, 2022) (discussing the SWIFT system for cross-border payments).

450. *See, e.g.*, PAUL W. PARFOMAK & MICHAEL RATNER, CONG. RSCH. SERV., R41875, THE U.S.–CANADA ENERGY RELATIONSHIP: JOINED AT THE WELL 1-2 (2011), https://perma.cc/C6JH-FVF7.

451. *See* DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 97-98 (2011).

452. *See generally* JOHN A. RIGGS, HIGH TENSION: FDR'S BATTLE TO POWER AMERICA (2020) (describing New Deal power initiatives).

Wars, public investment helped build aircraft and Merchant Marine vessels, some of which could be decommissioned after the wars ended.[453] Federal research-and-development spending has similarly been foundational for many critical industries, particularly in the technology sector.[454]

Another possibility is direct public provision through a "public option."[455] Consider the banking sector as an example. At the turn of the twentieth century, during the same period that state and federal laws restricted entry into domestic retail banking, the federal government offered a public option for basic bank accounts through the postal system. From 1911 to 1966, the Postal Savings System allowed Americans to deposit relatively small amounts of money at their nearest post office.[456] In recent years, with the rise of new payment platforms (both foreign and domestic), some banking scholars have called for the creation of "FedAccounts," a central-bank digital currency that would ensure public access to bank accounts and facilitate fast and free payments.[457]

Public investment and public options can thus complement regulation by ensuring the provision of key services without relying on foreign capital or foreign firms.

C. TikTok and the Future of Platform Regulations

Together, these four elements—sectoral regulations, structural separations, standards and interconnection, and public investment and provision—offer a third regulatory approach. This platform-utilities approach can be applied to tech platforms such as TikTok either via legislation or regulation.

453. On World War II, see generally MARK R. WILSON, DESTRUCTIVE CREATION: AMERICAN BUSINESS AND THE WINNING OF WORLD WAR II (2016) (describing U.S. efforts to mobilize industry for the war effort). On World War I, see *id.* at 8, 11, 16. On decommissioning, see generally GREG H. WILLIAMS, WORLD WAR II U.S. NAVY VESSELS IN PRIVATE HANDS (2013) (discussing vessels used for commercial and recreational purposes after World War II).

454. *See* MAZZUCATO, THE ENTREPRENEURIAL STATE, *supra* note 86, at 79-178.

455. *See* GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY 27-30 (2019).

456. *See* Mehrsa Baradaran, *A Short History of Postal Banking*, SLATE (updated Aug. 19, 2014), https://perma.cc/Q6Y2-DMTW (recounting the history of the Postal Savings System). *See generally* EDWIN W. KEMMERER, POSTAL SAVINGS (1917) (describing the origins of the Postal Savings System).

457. John Crawford, Lev Menand & Morgan Ricks, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113, 122-32 (2021).

1. IEEPA, CFIUS, and legislative reforms

First and foremost, it is worth noting that existing statutory frameworks are legally limited and have been used primarily as part of a technocratic, case-by-case strategy. The Trump Administration relied on two legal authorities to address TikTok and other Chinese apps. The first was the CFIUS review process. A company can inform CFIUS of a merger, takeover, or investment in a U.S. firm, or CFIUS can initiate a review on its own.[458] The CFIUS process, however, concerns only foreign investments of specific types.[459] For a tech platform that does not acquire, merge with, or invest in a U.S. company, CFIUS review does not apply. Mere presence in the United States does not trigger CFIUS review. In the case of TikTok, for example, had Chinese-owned ByteDance not acquired U.S. company Musical.ly, the CFIUS process would not have applied.[460] This is clearly a limitation of the CFIUS framework. Observe also that CFIUS is *designed* to provide case-by-case review and tailored remedies.

The other authority was IEEPA,[461] which also has significant legal and practical limitations that the TikTok example illustrates. Under IEEPA, the President has the power to declare a national emergency to address "any unusual and extraordinary threat."[462] After an emergency is declared, IEEPA allows the President to regulate or prohibit transactions involving the property of a foreigner subject to U.S. jurisdiction.[463] Congress has, however, limited the scope of this vast power with respect to "any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value."[464] The President also cannot regulate, directly or indirectly, "any information or informational materials" regardless of format or medium of transmission.[465] The information exception, created in 1988 with the Berman Amendment, was intended to be broad and emerged in

458. *See* Office of Investment Security; Guidance Concerning the National Security Review Conducted by CFIUS, 73 Fed. Reg. 74,567, 74,568-69 (Dec. 8, 2008).

459. *See* 50 U.S.C. § 4565(a)(4)(B). *See generally* JACKSON, *supra* note 76, at 12-34 (providing an overview of the criteria and standards for CFIUS review).

460. *See* Robert Chesney, *TikTok and the Law: A Primer (In Case You Need to Explain Things to Your Teenager)*, LAWFARE (Aug. 2, 2020, 4:07 PM), https://perma.cc/3Q3A-ST5N (describing the applicability of the CFIUS process to TikTok).

461. 50 U.S.C. §§ 1701-1706.

462. *Id.* § 1701(a).

463. *Id.* § 1702(a)(1)(B).

464. *Id.* § 1702(b)(1).

465. *Id.* § 1702(b)(3).

response to "'several seizures by the United States of shipments of magazines and books' from countries subject to trade embargos."[466]

President Trump's executive order on TikTok cited his authority under IEEPA, and it prohibited U.S. transactions with ByteDance.[467] The order was quickly challenged in court, and in *Marland v. Trump*, Judge Wendy Beetlestone of the Eastern District of Pennsylvania invoked the information exception to enjoin the Department of Commerce's implementing actions.[468] After analyzing the Trump Administration's arguments that the President had authority under IEEPA and that the information exception did not apply, Judge Beetlestone concluded that the Berman Amendment created an "IEEPA-free zone" with respect to informational materials.[469] The information exception thus likely precludes the President from taking action against foreign communications platforms like TikTok even under IEEPA's expansive authority.

Taking a page from the history of platform regulation, Congress could adopt legislation to address some of the limits of CFIUS and IEEPA—and adapt the platform-utilities paradigm to tech platforms in various sectors. First, Congress would need to consider passing sectoral regulations that apply to foreign tech platforms. Such regulations would engage the particular issues raised by foreign platforms in a given sector (for example, payment systems or telecommunications) in addition to general data issues. Questions about data could be addressed either via a trans-sectoral data privacy and security law or through sector-specific laws—again, depending on the particular challenges at issue in each sector. This approach would also allow Congress to address the Berman exception to IEEPA without a blanket delegation of discretionary authority to the President. And the approach could apply generally to activities within the United States, not merely to new investment and mergers like the CFIUS review process.

General sectoral rules could be designed to apply to every firm (domestic or foreign), or if there are particular dangers of foreign ownership and influence, rules could apply to all foreign tech platforms in the sector.[470] More

466. Marland v. Trump, 498 F. Supp. 3d 624, 629-30 (E.D. Pa. 2020) (quoting United States v. Amirnazmi, 645 F.3d 564, 584 (3d Cir. 2011)), *appeal dismissed*, No. 20-3322, 2021 WL 5346749 (3d Cir. July 14, 2021).

467. Exec. Order No. 13,942, 3 C.F.R. 412, 412-13 (2021).

468. 498 F. Supp. 3d at 636-41, 645.

469. *Id.* at 641.

470. Of course, Congress could always provide federal regulators with the authority to conduct individualized reviews if new national security concerns arise. This system would have the same technocratic problems described in Part I.B above, but with one difference: Under the platform-utilities approach, individualized review would be a last resort for exceptional cases. This is because sector-based rules would resolve national security concerns for most firms in most instances.

narrowly, Congress could require that the rules apply only to platforms from countries designated as "adversaries."[471] This could have the strategic advantage of exempting close allies from regulation and allowing the United States to cooperate with them, although it would have the downside of potentially increasing tensions with designated countries.

Legislation along these lines would have significant benefits. It would operate ex ante, rather than after the fact; it would create greater clarity, notice, and transparency for firms; it would be more administrable than case-by-case assessments, plans, and monitoring; it would offer a clear statement of legislative intent; and it would provide legitimacy through a comprehensive statutory regime.

2. The presidential regulation of foreign tech platforms

Even without congressional action, there is still a path forward for the platform-utilities approach through regulation. Despite the limitations of IEEPA and CFIUS, the Trump and Biden Administrations have used executive authority to build a legal foundation for the ongoing regulation of foreign tech platforms. In 2019, President Trump issued Executive Order 13,873, "Securing the Information and Communications Technology and Services Supply Chain."[472] The order prohibits the operation of a foreign adversary's information and communications technologies when the Secretary of Commerce, in consultation with other department and agency heads,[473] determines that they endanger national security.[474] Specifically, the Secretary must evaluate whether the foreign adversary's technology "poses an undue risk of sabotage to or subversion of" U.S. information and communications technologies and services; whether it "poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the digital economy"; or whether it "otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons."[475] The Secretary also has the power to (1) "design or negotiate

471. Congress could either make the determination of which countries are adversaries itself or rely on the determinations of the executive branch. The latter is the current practice. *See* Exec. Order No. 13,873, 3 C.F.R. 317 (2020). Congress could also (or alternatively) establish a regime in which it classifies some countries as nonadversaries, effectively giving ex ante approval to investment from specified nations.

472. *Id.*

473. These officials include the Secretaries of State, Defense, Homeland Security, and the Treasury; the Attorney General; the U.S. Trade Representative; the Director of National Intelligence; the Administrator of General Services; and the Chairman of the FCC. *Id.* at 318.

474. *Id.*

475. *Id.*

measures to mitigate" these concerns, including as a precondition to operation within the United States;[476] and (2) issue "[r]ules and regulations" that determine which countries or persons are covered, which technologies are included, and what criteria and licensing procedures apply.[477]

Although the Biden Administration revoked President Trump's executive orders on TikTok, WeChat, and other Chinese apps, it has built upon the framework of Executive Order 13,873. In Executive Order 14,034,[478] President Biden ordered the Secretary of Commerce to consider the dangers of data collection by "connected software applications" under the Secretary's Executive Order 13,873 obligations.[479] Executive Order 14,034 requires "rigorous, evidence-based analysis" and offers multiple factors for the Secretary to consider, including connections to foreign governments and militaries; the use of data for surveillance and espionage; a foreign adversary's ownership, control, and management; and the presence of independent and reliable auditing.[480] Recall that Executive Order 13,873 prohibits technologies from operating in the United States if the Secretary finds that they threaten national security. The Biden order does not change that fundamental position: Chinese tech platforms are still subject to bans if the Secretary of Commerce finds that they imperil national security.

Because Executive Order 13,873 creates a default rule of prohibition and allows case-by-case bans, ex ante licensing, and rulemaking, it gives significant discretion to the Secretary of Commerce to develop a new framework for the regulation of foreign tech platforms. It is unclear, as of this writing, how exactly that authority will be exercised. The Department of Commerce could take a light-touch, tech-neoliberal approach and effectively permit all foreign tech platforms. It could take a technocratic approach and make case-by-case, firm-specific determinations. But it could also use its rulemaking powers to

476. *Id.*

477. *Id.* at 319.

478. Exec. Order No. 14,034, 86 Fed. Reg. 31,423 (June 11, 2021).

479. *Id.* at 31,424-25.

480. *Id.* at 31,423. The full, and long, list of factors includes:

> ownership, control, or management by persons that support a foreign adversary's military, intelligence, or proliferation activities; use of the connected software application to conduct surveillance that enables espionage, including through a foreign adversary's access to sensitive or confidential government or business information, or sensitive personal data; ownership, control, or management of connected software applications by persons subject to coercion or cooption by a foreign adversary; ownership, control, or management of connected software applications by persons involved in malicious cyber activities; a lack of thorough and reliable third-party auditing of connected software applications; the scope and sensitivity of the data collected; the number and sensitivity of the users of the connected software application; and the extent to which identified risks have been or can be addressed by independently verifiable measures.

Id.

establish sector-specific regulations that are attentive to sectoral dynamics. The three models identified in this Article thus remain live options for the regulation of tech platforms. As the Department of Commerce moves forward, it can—and should—take a lesson from the long tradition of restrictions on foreign platforms and consider the creation of ex ante, sectoral, and structural regulatory regimes as it implements these executive orders.

Conclusion: The TikTok Trilemma

Economist Dani Rodrik once argued that there is a "trilemma of the world economy."[481] Rodrik wrote that "democracy, national sovereignty and global economic integration are mutually incompatible: we can combine any two of the three, but never have all three simultaneously and in full."[482] The debate over TikTok is, in some ways, a version of Rodrik's trilemma—a TikTok Trilemma. Tech neoliberals want to combine American democratic values with global economic integration. But the only way to do so is to erase national sovereignty and impose those values on nation-states that do not share them.

National security technocrats seek to navigate the trilemma by placing the minimum necessary restrictions on global economic integration in light of democratic imperatives. But their attempt to do so requires regulators to balance a dizzying array of factors in order to assess dangers and remedies, develop particularized solutions on a case-by-case basis, and engage in ongoing audits and monitoring to ensure compliance. There are strong reasons to believe this approach will not be successful in achieving its national security goals. There are many risk–risk tradeoffs, a constellation of policy alternatives whose adoption influences the degree of risk, and the problem that focusing on particular threats can undervalue systemic dangers. At the same time, a technocratic approach presents significant administrability challenges that proponents do not consider. Technocratic solutions are thus also unlikely to successfully manage the trilemma.

What is needed is a different paradigm for addressing foreign tech platforms. Some of the most interesting recent efforts in tech regulation have drawn principles from public-utility, infrastructure-industry, and regulated-industry law. This Article has shown that foreign-platform restrictions have been common in the banking, communications, transportation, and energy sectors. That history offers an approach to restrictions on tech platforms that differs significantly from the tech-neoliberal and technocratic national security paradigms—and is less likely to suffer from the downsides of those

481. Dani Rodrik, *The Inescapable Trilemma of the World Economy*, DANI RODRIK'S WEBLOG (June 27, 2007, 8:49 AM), https://perma.cc/KFY6-4HMT.

482. *Id.*

approaches. The platform-utilities paradigm emphasizes the legitimate authority and longstanding practice of regulating platforms that raise distinctive political-economy concerns. In rebalancing toward the democratic regulation of platforms, it offers an alternative approach to navigating the TikTok trilemma.