

C.2 The Algorithms of Law: Essays

Platform Government: The Emerging State of Contests for Control of Society From Jack Ma and China to Mark Zuckerberg and Australia

Coalition for Peace & Ethics

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Good innovation is not afraid of regulation, but is afraid of being subjected to yesterday's way to regulate. We cannot use the way to manage a railway station to manage an airport. We cannot use yesterday's way to manage the future.²

There are four interrelated stories that have tended to be treated as distinct affairs by what passes for the press and their academic facilitators. That is a pity, because in their intense desire to vindicate their own view of the way the world is (or ought to be) understood, these organs of authoritative societal sharpeners of meaning continue to miss one of the most important trajectories of power emerging in the last decade-*the fusion of state, governance, and markets through platforms.*

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² Jack Ma, 'Speech at the Bund Summit 2020 in Shanghai '(24 October 2020); Kevin Xu (trans) originally posted to Interconnected.blog (November 9, 2020); accessed at <https://www.linkedin.com/pulse/jack-mas-bund-finance-summit-speech-kevin-xu/?trk=articles_directory>.

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From this fusion, new forms and approaches are emerging to the control and management of the productive forces of society, and of the shaping of the *human factors of production* organized in well behaved communities manifesting values through behaviors that advance the interests, obligations or perceived responsibilities of (market, political, societal or other) vanguards. What appears to be the relationship between consumables and consumers is effectively reversed. Individuals now serve as the ultimate consumable for the production of communal stability and prosperity that is understood as the product of metrics measured against aggregate ideals applied to ensure the maximization of value from the societal, economic, and political consumption of human activity.

What then becomes critically important as a site of politics is not what passes for democratic expression (voting, engagement, etc.-these are carefully managed for all the right reasons in the context of the political model in which they are manifested). Instead first tier politics now centers on the control of the machinery of consumption, that is on the data (Foucault's now updated notion of "statistics" of importance to his theory of *governmentality*, to suit the technologies of the times) through which the ordering and control of social, political, religious, and economic production may be retained and enhanced.

The interrelated stories are these: (1) the disciplining of Jack Ma; (2) the completion of the first cycle of data protection and cybersecurity laws in China; (3) the detachment of data services from Ant; (4) the glimmerings of the Western parallel developments in the contest between Australia and Facebook. Each is briefly considered below. Together they suggest the intertwining of platforms as a governance space, and its power to bring together within its "spaces" all of the coordinate parts necessary for the management and consumption of human production in the service of the stability and prosperity of collectives overseen by those given that task under contextually different political-economic models.³

³ The importance of stability and prosperity as a core discursive trope of political ideology was most recently on evidence in the context of the 2019 protests in Hong Kong and especially in the discursive responses of the Chinese central authorities. See, Larry Catá Backer, *Hong Kong Between 'One Country' and 'Two Systems'* (Little Sir Press, 2021). In the liberal democratic West, the discursive trope has been centered, for example, in the approach of international financial institutions. See, Horst Köhler, Promoting Stability and Prosperity in a Globalized World—Remarks by Horst Köhler IMF Managing Director (7 May 2001); <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp050701> access
 ("Countries throughout the region have clearly embraced democracy, open markets, and macroeconomic stability. This has laid the foundation for a good future.").

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1. *The disciplining of Jack Ma.* On 24 October 2020, Jack Ma gave what will posthumously be considered a brilliant forecast of the forward thrust of global governance wrapped up in a plea for a very different relationship between platforms and regulators, between the state and private bodies corporate, and between experts and scholars.⁴ At the time he mentioned that "misgivings about whether to come here and give this speech today. But I thought people like me do have an inescapable responsibility to think about the future."⁵ (Ibid). And events proved him right. The state was not amused--he committed an act of *lèse majesté* that was not forgivable, though not sufficiently grave to cost him his life--just his relation to power. He disappeared for a while and his massive public offering was cancelled.⁶ In the meantime China produced a new data protection law and eventually the company that Jack Ma once controlled was split in a quite important way; he gave the speech after a period of "learning and thinking."⁷ He has as a consequence now been retired fully to serve the platform, and through it, the state, from the far more obscure position of expert walled up in his (luxurious to be sure) monastery.⁸

But the point was made: "Now, all around the world, there is a trend towards an increased focus on risk control, but not on development. Very few people talk about opportunities for the younger generation or where the opportunities are in developing countries"⁹ The resulting construct of imbalance between monitoring and control has produced a world that stifles innovation. What Ma might have been implying was not that innovation has been stifled, but rather that it has been bent to an overarching mania for control, but a control that exorcises risk to the state, to the economy, to society, to notions of stability and (limited but sufficient) prosperity. What Ma exposed--unacceptable in either liberal democratic or Marxist-Leninist (control) systems--was that trajectory and its deleterious effects. He seeks to make a case for risk at a moment

⁴ Jack Ma, 'Jack Ma's speech at the Bund Summit 2020 in Shanghai,' Apple News (18 November 2020); text available through Internet Archive <<https://web.archive.org/web/20201108044404/https://hk.appledaily.com/opinion/20201108/TRMUNM72DRAQJNCG3ON2JUUF4A/>>.

⁵ Ibid.

⁶ See, Charlie Campbell, 'Where Is Alibaba Founder Jack Ma? What the Saga of One of the World's Richest Men Reveals About China Under Xi Jinping,' Time (4 January 2021); available <<https://time.com/5926062/jack-ma/>> ("On Nov. 2, Ma was summoned by Chinese authorities for questioning. The next day, the \$37 billion IPO of Alibaba's fintech arm Ant Financial . . . was nixed. . . . By late December, regulators had instructed Ant Group to restructure its operations to adhere to new anti-monopoly rules, shaving billions off its valuation. . . . Ma has now not been seen in public for at least two months. ").

⁷ Jane Zhang and Zhou Xin, 'Alibaba founder Jack Ma delivers video speech to China's rural teachers in first public appearance in three months,' South China Morning Post (20 January 2021); available < <https://www.scmp.com/tech/big-tech/article/3118454/alibaba-founder-jack-ma-delivers-video-speech-chinas-rural-teachers> >.

⁸ Ibid.

⁹ Jack Ma, Jack Ma's speech at the Bund Summit 2020 in Shanghai, *supra*.

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in time in which private sector risk is increasingly subsumed within public sector administrative sensibilities and objectives that tend to be both risk averse and compliance oriented.

I have noticed another phenomenon. While many regulatory departments around the world have become risk-free themselves, the whole economy – as well as society as a whole – has become risky. The race tomorrow will be a race of innovation, not regulatory capabilities. Today all countries are vying to be the most ruthless regulator, and all developments are empty talk. But the rules outlawing this or that are all as sharp as razors.¹⁰

But that insight necessarily produces the impulse to profoundly provocative acts of *lèse majesté*.

As far as I know, the “improvement of the ability to govern”, as mentioned by President Xi, is about maintaining healthy and sustainable development under orderly regulations. It is not about having no development under regulations. Regulations are not difficult in themselves. What is difficult is achieving regulations that are aimed at maintaining sustainable and healthy development. Regulations should be aimed at achieving healthy development.¹¹

The *lèse majesté* of the remarks has a double edge. On the one hand it suggests that the discourse of development central to the state’s objectives since the start of the period of Reform and Opening Up may be taken off track through the governmentalization of risk in the private sector that was once detached from the state apparatus (at least enough) to permit or manage risk that then moved the state forward. That could be read as a challenge to the manifestation of New Era theory in its application to the economic sector—risk has become a political object. At the same time the unfortunate decision to mention Mr. Xi by name made the challenge both personal, and political. That, in turn, would have violated sensibilities grounded in political principles of democratic centralism and CPC leadership in an unacceptably public way.

If platforms are the new locus of innovation and the core infrastructure for communal life, then the question of the management and control of the platform and its technology becomes the central element of politics--a power that Jack Ma seriously underestimated himself even as he predicted its character. In this case, the platform was the state; its coders the CPC, and its users and consumers were the private sector whose greater autonomy Mr. Ma sought to defend. He might have read the trajectories of robust development under socialist

¹⁰ Ibid.

¹¹ Ibid.

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market conditions accurately; but he failed to read both signaling within the platform in which he operated, or its public taboos.

The rest follows.

2. *The new Chinese Data Protection Law.* October 21, 2020, China issued a draft of Personal Information Protection Law ("Draft PIPL") for public comments revised in April 2021.¹² It forms part of a number of provisions issued over the last several years that focus on data protection and cyber security.

The express protection of personal information under the Civil Code represents a new era of privacy and personal information protection. Moreover, on 3 July 2020, the Data Security Law of the People's Republic of China (Draft)¹³ was issued for public comments and, on 21 October 2020, the Personal Information Protection Law (Draft) ('the Draft Personal Information Law') was issued for public comments.¹⁴ The above legislation together symbolizes the establishment of a complete system of personal information protection.¹⁵

Like Jack Ma's speech there is a lot of meat. But for our purposes, it evidences one measure of control intimated by Jack Ma but fundamental to the ordering of politics to platforms--*the localization of data* and the imposition of significant barriers (borders) to the free movement of data across borders (for analysis [here](#)). It adds though doesn't change the trajectory of control already signaled by the New Draft Rules on Cross-Border Transfer of Personal Information Out of China (translation [here](#)). Informality is power--that is now almost a cliché; but in this case power quite specifically understood as fuel rewards and

¹² See, Hunton, Andrews, Kurth, LLP, 'China Issues Draft of Personal Information Protection Law,' Privacy & Information Security Law Blog (27 October 2020); available < <https://www.huntonprivacyblog.com/2020/10/27/china-issues-draft-of-personal-information-protection-law/>>; Hunton Andrews Kurth, LLP, 'China Issues Second Version of the Draft Personal Information Protection Law for Public Comments,' The National Review (4 May 2021); available <<https://www.natlawreview.com/article/china-issues-second-version-draft-personal-information-protection-law-public>>.

¹³ Data Security Law of the People's Republic of China (10 June 2021); available <<http://www.npc.gov.cn/englishnpc/c23934/202112/1abd8829788946ecab270e469b13c39c.shtml>> ; made effect pursuant to Order of the President of the People's Republic of China No. 84 (10 June 2021).

¹⁴ 中华人民共和国个人信息保护法(草案) ('Personal Information Protection Law of the People's Republic of China'); available <https://www.dataguidance.com/sites/default/files/china_draft_personal_data_law.pdf>.

¹⁵ Bagher Ansari and Shima Attar, 'Data Protection in China; A Comparative Study of the Data Protection Approach in the United States and the European Union' 82(22) 13(1) Comparative Law Review; Duoqun Luo, 'China—Data Protection Overview' Data Guidance.com (November 2021); available < <https://www.dataguidance.com/notes/china-data-protection-overview> >

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punishment for behaviors judges against ideal types for the transformation of governance to systems of algorithmically managed

3. *The reconstitution of Ant.* The disciplining of Jack Ma plus the thrust of the localization principles in Chinese approaches to data provided a background (it is hard to imagine connection vectors with any degree of certainty) for the reconstitution of Ant in a form that also contributed to the governmentalization of platforms. "Ant Group Co plans to spin off its consumer-credit data operations, people with knowledge of the matter said, a concession to aggressive regulators that should help the Chinese fintech giant get its massive public share sale back on track."¹⁶ The objective was obvious.

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The reward was good behavior was evident as well. But the significance of its consequences are revealed only in the shadow of the revisions of law and the political contests that were waged around it.

Ant, which began as Alibaba's payments arm, sits on an enormous cache of consumer data. That is the backbone of China's internet platforms, with companies offering financial products from consumer loans to investment products via smartphones. Big platforms have been hesitant to share or hand over their data to credit agencies run or backed by regulators. (Ibid.).

And there it is. Mountains of data organized and generated through platforms; platforms serving as the efficient vehicle for the coordination of monitoring and control, and as the backbone of systems of rewards and punishments to align with the objectives of those who govern. In China, as Jack Ma was reminded, that is the Communist Party and its state apparatus. It is not Jack Ma. And yet Jack Ma remains a necessary element of the equation--he may not direct the platform, but he certainly can be instrumentalized as its caretaker, its engineer and its

¹⁶ Julie Zhu and Kane Wu, 'Exclusive: China's Ant to hive off credit data in revamp; sees IPO in 2 years - sources,' Reuters (4 February 2021); available < <https://www.reuters.com/article/us-china-ant-group-exclusive/exclusive-chinas-ant-to-hive-off-credit-data-in-revamp-sees-ipo-in-2-years-sources-idUSKBN2A41FF> >.

¹⁷ Ibid.

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visionary--serving at the pleasure of state. And here is where Jack Ma's speech turns in on itself in an ironic way.

4. *Facebook's blocking News and other media sources in Australia.* The dynamics so publicly exposed in the shifting relationships between Jack Ma and the state with the object the control of the platforms and its instrumentalization, also has a western, liberal democratic, analogue. Though harder to expose, at least some of what is at stake can be seen where rifts occur (as between Ma and the central authorities) over the management of platforms. In the West, of course, full frontal control is impossible for the moment. Such an objective still violates core taboos of the publicly professed principals of the liberal democratic order. Control is sought in the usual levers of liberal democratic states--taxation, and regulation of markets with a direct or indirect effect on the integrity or balance of power in, between or around platforms. The financial sector model is easily transposed to a broader framework:

Importantly, platforms do not need to provide financial services themselves: they can monetize their comparative advantages without maintaining a dedicated balance sheet. On the communication side, the platforms' activity can be viewed as "match-making", which does not require risk-taking. On the information side, customer data can be passed on to other financial service providers.¹⁸

Indeed, the authors of that IMF Working Paper point to the way that platforms now make it possible to directly interlink information that even a few years ago would have been treated as unrelated. The result is to reshape analytics (of risk, for example for credit), and the power of behaviors generally to shape access to societal goods.¹⁹ The old expectations about the way different classes of information existed autonomously of others gave way to a new assumption—all data can potentially contribute to an assessment.

The consequences could not be avoided—either as a matter of the conduct of economic activity, and the politics of its control. That, in turn, produced a division among actors for the control of the processes and politics of data, its use, and the normative structures within which both politics and method could be rationalized and controlled. The spark that ignited these contests (and exposed the political contest for control

¹⁸ Arnoud W.A. Boot ; Peter Hoffmann ; Luc Laeven ; Lev Ratnovski, 'Financial Intermediation and Technology: What's Old, What's New?', IMF Working Paper No. 2020/161 (7 August 2020); available <<https://www.imf.org/en/Publications/WP/Issues/2020/08/07/Financial-Intermediation-and-Technology-Whats-Old-Whats-New-49624>>; p. 17.

¹⁹ Ibid., p. 10; "The rise of the internet permits the use of new types of non- financial customer data, such as browsing histories and online shopping behavior of individuals, or customer ratings for online vendors."

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of platforms within markets) was a proposed law in Australia²⁰ that would require the social-media giant to pay publishers for content. The News Media Bargaining Code²¹ The background was typical of disputes of this kind within the liberal democratic political-economic model: government in aid of another market segment eager to deploy state power in their economic contest against another market sector on which their bad decision making reduced them to dependence--the usual story in the West in the relations between power-economics-politics). But the stakes here were higher if only because of the already advanced stage of governance integration between political and economic structures within platforms.²²

In mid-February 2021, Facebook pulled the trigger,²³ “even before the News Media Bargaining Code, which also affects Google, became law. The decision was big and controversial given the increasing number of people who rely on the social network for information on topics ranging from the coronavirus to politics. The retaliatory step quickly sparked outrage from politicians, civil rights groups and news

²⁰ Daniel Van Boom, ‘Google’s Fight in Australia Could Change the Future of Media,’ CNET (14 February 2021); available <<https://www.cnet.com/tech/tech-industry/googles-fight-in-australia-could-change-the-future-of-media/#ftag=MSF491fea7>> (“Last month, Google said it may stop providing search results in Australia if the government passes a new bill forcing it to pay the country’s publishers for the news links and snippets its search engine surfaces. Leaving Australia would deprive its 25 million citizens of the world’s most widely used search engine, which handles almost 95% of the country’s daily searches.”).

²¹ Australia, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021; available <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6652>.

The code, which focuses on online content, came into effect on 2 March 2021. Under the legislation, the Treasurer is able to designate certain digital platforms as subject to the obligations under the code. No digital platforms have yet been designated, but this has not affected the effectiveness of the code. In deciding whether to designate a digital platform, the Treasurer must consider whether there is a significant bargaining power imbalance between the platform corporation and Australian news businesses, and also whether the platform corporation has made a significant contribution to the sustainability of the Australian news industry, including through agreements to remunerate those businesses for their news content.

See Australian Competition and Consumer Commission, ‘News Media Bargaining Code; available <<https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>> .

²² On the politics of the passage of the law, see, Bryon Kaye, ‘Facebook’s Australia news blackout: a shock four years in the making,’ Reuters (19 February 2021); available <<https://www.reuters.com/article/us-australia-media-facebook-history/facebook-australia-news-blackout-a-shock-four-years-in-the-making-idUSKBN2AJ1B4>>.

²³ Queenie Wong, ‘Facebook blocks users from sharing news in Australia,’ CNET (18 February 2021); available <<https://www.cnet.com/tech/services-and-software/facebook-blocks-users-from-sharing-news-in-australia/#ftag=MSF491fea7>> .

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outlets, which view it as another example of why the power of Big Tech needs to be checked.”²⁴ The consequences were meant to produce the sort of chaos that might augment pressure on the state to reconsider.²⁵ And that is exactly what the government was forced to undertake. Markets based bargaining produced a compromise—in return for the promise to amend the legislation in ways acceptable to tech platforms, they agreed to resume service.²⁶

Canada followed suit. “I suspect that soon we will have five, ten, 15 countries adopting similar rules. Is Facebook going to cut ties with Germany, with France?”²⁷ Nonetheless, a year later, the legislative effort was tabled.²⁸ In China, a deal will be struck that effectively passes greater control to the state, through the market, but leaves power divided between both.²⁹

In the end, the state intervention through the enactment of a statute shifted market power to produce private bargaining that suited the interests of the state (and its political class) by reforming the market for information. Better put, it externalized markets for information from

²⁴ Queenie Wong and Daniel van Doorn, ‘Facebook’s news ban in Australia: Everything you should know,’ CNET; available <<https://www.cnet.com/tech/mobile/facebook-news-ban-in-australia-everything-you-should-know/>>.

²⁵ Daniel van Boom, ‘Facebook pulled news in Australia. Here’s why that matters everywhere,’ CNET (17 February 2021); available <<https://www.cnet.com/tech/tech-industry/facebook-pulled-news-in-australia-heres-why-that-matters-everywhere/#ftag=MSF491fea7>> (“The implementation has been chaotic. Facebook has accidentally blocked various government pages, including two official health agencies amid the pandemic. Some publications are blank not just in Australia, but around the world. Many of my US colleagues can’t see the posts on CNET’s Facebook page.”).

²⁶ Angus Whitley, ‘Facebook Ends Australia News Blackout After Law Compromise,’ Bloomberg 22 February 2021; available <<https://www.bloomberg.com/news/articles/2021-02-23/facebook-to-restore-news-pages-in-australia-in-coming-days#xj4y7vzkg>>

²⁷ Joe Davies, ‘Canada vows to become second country to make Facebook pay for news as global backlash against tech giant continues,’ Daily Mail (20 February 2021) (Quoting Canadian Heritage Minister Steven Guilbeault); available <<https://www.dailymail.co.uk/news/article-9281105/Canada-vows-second-country-make-facebook-pay-news.html>>.

²⁸ Isabel MacDonald, ‘Canada’s Online News Act: Repeating Australia’s Mistakes?,’ Policy Options (25 April 2022); available <<https://policyoptions.irpp.org/magazines/april-2022/canada-online-news-act-mistake/>> (“The government of Prime Minister Justin Trudeau recently tabled the Online News Act, a proposed news media bargaining code law similar to one that Australian authorities have used to force Google and Meta (Facebook), to sign multi-million-dollar deals with many of Australia’s largest news publishers and broadcasters.”).

²⁹ See essays in Milton Mueller and Yik C. Chin (eds.), ‘Platform governance by competing systems of political economy: The United States and China,’ (2022) 14(2) Policy & Internet (Special Issue: Platform Power and Regulation in the US and China: Comparative Analysis)

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within platforms to between platforms and data providers. The question, then, with respect to which the law intervened, was the siting of markets and the repositioning of actors as consumers and producers of objects or services about which market transactions might occur. The platforms sought to internalize these information markets, placing itself beyond the universe of consumers and producers of information objects within them. The state sought to externalize the market so that the consumption of platform services itself became bound up with the consumption and production of information. The further consequence is an even greater elaboration of the power of government through and as platform in the liberal democratic order. One will likely see more media consolidation--with platforms. But platforms will continue to dominate the societal, and therefore, the political, spheres. The only question in this case was whether the state or Facebook was going to assume the role of platform within which bargaining over the production and consumption of objects-services would occur.

Within these stories is the story of the development and elaboration of the platform. It contains some of the characteristics of a market--a meeting point for actors and a place where goods are negotiated. It contains some of the elements of a political community--it serves as the modern expression of the ancient *agora*. It is structured as the great open spaces--Tiananmen, the National Mall (Washington), Plaza Mayor, a Commons--where people are gathered or gather for instruction or action. And the differences between these functions merge and express permutation in ways that are difficult to control. They are last, the great space for social experimentation that can be controlled--in the form of predictive analytics they can serve as the beta testing site for new and improved control, and for the better management of human resources that consumed. They become simultaneously all of these spaces that because of its construction, permits the separation of physical community even as it promises much more intimate abstract contact.

The stories, though, suggests that each political economic system faces quite distinct dilemmas. Both are moving to platform governance vehicles, and eventually the platforms themselves will become fused with or into the state apparatus. Around it the production of objectives, of monitoring, and of control will shift around the administrative apparatus' heart and its logic—from exogenous and prosecutorial to endogenous and managerial. It will also in the process reshape the nature and content of politics (showing in different ways) in liberal democratic and Marxist Leninist regimes. Liberal democratic orders build strength and projects outward through principles of free movement of goods, capital, investment (and to a limited extent) people. It relies on markets and projections into markets to control and accepts the diffusion of control

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within tightly interlocked networks of actors.³⁰ "The recently announced partnerships between Apple and Goldman Sachs as well as Google and Citigroup are consistent with this view, and most likely only mark the beginning of Biotech platform involvement in financial services provision."³¹ And yet, state control also plays a significant role in the operation of markets-driven liberal democratic regimes. In this case state intervention assumes a semiotic character as object (statute) the signification of which produces nudges in the way that actors respond in and to markets. Here the market is the state. Conceptualization of production and consumption within market spaces include the state even as the state intervenes to manage the shape of the market itself.

Marxist-Leninist approaches are grounded, as Jack Ma saw clearly, in state control. It is state control that is projected outward, into markets. Its generative power is grounded in tightly constructed networks coordinated through platforms around a centralizing core. Here the state is the market. Here conceptualization of production and consumption of objects are developed as a function of the overall management of the market-state as itself a platform dedicated to the production of specific meta-social objects. The differences then touch everything--from the construction of the Belt and Road Initiative (China's application of its platform ecology governance principles of hub and spoke control) to the United States' new multilateralism (a "nicer" vocabulary for the old system and the application of markets governance diffused systems of interlocking power sharing tightly managed through hierarchies of stake holding).



³⁰ See our preliminary work in Larry Catá Backer and Matthew McQuilla, *The Algorithmic Law of Business and Human Rights: Constructing a Private Transnational Law of Ratings, Social Credit, and Accountability Measures* (September 1, 2020); available <<https://ssrn.com/abstract=3684196>>.

³¹ Arnoud W.A. Boot ; Peter Hoffmann ; Luc Laeven ; Lev Ratnovski, 'Financial Intermediation and Technology: What's Old, What's New?,' *supra*.

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