

Submission for: U.S. DOJ Antitrust Division 3-14-18 Roundtable on Antitrust Exemptions & Immunities

A Market Divided

U.S. Internet Policy Creates Anticompetitive Asymmetric Accountability.

Government exemptions and immunities overwhelmingly favor regulatory arbitrage over free market competition. Accountability arbitrage harms: consumer welfare; free market forces; the process of competition; and economic growth.

(Note: A new causation model explains the anticompetitive arbitrage effects of asymmetric accountability.)

**U.S. Internet-first, industrial policy in the 1996 Telecom Act effectively [exempts](#) only Internet companies from: all U.S. communications law, regulation, and public responsibilities; most non-communications Federal/State regulation; and civil liability for whatever happens via their platforms and business models.*

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By Scott Cleland

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The views expressed in this presentation are the author's; see Scott Cleland's full biography at: www.ScottCleland.com.

Precursor LLC is an internetization consultancy serving Fortune 500 clients, some of which are Google competitors.

NetCompetition® is a pro-competition e-forum supported by broadband interests.

Executive Summary

- DOJ Antitrust Division [concerns](#) about government exemptions and immunities undermining “*a well-functioning free-market economy*” and “*the unrestrained interaction of competitive forces [that] yields the best allocation of economic resources*” – are well founded.
- America’s twenty-year-old, Internet-first Industrial-policy has exempted and immunized Internet platforms from most law, regulation, and accountability that their competitors must obey. This exceptional distortion of America’s free market competition, has resulted in the upside-down antitrust outcome, where the distribution networks with the most scale, scope, reach, network effects, market power, and competition complaints in modern history, appear to be enjoying minimal antitrust scrutiny currently from the DOJ and FTC.
- This DOJ filing spotlights **the problem of anticompetitive asymmetric accountability**, where only Internet companies are exempted from: all U.S. communications law, regulation, and public responsibilities; most Federal and State regulation; and most civil liability for whatever happens on their platforms.
- Regulating similar distribution networks oppositely, massively favors regulatory arbitrage strategies over free market competition. This is especially problematic because arbitrage is generally unproductive, speculative, or parasitic activity, and not generally economic investment or real value creation.
- **What’s innovative here is a first-of-its-kind causation model for asymmetric accountability.** It shows how asymmetric game rules and playing field incents arbitrage, and generates unfair predetermined winners and losers. The causation model also shows how arbitrage distorts the process of competition and depresses growth.
- Next are the effects of encouraging regulatory arbitrage, i.e. harms to: 1) consumer welfare; 2) free market forces; 3) the process of competition from Google, Facebook, and Amazon’s bottleneck distribution control over offline supply and online demand; and 4) economic growth.
- Finally the **recommended solution is new legislation that ensures equal accountability under the law**, with one consumer centric, and technology-neutral, communications standard and one equal accountability policy; and one antitrust enforcement policy that ensures no real or implied antitrust immunity for Internet platforms.

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- B. Accountability Arbitrage Distorts the Process of Competition
- C. Accountability Arbitrage Depresses Overall Revenue Growth

III. EFFECTS – Harms

- A. Harms to Consumer Welfare
- B. Distortions of Market Forces
- C. Harms to the Process of Competition
- D. Depressing effect on Revenue/Economic Growth

IV. SOLUTION – Equal Online-Offline Accountability Under the Law

- A. Equal Online-Offline Accountability Under the Law (including Antitrust)

PROBLEM: Asymmetric Accountability

U.S. Internet [Policy](#):

1. Exempts only Internet firms from all [FCC](#), laws, regs, costs, and duties;
2. Exempts only Internet firms from most Federal and State regulation in Section [230](#); and
3. Immunizes Internet firms from liability for harms on their platform or from their biz model, under Section [230](#).
 - Note: The Internet Association’s 2016 Policy [Platform](#) explained that section 230 provides “*essential liability protections that have allowed Internet platforms to scale and diversify*” via a “*shield... from liability*” that affords no “*requirements to police their users actions.*”

IMPORTANT – Antitrust laws are explicitly unaffected by the exemptions and immunities above in the 1996 Telecommunications [Act](#) and section [230](#).

- “Section 601... (b) ANTITRUST LAWS.— (1) SAVINGS CLAUSE.— Except as provided in paragraphs (2) and (3), **nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.**” [Bold added for emphasis.]

Regulating Similar Distribution Networks Oppositely Begg Reg-Arbitrage & Monopolization

Why do distribution networks with most scale, scope, reach, network effects & market power; get the least regulatory/antitrust scrutiny?

Communication Distribution Networks Are FCC-Regulated

Radio, Telecom, TV, satellite, cable, wireless, & broadband firms
Are, or Can Be, Subject to Legacy FCC Public Interest Duties & Laws

Competition Enforcement

US Ownership limits for cable, TV, radio & newspaper firms
Mergers reviewed by DOJ & the FCC public interest test
Competitive measures/performance determine regulation

National Security/Law Enforcement

Must comply with FBI-CALEA/FISA-national security warrants
Must comply with state & local law enforcement authorities

Public Safety Duties

Subject to homeland security, emergency preparedness regs

Privacy Enforcement

Subject to wiretap, telecom, wireless, video privacy/data regs

Public Interest Obligations

Subject to FCC indecency, EEO, localism, and children regs
FCC election ad discount, reporting, & transparency duties
Subject to reasonable network & non-discrimination duties
Infrastructure rights of way and local franchise obligations

Internet Distribution Networks Are Unregulated by FCC

Google, Facebook, Amazon, & Internet Association are unregulated
& Section 230-Immunized from FCC Accountability to public

No Competition Enforcement

No ownership/partnership limits to ensure diversity of views
Only FTC reviews mergers with implied section 230 immunity
No behavior, performance, or action risks FCC enforcement

No National Security/Law Enforcement

Claim immunity from FBI-CALEA/FISA-national security duties
Claim immunity from state/local law enforcement authorities

No FCC Public Safety Duties

Claim immunity for hosting sex trafficking & terrorist content

No FCC Privacy Enforcement

Ignore wiretap/privacy laws, immunized recording/using data

No FCC Public Interest Obligations

No FCC indecency, EEO, children/consumer protection duties
No election ad discount, reporting, & transparency duties
No reliability, reasonable network, non-discrimination duties
No cloud infrastructure rights of way or local franchise duties

Asymmetric Accountability Arbitrage Causation Model

Asymmetric Game Rules and Playing Field Incent Arbitrage, Generate Unfair Predetermined Winner & Loser Outcomes.

Unfair Game Rules/Playing Field of Asymmetric Rules/Fuels/Tools:

RULES: Only U.S. Internet Policy:

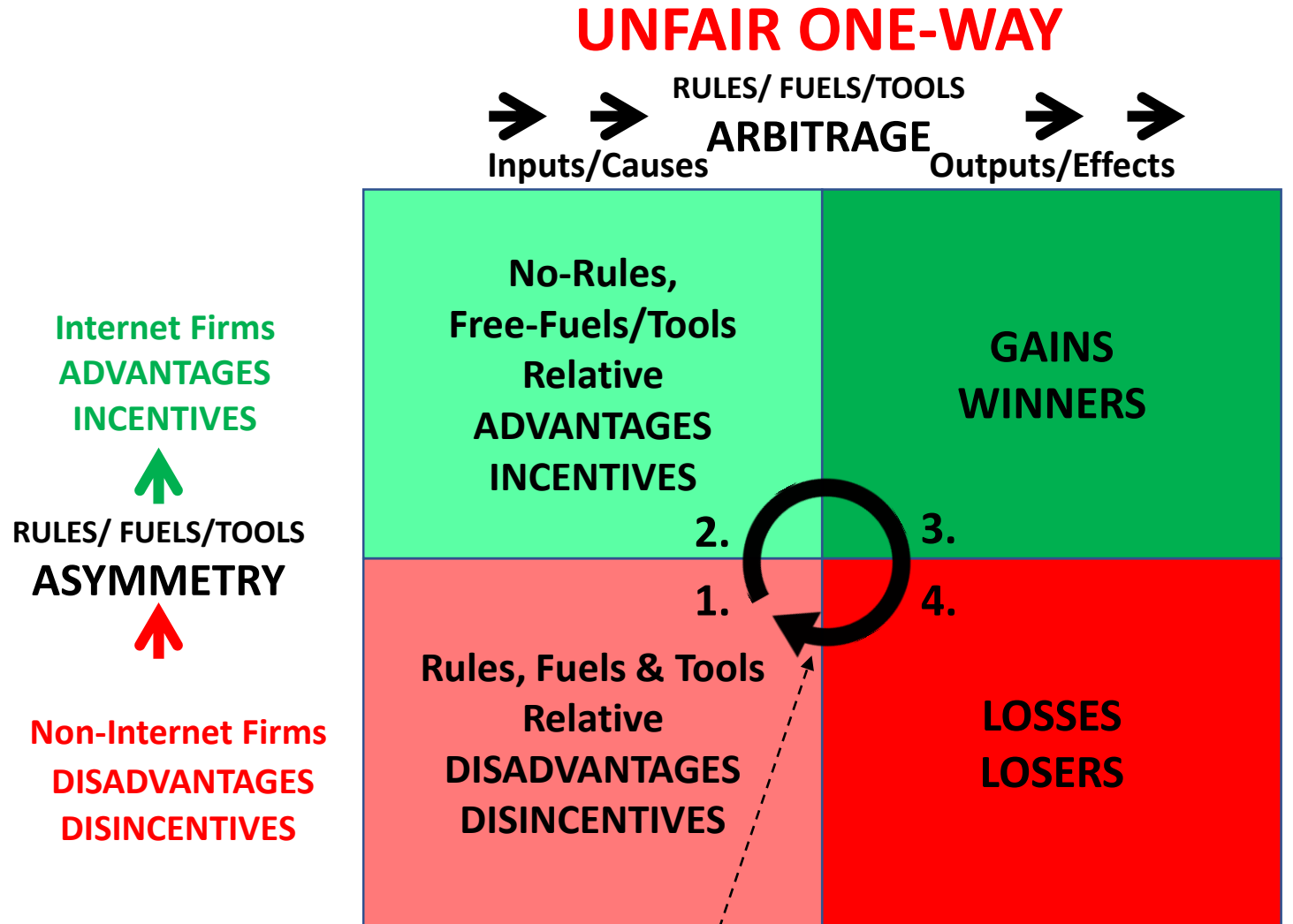
1. Exempts only Internet firms from all FCC laws, regs, costs, & duties;
2. Exempts only Internet firms from most Federal & State regulation;
3. Immunizes Internet firms from liability for harms on their platform or from their biz model;
4. Exempt only Internet firms from many taxes; public responsibility costs; & U.S. sovereign governance.

FUELS: Only Internet firms enjoy:

- Freedom from responsibility; no friction; network effects, fixed-price of zero; permissionless use of private data/property; unlimited scale/scope/reach; etc.

TOOLS: Only interactive computer services:

- Enjoy unaccountable technologies;
- Non-transparent intermediary algorithms; crypto-currencies; blockchain; AI; AR; data surveillance and collection; encryption; etc.



The Un-Virtuous Circle of Accountability Arbitrage

Info-Graphic by Scott Cleland 2018

Asymmetric Accountability Arbitrage Distorts the Process of Competition

Government-sanctioned rule arbitrage enables winner-take-all capitalization of benefits and socialization of costs, in a ~trillion dollar Government wealth transfer from non-Internet firms, consumers, and taxpayers, to Internet firms.

A Rigged Process of Competition Is Asymmetric Rules/Fuels/Tools:

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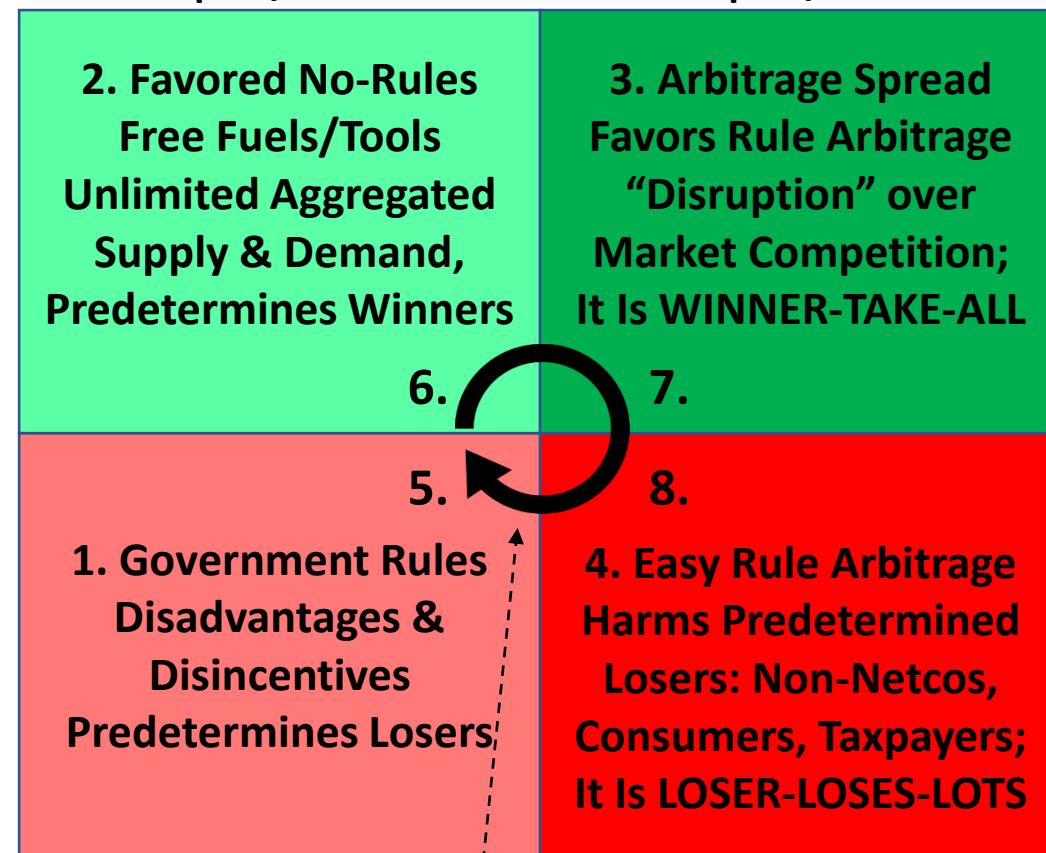
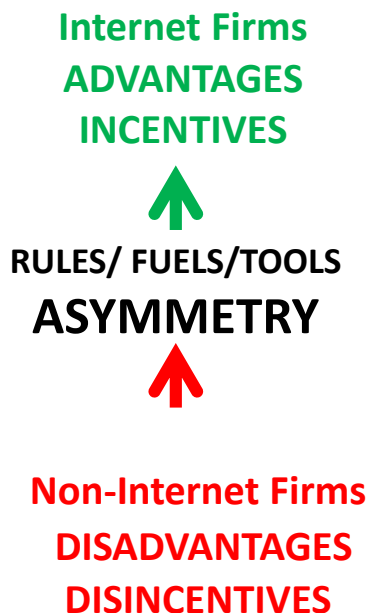
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ANTICOMPETITIVE

RULES/ FUELS/TOOLS



The Un-Virtuous Circle of Accountability Arbitrage

Info-Graphic by Scott Cleland 2018

Arbitrage Is Non-Productive & Value-Destroying Activity that Depresses Overall Revenue Growth

Rule arbitrage fosters zero-sum revenue cannibalization, commoditization, concentration, & monopolization.

Non-Productive & Value Destroying Asymmetric Rules/Fuels/Tools:

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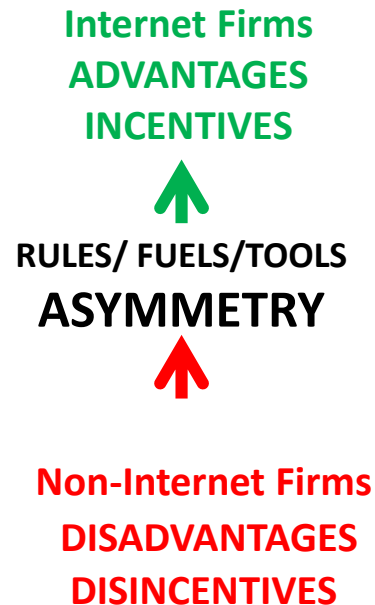
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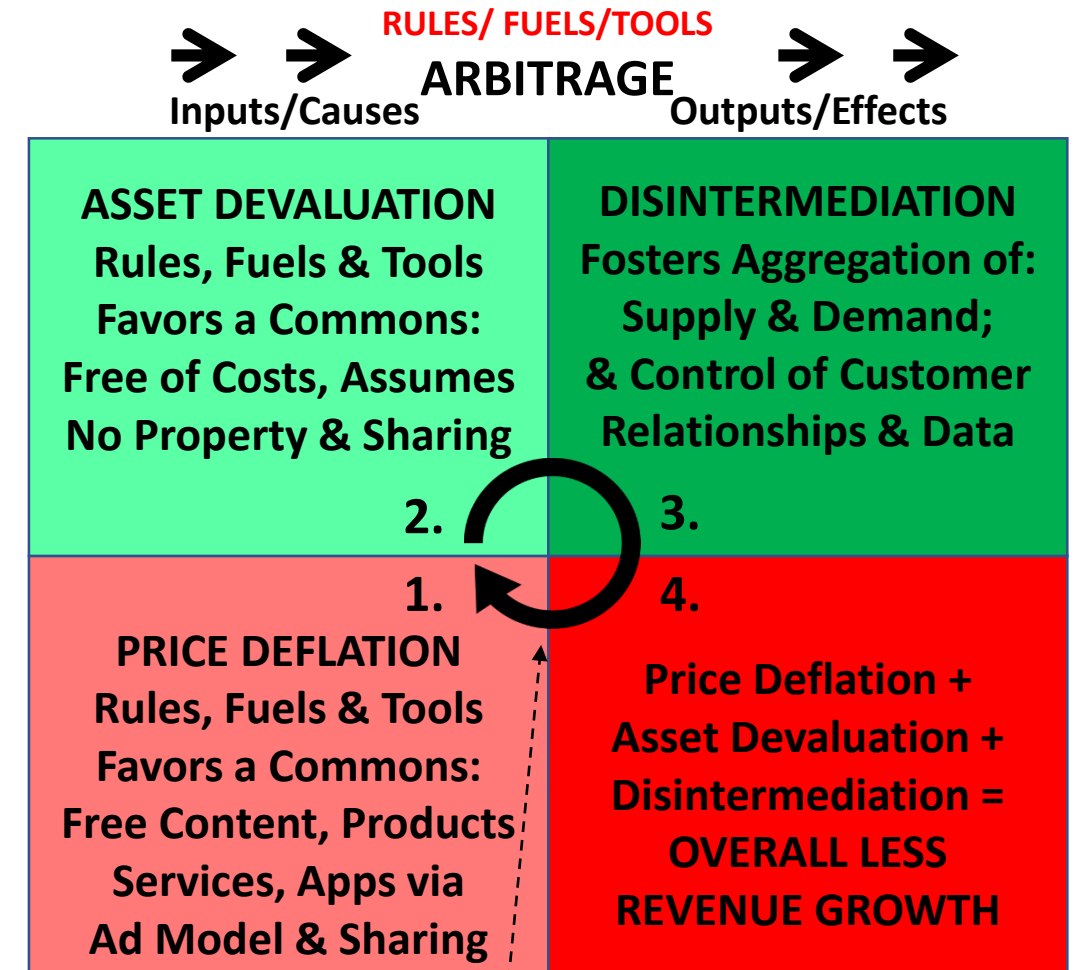
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TOOLS: Only interactive computer services:

- Enjoy unaccountable technologies;
- Non-transparent intermediary algorithms; cryptocurrencies; blockchain; AI; AR; data surveillance and collection; encryption; etc.



OVERALL LESS REVENUE GROWTH



The Un-Virtuous Circle of Accountability Arbitrage

Info-Graphic by Scott Cleland 2018

Asymmetric Accountability is Destroying Market Competition's Promotion of Consumer Welfare

Immunization from government risk for harming consumers guts competitive incentives to protect consumer welfare.

- 1. Winner-Take-All Monopolization Forces:** Accountability arbitrage favors monopolization over competition.
- 2. Minimal Cybersecurity Market Forces:** Since Internet policy matured, there are no longer market forces, or government incentives, duties, or expectations to: write secure computer code; make secure equipment, devices, [software](#), or apps, to protect American consumer welfare; or prevent online recruitment of terrorists.
 - Consequently, no consumer computer, device, network, or entity is safe from hacking.
 - [NSA](#), [CIA](#), [DOD](#), [DOJ](#), [DHS](#), [OPM](#), [White House](#), [Google](#), [Facebook](#), [Amazon](#), [Apple](#), [Microsoft](#), [Equifax](#), [et al](#) have all been hacked; and hackers can hack [planes](#) in flight, [vehicles](#) on the road, and [ships](#) at sea.
- 3. Minimal Market Forces for Consumer Online Privacy, Safety, & Security:** There are no longer competitive market forces or government responsibilities to minimally protect the online privacy, safety, and security of Americans, and their children, identities, privacy, data, and property.
- 4. Minimal Market Forces to Protect Minors Online:** The minimal online government accountability undermines market forces to curate for age appropriate content, products, services, apps, and platforms.
- 5. Compromised Anti-Fraud Protection:** Minimal government and competitive accountability enables and fuels rampant: fake news, fake ads, [fake video](#), fake likes/clicks, fake comments, fake etc., robocalls, etc.
- 6. Minimal Government Online Consumer Protection Authority:** U.S. consumer protection agencies -- FTC, FCC, CPSC, CFPB, SEC, and CFTC – don't have legal authority to protect Americans from Internet-originated harms.
- 7. Compromised Democracy Processes & Public Polarization by Design:** The integrity, civility, trustworthiness, and accountability of America's key democracy processes -- elections, news, journalism, social media, and digital advertising – are harmed seriously by minimal governmental and competitive accountability.
- 8. Addiction & Individual Manipulation By Design:** Minimal governmental accountability enables [purposeful](#) design of addicting/manipulative [social media](#) and [video](#) services without regard to consumer/minor welfare.

How Immunized Internet Platforms Undermine Free Market Economics & Competition

Google, Facebook, & Amazon disintermediate, and non-transparently and unaccountably govern much of U.S. economy – uneconomically.

FREE MARKET/INVISIBLE HAND
Scarce Interactivity Based on
Supply and Demand Is an Inherent
Competitive Growth Dynamic

vs.

IMMUNIZED INTERNET PLATFORMS
Universal Interactivity Based on
Algorithmic Disintermediation Is an Inherent
Uneconomic Deflation Dynamic

1. Purpose: Revenue/Profit Growth
2. Optimize Function: Value Creation
3. Supply-Demand Pricing Efficiency
4. Pricing Above Cost
5. Profit-Driven
6. Economic Growth Multiplier
7. Longer-Term Focus
8. Investment-Return Driven
9. Direct Customer Relationships
10. Differentiated Competitive Choice
11. Competitive Innovation
12. 3-4+ Competitors Comprise Market

1. Purpose: Interactivity Efficiency & Growth
2. Optimize Function: Input/Asset Utilization
3. Technology/Interactivity Efficiency
4. Pricing Delinked From Cost or Is Fixed Free
5. Cost-Savings & Market-Share-Driven
6. Cost-Reduction & Network Effect Multiplier
7. Immediate-Term Focus
8. Arbitrage-Spread Driven
9. Disintermediated Customer Relationships
10. 1 Maximally-Efficient Free Commodity
11. Process Automation Innovation
12. Winner-Take-All Monopoly Market-Maker

Accountability Arbitrage Fosters a Winner-Take-All Bottleneck Distribution Economy

How Google, Facebook, and Amazon Anti-Competitively Abuse their Bottleneck Control of Most U.S. Consumer Supply and Demand

Note: Google, Facebook, and Amazon do not compete directly with each other in their core consumer supply businesses: search, social, and ecommerce.

3. BOTTLENECK DISTRIBUTION

Google, Facebook, and Amazon are the Intermedia that are *in between* most everyone for most everything online:

Interrupting competition and market forces
Intercepting inside information/trade secrets
Interjecting discrimination & self-dealing
Interfering with branding and selling

1. OFFLINE SUPPLY

Is ~65% of U.S. GDP

Monopolizing key supplier processes:

- GOOGLE ~90% of Mobile Search Advertising
- FACEBOOK ~90% of Social Advertising
- AMAZON ~90% of eCommerce Platform Fees

2. ONLINE DEMAND

Is ~6% of U.S. GDP

Monopsonizing key demand processes:

- GOOGLE ~90% of Digital Info Access & Services
- FACEBOOK ~90% of Social Sharing Services
- AMAZON ~90% of eCommerce Platform Services

Intermedia monopolizing power can dictate prices suppliers pay to sell to which consumers; facilitates winner-take-all piracy, self-dealing, fee/tax arbitrage

Toll-Keeper
Pricing Power

Gate-Keeper
Entry Power

Intermedia monopsonizing power can drive what consumers find and buy from which suppliers; favors winner-take-all discrimination, little privacy/security

Winner-take-all harms to suppliers:

- Can't compete with "the house" that: extracts a monopoly toll to reach online consumers; is exempt from 10-25% platform fees; abuses platform customer confidentiality to pirate, self-deal, and deny access to data necessary to market and compete.
- Commoditizes brands, products, and services by devaluing offline brand's safety, recognition, differentiation, and loyalty;
- Disintermediates suppliers from customers, so suppliers must negotiate price/terms with platform not customer -- deflating prices, destroying value creation.

4. BOTTLENECK HARMS

Winner-Take-All
Unaccountability
No-Transparency
Forced Price Deflation
Depressed Growth

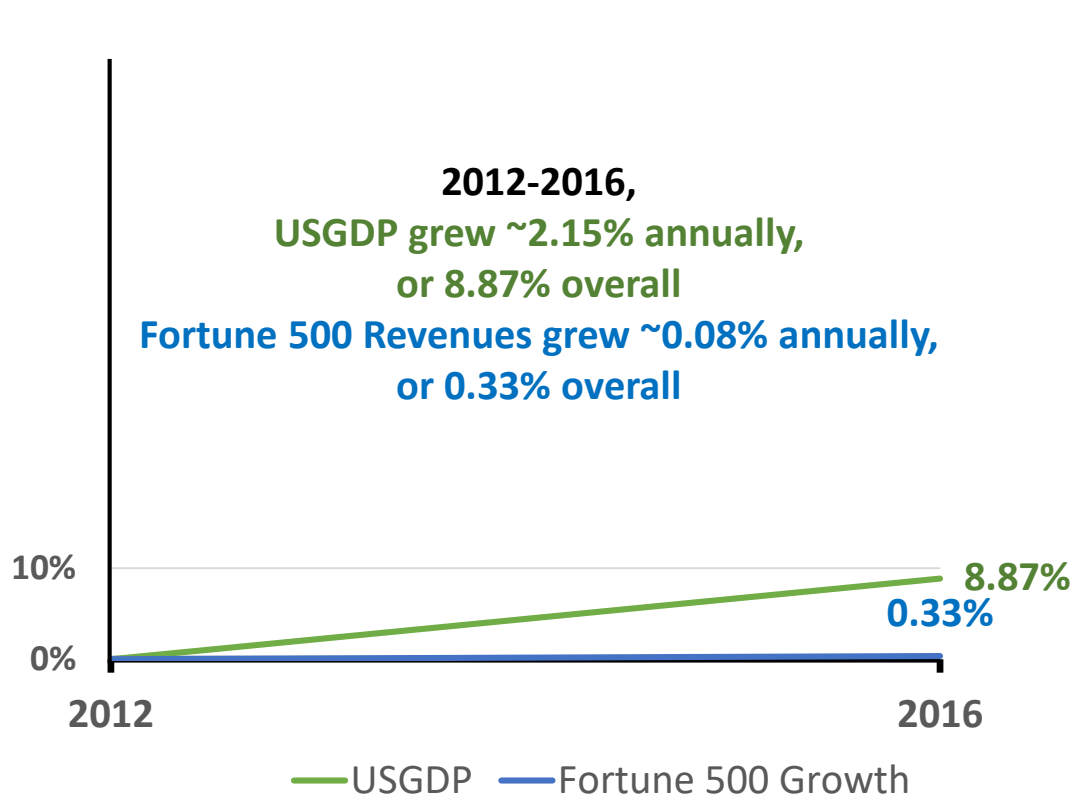
Winner-take-all harms to consumers:

- Hyper-concentrated aggregation of consumer demand means consumers get presented with the top one, or few, self-favored: results, clicks, apps, products, services that reinforce winner-take-all outcomes at the expense of competitive choice, quality, diversity, differentiation, and innovation;
- Consumers are not Google/Facebook's customers but the product that's sold to advertisers, so users' privacy, security, and best interests are low priority.

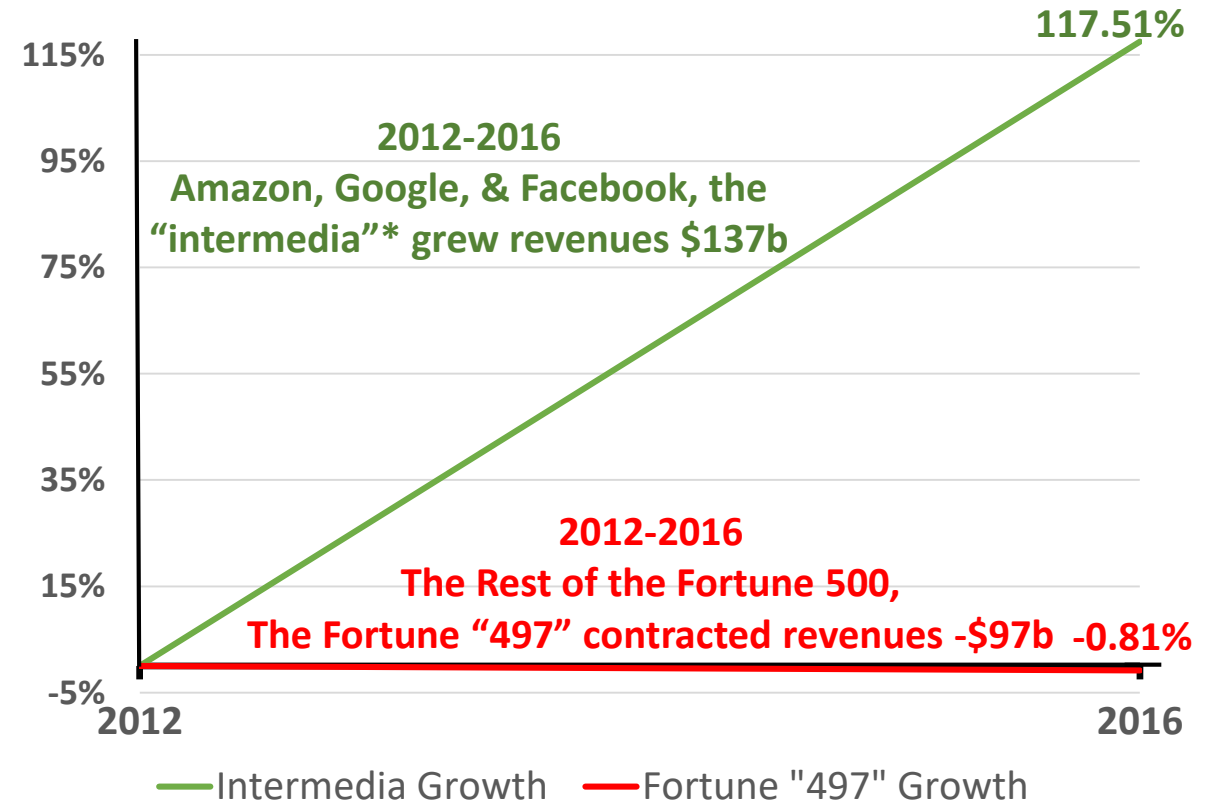
Asymmetric Accountability Creates Asymmetric Growth Results

Favoring regulatory arbitrage over free market competition fosters distortion of competition, economic forces, and growth.

The 2012-2016 offline economy growth recession: slow-growth U.S. GDP grew ~25 times faster than flat Fortune 500 revenues, that comprise 65% of USGDP



2012-2016, Amazon/Google/Facebook's winner-take-all capture of all Fortune 500 overall revenue growth depressed Fortune 497 revenues that comprise 64% of USGDP



Sources: U.S. Bureau of Economic Analysis and Fortune 500 public data.

*The "intermedia" are the dominant online intermediary platforms – Amazon, Google, & Facebook -- which enjoy special government intermediary immunity from liability for activity on their platforms.

SOLUTION: Equal Online-Offline Accountability Under the Law (Including Antitrust)

- 1. One Communications Standard:** Establish in a new law, one unified, consumer-centric, technology-neutral, communications regulatory standard -- for 21st century, national security, public safety, and consumer protection -- since convergence means unregulated Internet communications can do everything FCC-regulated communications do.
- 2. One Equal Accountability Standard:** Establish a new 21st century U.S. communications policy and law of equal accountability under the law standard that ensures no individual, entity, or technology, is considered: immune from accountability; above the rules; or outside the law.
- 3. One Antitrust Enforcement Standard:** In meantime, DOJ and FTC should publicly affirm that Section 230 confers no implied or real antitrust immunity for Internet platforms, or Internet freedom to act anticompetitively in any way that would be illegal if done by any other industry or technology.

Supporting Research

[**Part 1:**](#) The Internet Association Proves Extreme U.S. Internet Market Concentration [6-15-17]

[**Part 2:**](#) Why US Antitrust Non-Enforcement Produces Online Winner-Take-All Platforms [6-22-17]

[**Part 3:**](#) Why Aren't Google Amazon & Facebook's Winner-Take-All Networks Neutral? [7-11-17]

[**Part 4:**](#) How the Google-Facebook Ad Cartel Harms Advertisers, Publishers & Consumers [7-20-17]

[**Part 5:**](#) Why Amazon and Google Are Two Peas from the Same Monopolist Pod [7-25-17]

[**Part 6:**](#) Google-Facebook Ad Cartel's Collusion Crushing Competition Comprehensively [8-1-17]

[**Part 7:**](#) How the Internet Cartel Won the Internet and The Internet Competition Myth [8-9-17]

[**Part 8:**](#) Debunking Edge Competition Myth Predicate in FCC Title II Broadband Order [8-21-17]

[**Part 9:**](#) The Power of Facebook, Google & Amazon Is an Issue for Left & Right; BuzzFeed Op-Ed [9-7-17]

[**Part 10:**](#) Google Amazon & Facebook's Section 230 Immunity Destructive Double Standard [9-18-17]

[**Part 11:**](#) Online-Offline Asymmetric Regulation Is Winner-Take-All Government Policy [9-22-17]

[**Part 12:**](#) CDA Section 230's Asymmetric Accountability Produces Predictable Problems [10-3-17]

[**Part 13:**](#) Asymmetric Absurdity in Communications Law & Regulation [10-12-17]

[**Part 14:**](#) Google's Government Influence Nixed Competition for Winner-Take All Results [10-25-17]

[**Part 15:**](#) Google Amazon & Facebook are Standard Monopoly Distribution Networks [11-10-17]

[**Part 16:**](#) Net Neutrality's Masters of Misdirection [11-28-17]

[**Part 17:**](#) America's Antitrust Enforcement Credibility Crisis – White Paper [12-12-17]

[**Part 18:**](#) The U.S. Internet Isn't a Free Market or Competitive It's Industrial Policy [1-4-18]

[**Part 19:**](#) Remedy for the Government-Sanctioned Monopolies: Google Facebook & Amazon [1-17-18]

[**Part 20:**](#) America Needs a Consumer-First Internet Policy, Not Tech-First [1-24-18]

[**Part 21:**](#) How U.S. Internet Policy Sabotages America's National Security [2-9-18]

[**Part 22:**](#) Google's Chrome Ad Blocker Shows Why the Ungoverned Shouldn't Govern Others [2-21-18]

[**Part 23:**](#) The Beginning of the End of America's Bad "No Rules" Internet Policy [3-2-18]

Scott Cleland, President, Precursor® LLC

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- Scott Cleland is a proven thought leader and a leading Internet competition and policy expert. He was the first analyst to foresee that Google would become an increasingly problematic global monopoly and the first to discover that Google and Facebook abruptly stopped competing with each other in 2014 and evidently divided up the digital advertising market into a de facto digital ad cartel.
- Cleland has testified seven times before the Senate and House Antitrust Subcommittees on antitrust matters. Overall, eight different congressional subcommittees have sought his expert testimony a total of sixteen times. He served as Deputy U.S. Coordinator for International Communications & Information Policy in the George H. W. Bush Administration. And when he served as an investment analyst, *Institutional Investor* twice ranked him the #1 independent analyst in communications.
- He is President of [Precursor LLC](#), an internetization consultancy specializing in Internetization -- how the Internet affects competition, markets, the economy, and policy -- for Fortune 500 companies, some of which are competitors to Internet platforms. He is also Chairman of NetCompetition, a pro-competition e-forum supported by broadband interests.
- Cleland authors the widely-read www.PrecursorBlog.com; and publishes www.Googleopoly.net. He also authored the book: *“Search & Destroy: Why You Can’t Trust Google Inc.”*