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## Markets, Elites, and Information Technology in the Internet Age

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## MARKETS, ELITES, AND INFORMATION TECHNOLOGY IN THE INTERNET AGE

Gregory P. Nowell

DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (PRINCETON UNIVERSITY PRESS 2016). Pp. 312. HARDCOVER \$29.95.

MARK R. PATTERSON, *ANTITRUST LAW IN THE NEW ECONOMY: GOOGLE, YELP, LIBOR, AND THE CONTROL OF INFORMATION* (HARVARD UNIVERSITY PRESS 2017). Pp. 336. HARDCOVER \$45.00.

Ideally, these two books would portray two intertwined elements of world political economy: Patterson's would provide a detailed introduction to the thorny issues around antitrust law and the control of information. Kennedy's would provide a portrait of how international elites vie for the power and influence to shape outcomes in these and other domains. Patterson's book delivers; Kennedy's book disappoints, so the pairing is not as synergistic as one might wish.

Kennedy's *World of Struggle*<sup>1</sup> addresses a long, well-established social science topic: elites in the world order; the unsurprising thesis is that there is a great deal of conflict among international elites. In another time, a personal memoir of a career dealing with important people and important issues would meaningfully contribute to our understanding of global politics. But this is an effort to turn personal ruminations into social science. Kennedy's work does not situate itself against other studies of elites in politics, and it neither offers nor refutes a clear thesis (an example of a clear thesis about elites is Robert Michels' "iron law of oligarchy"<sup>2</sup>).

Nor do we get case studies that would give flesh to the generalities. Kennedy seems ready to tip in this direction in Chapter 4: he proposes three case studies of "expert communities." The three cases are (1) Public international lawyers in the U.S. after World War II; (2) Human rights advocates in the West after 1980; and (3) "Specialists in development policy who draw on legal and economic materials," the time period

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1. DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016).

2. ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (1911).

unspecified.<sup>3</sup> However, if you think you are going to get the names of public international lawyers and their important cases after World War II, you are in for a disappointment. There is no chapter on human rights advocates, nor is there a chapter on development economics and its controversies, by which I mean, a chapter that shows patterns of elite argumentation on something identifiable, whether the General Agreement on Tariffs and Trade or the desirability of hydroelectric projects in Brazil and Egypt. Kennedy's apparent goal is to say that within specialties there emerge patterns of argument that are generalizable across all cases; he refers to "a grammar of arguments."<sup>4</sup> But this book shows no evidence of how to create such case studies or how case studies are used as the basis for broader generalizations. Figure 5-4 offers a scintilla of promise; in this table about development experts, Kennedy cites clusters of well-known economists in one column, and then associates them with clusters of policy objectives, policy instruments, and legal expertise.<sup>5</sup> If Kennedy had produced similar tables for "public international lawyers" and "human rights advocates," and most importantly, fleshed out the table summary with a chapter of historical and textual analysis showing real people fighting over real cases, we would have a book that at its best could be intriguing and brilliant; and at its worst, it would be very useful, because the case studies would serve those interested in learning about the three areas.

The book, unfortunately, is also essentially bereft of methodology. Kennedy briefly discusses his techniques: "My own next step has usually been to spend time with these people, observing their modes of work, listening to their style of argument, and reading the materials they produce."<sup>6</sup> However, we never find out who "these people" are: not by name, not by country, not by income, not by rank or position or types of organizations that employ them, nor how many. We never find out what materials "they" produced, because these materials are never cited; nor are we offered textual excerpts from the different materials that would empirically demonstrate a similar grammar of argument across the three specialties. In short, this book about international elites does not define 'elites' in general, nor does it name the elites it purportedly studies; nor does it examine whether there is a difference between international elites and national elites.

And the more's the pity. Since global elites are an important topic, let me name a few studies that at least provide a spectrum of methodologies and perspectives. At the level of concrete case studies of international elites, let me mention Keck and Sikkink on transnational movements<sup>7</sup> or Haas on epistemic communities.<sup>8</sup> These are solid empirical works that advance our understanding of the international arena and elites. At the level of elite studies that have essentially become classics of political theory, there is of course

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3. KENNEDY, *supra* note 1, at 120.

4. *Id.* at 144.

5. *Id.* at 142, fig.5-4.

6. *Id.* at 124.

7. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

8. PETER M. HAAS, *SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION* (1990).

Michels' *Political Parties*<sup>9</sup> and Mosca's *The Ruling Class*.<sup>10</sup> And of course Mills' *The Power Elite*<sup>11</sup> offers a sociology of power and how it affects ideology and decision making. Mosca, Michels, and Mills may not be specifically "global" theorists but they certainly offer models of how to approach today's Davos global elites. I mention last Van der Pijl's *The Making of an Atlantic Ruling Class*,<sup>12</sup> which seems to me the most on point: here we have a study of an evolving pattern of contested transnational governance, that is to say, the elites are in conflict, which is among Kennedy's concerns. Since Kennedy makes no reference to antecedent studies of elites and how he seeks to extend or refute their ideas, *A World of Struggle* becomes a mish-mosh with no compelling theoretical statement and no compelling empirical cases; it amounts to a very unmemorable read.

By contrast, Patterson's *Antitrust Law in the New Economy* is smart, useful, frustrating, informative, and worrisome.<sup>13</sup> If you are a lawyer or a professor interested in antitrust cases, this is a book to get—it will be a valuable resource and is worth every penny. It advances detailed analysis of specific cases and legal opinions related to information technology. The author carefully walks through cases, analogies, and precedents. To the non-lawyer these same virtues can be hard to push through, and the disciplined focus on legal principles becomes frustrating and worrisome. There is a vast technological transformation of human civilization that oozes in and around this legal narrative, and the worries come from the non-legal implications that are woven around Patterson's analyses.

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or on some contrivance to raise prices."<sup>14</sup> Smith's *Wealth of Nations* posits the notion that a conspiracy against the public—as opposed to a natural condition in which prices are set—is the bedrock conceit of antitrust theory, whether as articulated by Smith in 1776 or today.

That is, the notion of antitrust is co-existent with the development of capitalism. Smith's *Wealth of Nations* is not just about how capitalism works, but how it evolved against feudalism. The trade restrictions of avaricious lords held back the development of a capitalist economy: their grasping reach curtailed the development of wealth in general. The long feudal stagnation was overthrown by an alliance of monarchies with slowly developing capitalist interests in the towns. The good news was that the aristocracy's influence over the economy was decreased. The bad news is that the restriction of that power led to very tight networks between capitalist interests and the state. Market privileges were doled out to the favored few; those not so favored were placed at a distinct competitive disadvantage. Cartel pricing, and the use of political power for the market benefit of one at the expense of another, were the norm. That is mercantilism. The only way to stop mercantile regulation, said Smith, was through legislative intervention; he imagined that a virtuous parliamentary landed gentry would legally enforce competitive

9. MICHELS, *supra* note 2.

10. GAETANO MOSCA, *THE RULING CLASS* (Hannah Kahn trans., 1939).

11. C. WRIGHT MILLS, *THE POWER ELITE* (1956).

12. KEES VAN DER PIJL, *THE MAKING OF AN ATLANTIC RULING CLASS* (1984).

13. MARK R. PATTERSON, *ANTITRUST LAW IN THE NEW ECONOMY: GOOGLE, YELP, LIBOR, AND THE CONTROL OF INFORMATION* (2017).

14. ADAM SMITH, *THE WEALTH OF NATIONS* 117 (Dutton and Co. 1910) (1776).

norms.<sup>15</sup> These arguments about Smith are laid out very well in McNally's *Political Economy and the Rise of Capitalism*.<sup>16</sup>

Weighed against history, free competition is an artificial construct, an ideological position, if you will, of those excluded from protected economic privileges against those who have them. And it has always been this way. So the "natural state" of capitalism is collusion, cartels, and discriminatory regulation. Therefore, part of the history of antitrust law is how the natural state of collusion manages to reproduce itself in the legal system designed to control it. As an example, Patterson discusses reverse payments in the drug industry, where pharmaceutical producers pay other potential producers not to infringe on their monopolistic market.<sup>17</sup> The complexity of antitrust theory is that it is, first of all, precedent based and thus dips into almost every aspect of business endeavor for analogies. But the other level of complexity is that it is very hard to master the precedent-based cases and at the same time keep in view the notion of preserving fair competition, as well as the public interest, given that the two are not always the same.

Patterson's search for relevant legal precedent becomes a review of the history of technology and market power struggles among firms for the last 100 years or so. Reading them, it is hard not to yearn for simpler days, when oil companies colluded in their domain, and steel companies in theirs. But our private lives were our own. No matter whether today's information technology practices are adjudged competitive or anti-competitive, their scale and reach are stupendous. One wishes their actions could be *merely* a "conspiracy against the public."

The market rigging behind the LIBOR (London Interbank Offered Rate) is a classic insider price rigging scheme where the technical complexity helps shield participants from discovery.<sup>18</sup> Railroads and oil companies once jiggered their prices through the basing point system; the bankers discovered they could manipulate LIBOR. That such manipulation requires *information* is true enough; but it is true in the sense that people who know what they are doing in an industry are always best positioned to craft desired outcomes. The discussion of LIBOR does not take us too far afield from the analyses we might find in mid-twentieth century classics such as Hexner's *International Cartels*<sup>19</sup> (which is very rich on patent law) and Machlup's *Political Economy of Monopoly*<sup>20</sup> (which raises the possibility that patents should be done away with entirely). The discussion of Yelp is interesting but not critical; Yelp is really a minor player on today's internet. The exploration of Google's monopoly travails, however, opens up many interesting themes.

Patterson expands upon Rubinfeld and Maness's idea of a "patent thicket" which the large corporations buy up—bundles of tens of thousands of patents, which they can deploy against competitors.<sup>21</sup> Neither the owners of the patent bundles nor the competitors under

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15. *Id.* at ch. 13.

16. DAVID MCNALLY, *POLITICAL ECONOMY AND THE RISE OF CAPITALISM: A REINTERPRETATION* (1988).

17. PATTERSON, *supra* note 13, at 187.

18. *Id.* at 92–93.

19. ERWIN HEXNER, *INTERNATIONAL CARTELS* (1946).

20. FRITZ MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* (1952).

21. PATTERSON, *supra* note 13, at 200; DANIEL L. RUBINFELD & ROBERT MANESS, *The Strategic Use of Patents: Implications for Antitrust*, in *ANTITRUST, PATENTS, AND COPYRIGHT: EU AND US PERSPECTIVES* 89–91 (Francois Leveque & Howard Shelanski eds., 2005).

legal threat actually know what is in these bundles. The relevance and theoretical violations of these patents have to be litigated, and if one litigation effort fails, the patent bundle owners reaches into its bundle and begins anew an infringement suit, indefinitely. Companies like Microsoft, Google, Amazon, Apple, etc., have ample litigation funds to make competitors see the light about paying a licensing fee. The legal system that is supposed to guarantee “due process” and maintain competition becomes, instead, a weapon of market control.

In this book, the nominal focus on the title cases leads inevitably to related cases, such as Microsoft’s patents.<sup>22</sup> At the simplest level for Google, one that has been the object of ongoing litigation, is the order in which it displays search results. Corporations that pay Google advertising fees rise higher in the hierarchy of returned search listings than those who do not, according to critics.<sup>23</sup> This may be obvious, in the form of paid advertisements, but it may also arise in what appear to be nominally “objective” search results.

Consider a search on a cooling fan for a desktop computer case. Doing a Google “All” search tends to direct one to various emporia (Newegg, Tiger Direct, Amazon) as well as stores (Walmart) and manufacturers (Corsair, Cougar, Cooler Master). One can do a Google “shopping” search and thousands of individual fans (many manufacturers and models) will be offered. Each individual fan will have a hierarchical listing of vendors, up to several dozen. Of these vendors, two or three are immediately put before the eye. For the rest you have to click through. Buyers’ ratings of the vendors, which are almost invariably big established firms, propel them to first place over the “Mom and Pop” EBay listings, which often have no ratings at all.

But do these buyers’ ratings accrue to the big firms because name recognition drives business to them? Or do they accrue because Google, accepting payment, has arranged for these big firms to surface in conspicuous positions? That is hard to know. Are the algorithms inherently unfair?

One might head for Amazon and skip Google. In Amazon, one is in a controlled marketplace which directs searches exclusively to vendors who are members. The Amazon emporium is so vast that search results for gadgets are almost as exhaustive as on Google. And Amazon has a number of tricks up its sleeve to get customers into their emporium: popular television shows that are only available to Amazon Prime members and Whole Foods discounts that are likewise only available to Amazon Prime members, to name just a couple. When you pay your \$100 annual fee to Amazon for the “free shipping” offer that goes with it, you suddenly have an interest in making sure your next purchase is from Amazon. Keeping track of when you break even with money paid and money saved is a chore. It is easiest just to keep going back to Amazon to get maximum value from your membership. Once in the Amazon all-encompassing emporium, you might never want to go to EBay or do a Google search again. You may spend a lot less time with Netflix or HBO, and forsake as well the local supermarket. The immense diversification of Amazon’s activities is key to its market dominance: one might prefer to buy computer parts and electronics from Newegg or Tiger Direct, which are also (comparatively tiny) emporia,

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22. PATTERSON, *supra* note 13, at 201.

23. *Id.* at 79–80.

but neither Newegg nor Tiger Direct can offer, wrapped into an annual shipping charge, exclusive access to online entertainment and discounts at a store like Whole Foods. Even if these lesser emporia manage to sell a twenty dollar computer fan to you for a buck or two less, does it matter?

Google's alleged rank-ordering practices may be related, in some ways, to the single-market dominance of major urban newspapers in advertising before the internet era.<sup>24</sup> Connections between older case law and current issues are Patterson's strong point. But it is just a leaf on top of the flood: the relevance of antecedent caselaw in newspapers to Google's advertising practices is important to the antitrust lawyer. Yet it is Craigslist, charging mainly for employment listings in only six American cities, that eviscerated the classified ads in *all* the nation's newspapers. A core source of newspaper funding collapsed. If only we could go back to the good old days where every city had a thriving monopolistic newspaper! That system paid for good journalism, such as we see less and less.

The ultimate monopolistic threats lie, it seems, less in market control than in amassing great hordes of data. Run-of-the-mill businesses like car companies and airlines are going to find themselves beholden to the information masters and what they charge to release their data. The amount of information gathered about us is not only greater than we imagine, it is greater than we *can* imagine. We-Vibe, a company that markets sexual toys, recently agreed to pay out \$3.2 million in damages for using Bluetooth technology to gather live data, without prior notice or consent, from customers using their products.<sup>25</sup> Roomba's cute vacuum robots are set to map users' homes and sell the map data to such buyers as Amazon, Alphabet (Google), and Apple.<sup>26</sup> Who could think these things up?

Dynamic pricing is being coupled with behavioral psychology, and now it is not merchants conspiring to raise prices, but their computer programs. A real-time gasoline pricing tool marketed by a2i Systems in Holland, for example, received a complaint from a gasoline station owner that the program had not marked down his station's prices in response to a sale at the station across the street. But the program was correct: it accurately determined that long waiting times at the bargain-priced station would discourage buyers and send many of them across the street where they would be willing to pay more. To take advantage of this anticipated influx, the computer program raised prices, all the while calculating the perfect margin that would allow the revenue from increased markup to exceed the revenue lost to decreased sales volume.<sup>27</sup> Is this Smith's "conspiracy against the public" or merely a fiendishly clever and altogether legal practice? The lower-priced competitor is right across the street. All you have to do is wait in line. The bottom line is, we do not have a chance. Our actions are not only surveilled, as in Orwell's *1984*, but our

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24. *Id.* at 118–27.

25. Alex Hern, *Vibrator Maker Ordered to Pay Out C\$4m for Tracking Users' Sexual Activity*, GUARDIAN (Mar. 14, 2017), <http://www.theguardian.com/technology/2017/mar/14/we-vibe-vibrator-tracking-users-sexual-habits>.

26. Alex Hern, *Roomba Maker May Share Maps of Users' Homes with Google, Amazon or Apple*, GUARDIAN (July 25, 2017), <https://www.theguardian.com/technology/2017/jul/25/roomba-maker-could-share-maps-users-homes-google-amazon-apple-irobot-robot-vacuum>.

27. Sam Schechner, *Why Do Gas Station Prices Constantly Change?*, WALL ST. J. (May 8, 2017), <https://www.wsj.com/articles/why-do-gas-station-prices-constantly-change-blame-the-algorithm-1494262674>.

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reactions are anticipated by behavioral models. And it is all fully automated, too.

The future promises to generate a lot of work for antitrust lawyers, and Patterson's book is a major guide to complex terrain. But the downside of the book is that, while reading it, one becomes attuned to the vast implications of a wholly cybernetic society: not just the issues in the book, but those that are popping up every day in the news. Our prospects are not good, not just in terms of the chimerical search for a competitive market, but in terms of preserving elements of human identity that many of us grew up taking for granted.