THE SECESSION OF THE SUCCESSFUL: THE RISE OF AMAZON AS PRIVATE GLOBAL CONSUMER PROTECTION REGULATOR

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In 2005, the Americans for Fair Electronic Commerce Transactions ("AFFECT") coalition issued a list of 12 principles it hoped would contribute to a new consensus about what constitutes fairness in online consumer transactions. A decade later, a cursory review of different jurisdictions indicates that, while there has been little discernable progress in the direction of the principles in the United States, other jurisdictions such as the European Union have made more progress. However, the one jurisdiction in the world that comes closest to implementing all 12 principles across the full spectrum of consumer transactions is not a government at all, but Amazon acting as a private regulator. Amazon's status as a regulator arises out of its ownership of a "multi-sided platform" that acts as a global retail marketplace. The rise of global platforms such as Amazon, Google, Apple, Facebook, and Microsoft that own global online marketplaces and simultaneously act as their primary regulators calls to mind the "Secession of the Successful" described by Robert Reich in 1991—the withdrawal from civil society of the wealthy and powerful into private gated communities. Amazon's status as the primary de facto regulator of the marketplace it owns combined with its single-minded pursuit of customer satisfaction contributes to relations with its employees and suppliers that are often profoundly problematic. When a platform operator is also the primary regulator of the market it creates, negative spillover effects may occur: squeezing employees and suppliers to insure that consumers get whatever they want merely pushes conflict from one part of the platform "ecosystem" to another. When this occurs, it does not make online commerce fairer overall, which was the implicit goal of the 12 principles. Although transaction-level norms such as those found in the 12 principles cannot ensure that all stakeholders in online marketplaces are treated fairly, other forms of regulation might be more effective in contributing to that goal.

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TABLE OF CONTENTS

INTRODUCTION

In 2005, Americans for Fair Electronic Commerce Transactions ("AFFECT") issued a list of 12 principles that it hoped would renew public dialogue about how the legal framework of electronic commerce could promote fairness in online consumer transactions.[1] Jean Braucher played a leading role in the development of the principles and in their subsequent dissemination.[2] This Article revisits those principles a decade later in light of the rise of global platforms such as Amazon that now dominate online retail markets. It also explores the question of which regulatory strategies would be best suited to advance the broader social justice ideals that Professor Braucher championed, and that underlie the 12 principles, in light of these changed circumstances. This Article was first presented at a symposium at the University of Arizona James E. Rogers College of Law celebrating Professor Braucher's life and work.

The AFFECT coalition was formed by opponents of the Uniform Computer Information Transaction Act, a legislative project that started out as part of the Uniform Commercial Code ("UCC") revision process but was later completed as a separate uniform law.[3] When the original version of the UCC was completed in the 1950s, "software" as something separate from the hardware of computing machinery had not been invented, let alone become the subject of a major category of commercial transactions.[4] After efforts during the 1990s to create a commercial law governing software and information transactions became hopelessly bogged down in political controversy, almost all state legislatures rejected it.[5] The 12 principles of fair electronic commerce represented an effort to shift the focus of debate away from that debacle and toward building a consensus

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1. Jean Braucher, *New Basics: Twelve Principles for Fair Commerce in Mass-Market Software and Other Digital Products*, *in* CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 183 (Jane K. Winn ed., 2006).

2. *Id.* at 178.

3. UNIF. ELEC. TRANSACTIONS ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002), http://www.uniformlaws.org/shared/docs/computer_information_transactions/ucita_final_02.pdf.

4. *Id.* at 1.

5. Braucher, *supra* note 1, at 180–82.

regarding what constitutes "fair dealing" for trade in digital products and electronic commerce.[6]

A decade after the 12 principles were issued, a cursory review of different legal systems indicates that progress in the direction of the 12 principles has been modest at best. While American consumer protection laws have generally been subject to creeping obsolescence as a result of technological innovation, the European Union has repeatedly revised its consumer and data protection laws to ensure their continued efficacy.[7] Neither jurisdiction, however, has clearly embraced the principles. By contrast, the one jurisdiction that arguably comes closest to implementing all of the 12 principles in online consumer transactions generally is not a government at all, but Amazon acting as a private regulator.

Amazon is the largest American Internet retailer by a large margin, as well as one of the largest retailers in America.[8] In addition, Amazon operates the Amazon Marketplace where independent retailers offer products for sale. It has one of the most efficient logistics systems in the world for its own products, and also provides logistical support—including order fulfillment, delivery, payment processing, and web hosting services—for Amazon Marketplace sellers. As part of its brand management strategy, Amazon maintains an intense focus on customer satisfaction and requires participants in the Amazon Marketplace to do the same.[9] In other words, Amazon's customers do not need to worry about whether their national consumer protection laws have been updated to address online commerce issues because they know Amazon has staked its reputation on making sure that its customers are always treated fairly. The same cannot be said of Amazon's suppliers or employees, however. Amazon has been criticized for abusing its power as a monopsonist in some markets and for the harsh treatment of its employees.[10]

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6. *Id.* at 182–83.

7. *See* Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304/64); *see also Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/comp_am_art_30-91/comp_am_art_30-91en.pdf.

8. Phil Wahba, *Amazon Ranks Among Retail's 10 Biggest Companies for the First Time*, FORTUNE (July 1, 2014, 4:50 PM), http://fortune.com/2014/07/01/10-largest-retailers-amazon/; *Running Away*, WALL ST. J., http://www.wsj.com/articles/SB10001424127887323324904579041300287558882.

9. George Anders, *Jeff Bezos Reveals His No. 1 Leadership Secret*, FORBES (Apr. 4, 2012, 6:00 PM), http://www.forbes.com/forbes/2012/0423/ceo-compensation-12-amazon-technology-jeff-bezos-gets-it.html; Joe Nocera, *Put Buyers First? What a Concept*, N.Y. TIMES, Jan. 5, 2008, at C1.

10. Paul Krugman, *Amazon's Monopsony Is Not O.K.*, N.Y. TIMES, Oct. 20, 2014, at A25; Spencer Soper, *Amazon Worker Forces Changes as Labor Board Settles Claim*, BLOOMBERG (Nov. 18, 2014, 3:56 PM),

In 1991, Robert Reich published an essay in the *New York Times Sunday Magazine* entitled *The Secession of the Successful*.[11] Reich described the growing concentration of wealth in American society in the hands of what he called the "fortunate top fifth" of the population, and this group's increasing withdrawal into private gated communities, private schools, private security forces, and private infrastructure.[12] This withdrawal, in turn, impoverishes civil society in America, making the political challenges it faces even more intractable. While Reich was describing the migration of wealthy individuals into private geographical spaces, a similar migration occurs when economically powerful players withdraw into private regulatory orders that define global markets. Due to a limited interface between those private regulatory orders and the national legal systems from which they grew, private regulators can focus on maximizing value to shareholders while avoiding the broad range of duties a national legal system must accommodate.

This rise of private global regulators and erosion of national legal systems has been studied through various lenses, including transnational business governance,[13] global administrative law,[14] global legal pluralism,[15] transnational legal orders,[16] new governance and smart regulation,[17] global private regulation,[18] and democratic experimentalism.[19] These studies have highlighted many different aspects of the transformation of legal systems in response to the rise of global

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http://www.bloomberg.com/news/articles/2014-11-18/amazon-settles-labor-board-complaint-on-workers-rights; David Streitfeld, *Inside Amazon's Very Hot Warehouse*, N.Y. TIMES: BITS (Sept. 19, 2011, 6:12 PM), http://bits.blogs.nytimes.com/2011/09/19/inside-amazons-very-hot-warehouse/.

11. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES MAG. (Jan. 20, 1991), http://www.nytimes.com/1991/01/20/magazine/secession-of-the-successful.html?pagewanted=all.

12. *Id.*

13. Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 1, 1–21 (2014).

14. *See* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 27–29 (2005).

15. Paul Schiff Berman, *From Legal Pluralism to Global Legal Pluralism*, *in* LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 255 (Richard Nobels & David Schiff eds., 2014); Ralf Michaels, *Globalization and Law: Law Beyond the State*, *in* LAW AND SOCIAL THEORY 287 (Reza Banakar & Max Travers eds., 2d ed. 2013); Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375 (2008).

16. *See* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3–6 (Terence C. Halliday & Gregory Shaffer eds., 2015).

17. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 4 (1992); NEIL GUNNINGHAM & PETER GRABOSKY, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY (1998); LESTER M. SALAMON, *The New Governance and the Tools of Public Action: An Introduction*, *in* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1 (Lester M. Salamon ed., 2002).

18. *See* TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011); M. Patrick Cottrell & David M. Trubek, *Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 359 (2012).

19. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

markets and accelerating pace of technological innovation. However, none of these studies have focused on the role of information and communication technology ("ICT") networks or global "multi-sided platforms" in the governance of global markets.[20] Once ICT networks have been launched successfully, they are difficult to unseat, an advantage that may give the operator of a successful network considerable leverage over users of that network.[21] Global technology companies—such as Amazon, Google, Apple, Facebook, and Microsoft—have rapidly achieved enormous market power as ICT networks. They have further amplified that power by adopting a multi-sided platform business model, which requires complementary "sides" such as consumers and retailers, or users and advertisers, to participate in their platforms.[22] These platform operators can exercise considerable private regulatory authority over the global "ecosystems" that the operation of their platforms has spawned.

The ability of these platform operators to act as private regulators with authority over the global online marketplaces they have created calls to mind Reich's description in 1991 of the withdrawal of the wealthy and powerful from civil society into private gated communities.[23] Amazon's status as the primary regulator of its own marketplace combined with its single-minded pursuit of customer satisfaction often produces profoundly problematic relations with employees and suppliers.[24] When a platform operator is also its primary regulator, negative spillover effects may occur. In particular, squeezing employees and suppliers to ensure that consumers get whatever they want merely pushes conflict from one part of the platform "ecosystem" to another; it does not make online commerce fairer, which was the goal of the 12 principles.

Although transaction-level norms such as those found in the 12 principles cannot ensure that all stakeholders in online markets are treated fairly, other forms of regulation might be more effective in achieving that goal. Shifting the focus of efforts to make markets operate more fairly from the level of specific contract terms to the broader relationship between national legal systems and global private regulators might be a more effective regulatory strategy. For example, the California Transparency in Supply Chains Act of 2010 promotes fairness in global commerce by mandating disclosure of efforts to abolish forced labor in global production networks. If global retailers such as Amazon and Walmart were required to disclose to consumers whether their employees and suppliers had

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20. OZ SHY, THE ECONOMICS OF NETWORK INDUSTRIES (2001).

21. *See id.* at 155–59; *see also* HAL R. VARIAN ET AL., THE ECONOMICS OF INFORMATION TECHNOLOGY: AN INTRODUCTION 21–25 (2004).

22. Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 INT'L J. INDUS. ORG. 162, 162–63 (2015); Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. ECON. PERSP. 125, 126–29 (2009).

23. Reich, *supra* note 11.

24. Jodi Kantor & David Streitfeld, *Inside Amazon: Wrestling Big Ideas in a Bruising Workplace*, N.Y. TIMES, Aug. 16, 2015, at A1. *But see* Krishnadev Calamur, *A Blistering Response from Amazon*, ATLANTIC (Oct. 19, 2015, 3:15 PM), http://www.theatlantic.com/business/archive/2015/10/amazon-responds-new-york-times/411232/ (noting that Amazon questioned the accuracy of the *New York Times*' reporting and provided evidence calling into question the reliability of some sources).

earned a "living wage," then these global retailers might have stronger incentives to ensure that the treatment of different stakeholder groups was more balanced.

I. PLATFORM AS GOVERNANCE

In 2015, Amazon together with Google, Apple, Facebook, Microsoft, and Alibaba, comprised a small, elite group of businesses that operated global platforms. The word platform in this sense has been defined in the following terms:

> The platform, created and maintained by one or more intermediaries, encompasses components and rules employed by users in most of their interactions. Users' interactions are subject to network effects, which are demand-side economies of scale: the value of platform affiliation for any given user depends upon the number of other users with whom they can interact.[25]

A platform business strategy has been defined as, "the mobilization of a networked business platform to expand into and operate in a given market. A business platform, in turn, is a nexus of rules and infrastructure that facilitate interactions among network users."[26]

Out of the five most valuable brands in the world in 2015, four were platforms in this sense: Apple, Google, IBM, and Microsoft.[27] Samsung, Facebook, Amazon, Cisco, Oracle, and Intel were included in the top 20 most valuable brands of 2015, and are also considered platforms in this sense.[28]

Computer networks are an essential element of platforms. Economists have defined networks as markets characterized by complementarity (i.e., what consumers value are systems made up of multiple products), compatibility (i.e., the different products making up a system are interoperable), and interoperability standards.[29] Markets based on networks have certain special characteristics that make launching a viable network very difficult, which in turn makes displacing a successful network difficult once it is in place.[30] These special characteristics include consumption externalities—i.e., the utility of a product to one consumer depends on how many other consumers are using the same product.[31] Another special characteristic is the high risk of user "lock-in" once a network has been launched successfully: If the switching costs involved in moving from one system to another are high, then users may find themselves "locked in" to the old system

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25. Thomas R. Eisenmann et al., *Platform Envelopment*, 32 STRATEGIC MGMT. J. 1270, 1273 (2011).

26. Geoffrey Parker & Marshall W. Van Alstyne, *Platform Strategy* 1 (Bos. U. Sch. of Mgmt., Research Paper No. 2439323, 2014), http://ssrn.com/abstract=2439323.

27. *The World's Most Valuable Brands*, FORBES, http://www.forbes.com/powerful-brands/list/ (last visited Jan. 16, 2015).

28. *Id.*

29. SHY, *supra* note 20, at 1–2.

30. *Id.* at 3–6.

31. *Id.* at 3–4; *see also* VARIAN ET AL., *supra* note 21, at 33–37.

even if a new, better system becomes available.[32] Networks are also subject to significant economies of scale in production. Many products distributed over networks such as software or digital media also have extremely high up-front development costs but a marginal production cost approaching zero.[33]

As a result of innovations in the technology of computer networks, what were once public marketplaces can now be operated as privately owned multi-sided platforms, in effect privatizing a public good.[34] A platform is an "institution" as that term was used by economist Douglass C. North:

> Institutions are the rules of the game in a society, or more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change.[35]

A successful platform operator is not merely the manager of activity taking place on the platform, but also one of the regulators governing that activity.[36] A platform operator's power as a private regulator may be amplified by network effects, and because it is exercised through global ICT networks, the impact can be direct and immediate.[37]

II. REGULATORY GOVERNANCE AND PLATFORMS

Although it may be conventional to think of enterprises such as Amazon as subjects of nation-state regulation, the role of such enterprises in regulating economic activity by displacing public marketplaces has also long been recognized.[38] In recent decades, however, governance activities undertaken by businesses have expanded beyond the market/hierarchy distinction and now include interactions with a range of private sector, civil society, multi-stakeholder,

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32. Examples of switching costs include the cost of researching alternatives to the current system and weighing the costs and benefits of switching ("search costs"); the human effort of learning a new system; converting data stored in the old system to formats that can be used with the new system; and contractual restrictions that would make switching networks a breach of contract. SHY, *supra* note 20, at 4–5.

33. *Id.* at 5; *see also* VARIAN ET AL., *supra* note 21, at 25.

34. *See generally* Robert J. Staaf, *Privatization of Public Goods*, 41 PUB. CHOICE 435, 435–36 (1983) (noting how technological innovation makes privatization of public goods possible).

35. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (James Alt & Douglass C. North eds., rev. ed.1999).

36. *See* Kevin S. Boudreau & Andrei Hagiu, *Platform Rules: Multi-sided Platforms as Regulators*, *in* PLATFORMS, MARKETS AND INNOVATION 163 (Anabelle Gawer ed., 2009); *see also* David S. Evans, *Governing Bad Behavior by Users of Multi-sided Platforms*, 27 BERKELEY TECH. L.J. 1201, 1210 (2012).

37. Jane K. Winn, *Technical Standards as Data Protection Regulation*, *in* REINVENTING DATA PROTECTION 191 (Serge Gutwirth et al. eds., 2009).

38. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 401–05 (1937).

and hybrid public-private institutions.[39] The rise of Amazon as the de facto consumer protection authority with jurisdiction over its marketplace is an example of business acting as a source and not merely a target of regulation. The interaction among nation states, international organizations, and business institutions produces what Eberlein et al., describe as "regulatory governance."[40] By focusing on institutions that maintain accountability, legitimacy, and rights rather than on traditional conceptions of "law," Eberlein et al., have developed a framework to analyze the dynamics of regulatory governance without regard to its roots in the nation state or elsewhere. This framework breaks down the lifecycle of regulatory governance into the following stages: agenda setting, norm formation, implementation, monitoring, enforcement, and review.[41]

Amazon derives its authority as a private regulator in part from its ownership of the ICT platform on which its marketplaces operate and in part from its status as a private business enterprise under the law of each country, as well as the status of its interactions with its customers, suppliers, and employees *based on* contracts. Moreover, Amazon's market power as one of the world's most ferocious competitors and successful platform operators enhances its de facto regulatory authority derived from traditional legal relations. In terms of the taxonomy of regulatory governance activities, Amazon is engaged in the following:

Problem Definition and Agenda Setting	Prioritize customer experience; omni-channel commerce; ubiquitous computing
Norm Formation	"One-Click" contracting; A-to-Z Guarantee
Implementation	Terms and Conditions; Privacy Policy
Monitoring and Information Gathering	Data analytics from activity on Amazon Marketplace; Amazon Web Services; Kindle
Enforcement	Exclude stakeholders from platform; chargeback contested transactions to merchants; plus contract and property enforcement in national legal systems
Review and Evaluation	Internal review; national government oversight

When Amazon was founded in 1994, its business model was simply online retailer rather than multi-sided platform, as it only sold to consumers the products that it owned.[42] In 1999, it launched a service originally called zShops to allow third parties to sell their products on its platform, a service that was later rebranded as Amazon Marketplace.[43] Third-party sellers pay nothing to list items

39. Eberlein et al., *supra* note 13, at 13.
40. *Id.* at 3.
41. *Id.* at 6.
42. Hagiu & Wright, *supra* note 22, at 163.
43. John Fredrick Moore, *Amazon Adds Merchants*, CNNMONEY (Sept. 29, 1999, 5:06 PM), http://money.cnn.com/1999/09/29/technology/amazon/; *Selling at Amazon.com: zShops Storefront*, AMAZON, http://www.amazon.com/gp/help/customer/display.html?nodeId=1161442 (last visited Jan. 16, 2016).

but 15–45% in "referral fees" and other charges to Amazon when an item is sold.[44] In 2015, 40% of all products sold on Amazon were sold by Amazon Marketplace sellers.[45]

With regard to consumer transactions taking place within the Amazon Marketplace, Amazon both defines and enforces the norms that apply to third-party merchants.[46] In order to inspire consumer confidence, Amazon provides Amazon Marketplace buyers with a comprehensive "A-to-Z Guarantee" that in effect forces third-party merchants to match its fanatical pursuit of customer satisfaction. The A-to-Z Guarantee provides refunds up to $2,500 for buyers who claim an item they received was damaged, defective, or materially different from the item represented on the product detail page.[47] Refunds may also be provided for items that did not arrive within the delivery window, if the seller has not voluntarily issued the refund.[48] Amazon can enforce its buyer guarantee policy by charging back refunds against the seller, or even excluding the seller from the Amazon Marketplace: "Sellers with excessive guarantee claims and/or service chargebacks may be subject to warnings, suspensions, and account termination."[49]

Although Amazon has considerable clout as a private regulator, it nevertheless must rely on national legal systems for support in dealing with the worst offenders. For example, in 2015, Amazon filed suit in Washington State against 1,000 individuals it said were selling fake reviews to Amazon Marketplace merchants.[50] The lawsuit involved trademark disparagement and breach of contract claims based on the reviewers' assent to Amazon's terms of service.

Given Amazon's strong tilt in favor of retail customers, it is not surprising that reports of buyer fraud are widespread, as are reports of seller

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44. *Selling on Amazon Fee Schedule*, AMAZON, http://sellercentral.amazon.com/gp/seller/registration/participationAgreement.html?itemID=200336920&language=en_US&ld=SCSOAStriplogin (last visited Jan. 16, 2016); Mary Weinstein, *See on Amazon: How Much Does It Cost to Sell on Amazon?*, CPC STRATEGY: BLOG (June 23, 2014), http://www.cpcstrategy.com/blog/2014/06/sell-on-amazon-pricing/.

45. *Technologies Transforming Transportation: Is the Government Keeping Up?*, *Hearing Before the Subcomm. On Surface Transp. And Merch. Marine Infrastructure, and Sec.*, 114th Cong. 1 (2015) (statement of Paul Misener, Vice President for Global Public Policy, Amazon).

46. *Seller Protection & Best Practices*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_cn?ie=UTF8&nodeId=13832211 (last visited Jan. 16, 2016).

47. *About A-to-Z Guarantee*, AMAZON, http://www.amazon.com/gp/help/customer/display.html?nodeId=200783670 (last visited Jan. 16, 2016).

48. *A-to-Z Guarantee Claims Program*, AMAZON, http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=13832181 (last visited Jan. 16, 2016).

49. *Id.*

50. Mae Anderson, *Crackdown: Amazon Sues to Stop Phony Product Reviews*, ASSOCIATED PRESS (Oct. 19, 2015, 7:05 PM), http://bigstory.ap.org/article/c2bc7f2e4b64490db4291ed5619ff2b2/amazon-sues-review-sellers-salvo-against-bogus-reviewers.

frustration with Amazon's dispute resolution procedures.[51] Amazon provides the following guidance for sellers concerned about this type of fraud on its website:

> If a seller follows the Amazon Marketplace Community Rules when listing, selling and shipping their item and, can document shipment to the customer or that the buyer received the correct item, Amazon usually does not hold the seller responsible for the reimbursement of the claim. Otherwise, reimbursement for the claim will usually be debited from the seller's account.[52]

Discussion among sellers on Amazon's own seller discussion forums indicates that sellers are in fact penalized by Amazon for any A-to-Z claims, even if the buyer later withdraws the claim, such as when a package that was delayed finally arrives.[53] While buyers are allowed to review seller performance, sellers are not permitted to comment publicly on misconduct by buyers, leading one seller to lament:

> I've found that recently more buyers are using [the A-to-Z Guarantee] to specifically get free product. I mean, it's not a secret Amazon will send a refund for any lame reason . . . but if Amazon is going to expect that their sellers give a FULL REFUND without returning an item AND downgrade a seller's reputation, then there should be an aspect of seller protection tied to it, be it buyer ratings or some method to know how often the customer has asked for a refund in the past . . . [54]

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51. *See* Jake Seilger, *Is Amazon's Marketplace Encouraging Buyers to Scam Sellers by Filing a Refund Claim?*, STORY'S STORY (Feb. 16, 2013), http://jakeseliger.com/2013/02/16/is-amazon-coms-marketplace-encouraging-buyers-to-scam-sellers-by-filing-a-refund-claim/; *see also* Richard Stubbings, *The Dreaded A-Z Claim*, PRACTICAL ECOMMERCE (May 6, 2013), http://www.practicalecommerce.com/columns/the-view-from-england/11034-The-dreaded-Amazon-A-Z-claim-; *cf.* Better than Outlet, Reply to *Buyer Return Different Item Scam*, AMAZON SERVICES SELLER FORUMS (July 12, 2013, 8:05 AM), http://sellercentral.amazon.com/forums/message.jspa?messageID=2489867 (Amazon Marketplace seller reporting on Seller Forum that Amazon denied a fraudulent buyer claim).

52. *Seller Protection*, AMAZON.COM, http://www.Amazon/gp/help/customer/display.html?nodeId=13832211 (last visited Jan. 17, 2016).

53. Philips Light Lounge-Ved Electricals, *A-Z Guarantee Claim: Penalized for a Claim Withdrawn by the Buyer?*, AMAZON SERVICES INDIA SELLER FORUMS (Nov. 25, 2014, 5:06 PM), http://sellercentral.amazon.in/forums/message.jspa?messageID=1236715 ("We recently had an A-Z Guarantee Claim opened by a buyer and the buyer withdrew/cancelled his claim and yet we were penalized for the same. When we contacted Amazon, the customer service rep replied that even if a buyer withdraws or cancels his claim, the seller will still be penalized. This is however contradictory to Amazon's own online help article information.").

54. krlpuretone, *Seller Discussion - Amazon A to Z Guarantee Claims*, STEVE HOFFMAN MUSIC FORUMS (June 7, 2014), http://forums.stevehoffman.tv/threads/seller-discussion-amazon-a-to-z-guarantee-claims.359879/.

In the absence of a violation of national antitrust or competition law, merchants who are dissatisfied with Amazon's enforcement of its rules have no choice but to exit:

> In the end, it is Amazon's playing field. By selling on Amazon you have to accept that Amazon will always put the customer first. You have to accept the way in which they judge their sellers. No matter how unfair or unreasonable it seems, it is their playground, their rules. It is better to accept this and find a way to play within these rules, or get out before you are forced out.[55]

III. NEW BASICS IN THE SHADOW OF PLATFORM GOVERNANCE

In 2005, Professor Braucher published a paper describing the 12 principles developed by AFFECT as guidelines for electronic commerce involving consumers.[56] She first outlined the challenges facing consumers in markets dominated by networks and platforms.[57] Professor Braucher and all those who contributed to the principles hoped they might be the catalyst for major reforms:

> Given all these market weaknesses, a good place to begin law reform efforts concerning software and digital content deals is with a focus on mass-market transactions in digital projects. To do this job well, we need to have basic principles in mind. Although law reform could begin at either the state or federal level, ultimately federal legislation will probably be desirable because of the connection to federal intellectual property law and policy involved in addressing the overreaching in non-negotiated terms for mass-market digital products. Some state statutory experiments could lead the way to this outcome.[58]

In terms of the transnational business government framework described above, the principles were intended to be an exercise in agenda-setting and norm formation.

The 12 principles were developed in two forms, a concise form designed to be comprehensible to consumers and a more elaborate form intended for lawyers and legislators. In their simplified form, they are:

> I. Customers are entitled to readily find, review, and understand proposed terms when they shop.
>
> II. Customers are entitled to actively accept proposed terms before they make the deal.
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> III. Customers are entitled to information about all known nontrivial defects in a product before committing to the deal.
>
> IV. Customers are entitled to a refund when the product is not of reasonable quality.

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55. Stubbings, *supra* note 51.
56. *See* Braucher, *supra* note 1.
57. *Id.* at 2.
58. *Id.* at 2–3.

> V. Customers are entitled to have their disputes settled in a local convenient venue.
>
> VI. Customers are entitled to control their own computer systems.
>
> VII. Customers are entitled to control their own data.
>
> VIII. Customers are entitled to fair use, including library or classroom use, of digital products to the extent permitted by federal copyright law.
>
> IX. Customers are entitled to study how a product works.
>
> X. Customers are entitled to express opinions about products and report their experiences with them.
>
> XI. Customers are entitled to the free use of public domain information.
>
> XII. Customers are entitled to transfer products as long as they do not retain access to them.[59]

In the decade following publication of the principles, progress toward enshrining them in U.S. law is difficult to detect. While principles I and II may often be observed in U.S. cases involving consumers and electronic commerce,[60] the controversial but influential *Hill v. Gateway*[61] case remains good law and arguably violates both principles.[62] With regard to principles III and IV, American sellers generally remain free to disclaim warranty liability for the products they sell and are generally under no duty beyond that imposed by tort law to disclose defects.[63] The use of arbitration terms in consumer contracts is even more widespread in America in 2015 than it was in 2005.[64] In 2011, the U.S. Supreme Court resoundingly rejected the idea that American consumers have any right to

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59. *Id.* at 8.

60. *See, e.g.*, Knutson v. Sirius XM Radio Inc., Civil No. 12cv418 AJB (NLS), 2012 WL 1965337 (S.D. Cal. May 31, 2012), *rev'd and remanded*, 771 F.3d 559 (9th Cir. 2014).

61. Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (validating "pay now, terms later" or "rolling contracts" contract formation mechanisms while rejecting an attempt by consumers to commence a class action against Gateway 2000 for defective computers and enforcing the arbitration term that had not been mentioned when the Hills placed their order by telephone but instead had been shipped in the box with the computer).

62. The reporters of an American Law Institute project, which aimed to harmonize consumer contract law in areas including electronic commerce, found that, in the 20 years following the *Hill v. Gateway* case, it had been followed 80% of the time that similar issues had been considered by American courts. RESTATEMENT OF THE LAW, CONSUMER CONTRACTS 27 (AM. LAW INST., Preliminary Draft No. 2, 2015).

63. *See generally* U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

64. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1.

have their disputes heard in a local, convenient venue in *AT&T Mobility Inc. v. Concepcion*.[65]

American information privacy and computer security rights remain fragmented and weak and continue to lag behind those of other jurisdictions such as the European Union.[66] The scope of the fair use defense under copyright law with regard to digital products and electronic commerce also remains uncertain, although the Ninth Circuit recently affirmed that before issuing takedown notices to website operators pursuant to the Digital Millennium Copyright Act, copyright owners must first consider whether the person posting the allegedly infringing content might have a fair use defense.[67]

While American consumers are generally free to post negative reviews of products and services, they do so at the risk of being sued for defamation.[68] On the other hand, sellers who try to prohibit leaving truthful negative reviews may be found to have engaged in unfair trade practices.[69] While nonprofit organizations such as Creative Commons[70] and Public.Resource.Org[71] may have increased the volume of online materials available to the public royalty free, there is no general right of free access to public-domain materials. The 12 principles proposed that copies of digital media should be as freely transferable as hard copies so long as the transferor did not retain a copy, but U.S. law today still does not recognize such a right unless the license granted by the copyright owner includes permission to make such transfers.

By contrast, Amazon's focus on customer satisfaction has led it to comply voluntarily or come close to complying with almost all of the 12 principles:

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65. 563 U.S. 333 (2011); *accord* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).

66. *See generally* Paul M. Schwartz, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966, 1978 (2013).

67. Lenz v. Universal Music Corp., 801 F.3d 1126, 1129 (9th Cir. 2015).

68. With regard to state law defamation claims for negative reviews, see, e.g., Rahbar v. Batoon, A136463, 2014 WL 346910, at *4–5 (Cal. Ct. App. Jan. 31, 2014). *But cf.* Pham v. Lee, H039184, 2014 WL 6992251, at *4–7 (Cal. Ct. App. Dec. 11, 2014); Adi Kamdar, *Amid Further Lawsuits, a Federal Anti-SLAPP Law Is Sorely Needed*, ELEC. FRONTIER FOUND. (Jan. 9, 2013), http://www.eff.org/deeplinks/2013/01/amid-further-lawsuits-federal-anti-slapp-law-sorely-needed.

69. The FTC has recently taken action against vendors who tried to prohibit consumers from posting negative reviews about their products. Press Release, Fed. Trade Commission, FTC Sues Marketers Who Used "Gag Clauses," Monetary Threats, and Lawsuits to Stop Negative Consumer Reviews for Unproven Weight-Loss Products (Sept. 28, 2015), http://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits.

70. CREATIVE COMMONS, http://www.creativecommons.org/about/ (last visited Jan. 17, 2016).

71. PUBLIC.RESOURCE.ORG, http://www.public.resource.org (last visited Jan. 17, 2016).

	New Basics	Amazon
I	Accessible, Comprehensible Terms	Posted on the bottom of every page; links to relevant content prominently displayed and embedded in purchase and return processes
II	Actively accept terms before being bound	Unambiguous order placement interface
III	Right to information about defects before purchase	Customer reviews provide information about defects before purchase
IV	Right to a refund if not reasonable quality	Right to a refund in most cases without regard to quality
V	Right to settle disputes at convenient venue	Right to use local small-claims court preserved
VI	Customer controls own computer	No use of spyware
VII	Customer controls own data	Right to opt-out of interest based ads, information sharing, communications
VIII	Freedom to enjoy fair use rights	Entitled to download digital content to unlimited number of devices; Kindle Online Lending Library for Prime members
IX	Freedom to study how products work	Reverse engineering of Kindle was not blocked until recently
X	Freedom to express opinions and report experiences	Freedom to express opinions and report experiences
XI	Free use of public domain material	Free access to public domain materials in Kindle
XII	Entitled to transfer if no copy retained	Entitled to download digital content to unlimited number of devices

Amazon is clearly in compliance with principles I, II, III, and IV.

Although its customers are generally required to arbitrate disputes, thus reducing the risk of class-action lawsuits, Amazon agrees to appear in the local small-claims court of any individual buyer who prefers that route to arbitration.[72]

Given that Amazon Web Services is the largest provider of cloud computing services in America,[73] Amazon is presumably subjecting all its own customer data to intense scrutiny using "Big Data" analytics.[74] Amazon provides mechanisms for any customer that prefers not to be subject to that kind of scrutiny to "opt out" of it, however.[75] While Amazon became embroiled in some high profile information-privacy-breach litigation in the 1990s,[76] it has since maintained a low profile and managed to avoid further controversy in the area of information privacy.[77]

Amazon protects the one-sided right of buyers to review sellers so vigorously that some sellers believe they cannot defend themselves from buyer fraud.[78] Through the Kindle e-book reader, Amazon has made it easier than ever before for consumers to access public domain works. While Amazon does not literally allow licensees of digital content to transfer copies to nonlicensees, Amazon Prime service subscribers may achieve a similar result with the ability to download content to an unlimited number of devices.[79]

While Amazon might once have tolerated "jailbreaks" of its Kindle e-reader, it is now very serious about locking down the device to prevent tinkering.[80] Thus, the only one of the 12 principles for which Amazon is clearly out of compliance is principle IX governing reverse engineering.

Not only has Amazon come closer to compliance with the 12 principles than any country in the world, it has also served as a transmission vector by

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72. *Conditions of Use*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=ap_desktop_footer_cou?ie=UTF8&nodeId=508088 (last visited Feb. 27, 2016).

73. Barb Darrow, *Shocker! Amazon Remains the Top Dog in Cloud by Far, but Microsoft, Google Make Strides*, FORTUNE (May 19, 2015, 10:28 AM), http://fortune.com/2015/05/19/amazon-tops-in-cloud/.

74. J.P. Mangalindan, *Amazon's Recommendation Secret*, FORTUNE (July 30, 2012, 11:09 AM), http://fortune.com/2012/07/30/amazons-recommendation-secret/.

75. *Amazon.com Privacy Notice*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=ap_desktop_footer_privacy_notice?ie=UTF8&nodeId=468496 (last visited Feb. 27, 2016).

76. *See, e.g.*, Sklare v. Alexa Internet (In re Amazon.com/Alexa Internet Privacy Litig.), No. 1346, 2000 U.S. Dist. LEXIS 8201, at *2–4 (J.P.M.L. June 7, 2000).

77. John P. Mello, Jr., *Data Requests Put Amazon Between Rock, Hard Place*, E-COM. TIMES (June 23, 2015, 1:45 PM), http://www.ecommercetimes.com/story/82207.html.

78. *See, e.g.*, Stubbings, *supra* note 51.

79. Marshall Honorof, *What Is Amazon Prime?*, TOM'S GUIDE (Dec. 28, 2015, 10:07 AM), http://www.tomsguide.com/us/what-is-amazon-prime,news-18041.html ("Amazon Households allow two adults and up to four children to share digital Amazon content.").

80. *Amazon Quietly Bricked Jailbroken Kindle Devices Last Year*, TECHDIRT (May 24, 2015), http://www.techdirt.com/articles/20150321/13350230396/while-bricking-jailbroken-fire-tvs-last-year-amazon-did-same-to-kindle-devices.shtml.

bringing European consumer rights into the American market.[81] In 2000, the EU E-Commerce Directive mandated that online vendors in Europe make clear to website visitors what technical steps were required to form an online contract as well as the means for identifying and correcting errors prior to placing an order.[82] To comply, Amazon was among the first American retailers to display a visual representation of the transaction flow across the top of the screen during the order process, highlighting the current step in the process while making all steps visible. This visual cue has now become ubiquitous in American online commerce in the absence of any legislative mandate, suggesting that Amazon's competitors may have followed its lead. Amazon's 30-day return policy exceeds the mandatory 14-day right of return imposed by Consumer Rights Directive.[83]

Amazon's unflagging attention to customer satisfaction, however, comes at the cost of profoundly problematic relations with its employees and suppliers.[84] It has repeatedly been criticized for the grueling conditions to which its workers are subjected in its distribution and logistics network.[85] The intensity and harshness of Amazon's culture apparently extends all the way up the hierarchy to top management.[86] Amazon enjoys a virtual monopsony in many markets such as online book sales, and has been criticized for abusing that market power.[87] While

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81. Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on US Business-to-Consumer Internet Merchants*, 62 BUS. LAW. 209 (2006).

82. Directive 2000/31/EC of the European Parliament and of the Council of 8 June, 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, O.J. (L. 178) 1–16.

83. Directive 2011/83/EU of the European Parliament and of the Council of 25 Oct., 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance, O.J. (L 304), art. 9 ("Right of withdrawal 1. Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14."). Under the former Distance Selling Directive, the right of return was for 7 days.

84. *See* Kantor & Streitfeld, *supra* note 24; Calamur, *supra* note 24.

85. Hal Bernton & Susan Kelleher, *Amazon Warehouse Jobs Push Workers to Physical Limit*, SEATTLE TIMES (Apr. 3, 2012, 9:30 PM), http://www.seattletimes.com/business/amazon-warehouse-jobs-push-workers-to-physical-limit/; Nathaniel Mott, *Don't Be Surprised at how Amazon Treats Its Workers*, GIGAOM (Aug. 18, 2015, 9:15 AM), http://gigaom.com/2015/08/18/dont-be-surprised-at-how-amazon-treats-its-workers/; Spencer Soper, *Inside Amazon's Warehouse*, MORNING CALL (Aug. 17, 2015, 12:13 PM), http://www.mcall.com/news/local/amazon/mc-allentown-amazon-complaints-20110917-story.html. *But see Working at Amazon*, AMAZON, www.amazon.com/fcpractices (last visited Jan. 16, 2016) (pointing out that wages and benefits for workers in Amazon fulfillment centers are above the national average for retailer workers)

86. Kantor & Streitfeld, *supra* note 24; Calamur, *supra* note 24.

87. *See* Joshua Gans, *Amazon: It's Not the Power, It's the Lost Focus*, DIGITOPOLY (Oct. 20, 2014), http://www.digitopoly.org/2014/10/20/amazon-its-not-the-power-its-the-lost-focus; *see also* Krugman, *supra* note 10. *But cf.* R.A., *Big Bad Amazon*, ECONOMIST (Oct. 20, 2014, 8:19 PM), http://www.economist.com/blogs/freeexchange/2014/10/market-power.

Walmart was once the world leader in the relentless pursuit of efficiency to bring "everyday low prices" to its customers, that mantle has now passed to Amazon, whose market capitalization exceeded Walmart's for the first time in 2015.[88] While Walmart's unfair or even illegal labor practices have attracted widespread attention, the fact that Amazon's labor practices do not appear to be any better than those of Walmart has not been as widely noted.[89]

IV. ACCOUNTABILITY OF PLATFORM GOVERNANCE

With regard to activities that take place within the "ecosystem" of the platform, the regulatory authority exercised by global platform operators may rival that of national governments. However, the exercise of that regulatory authority is not normally legitimated by the same mechanisms as government regulation: representative democracy or judicial review. Any legitimacy that platform operators enjoy as regulators of activity taking place on the platform is derived from their power in markets, as well as contract and property rights established under national legal systems. The power and authority of national governments—the traditional nexus of legitimate authority in modern societies—is declining, but widely recognized measures of political legitimacy for platform governance equivalent to representative democracy or judicial review have not yet emerged.[90] Amazon's intense focus on customer satisfaction combined with its status as a private regulator currently permit it to externalize many of the costs of achieving high levels of customer satisfaction onto those stakeholder groups most excluded from its governance processes.

If increased enforcement efforts increase compliance in one area by triggering an increase in violations in another area, the result of such negative spillover effects is like squeezing a balloon. Although the term "balloon effect" was first used with reference to the failure of the U.S. War on Drugs to stem the tide of drug trafficking in North and South America,[91] a similar dynamic may be at play when the 12 principles are applied to private regulators such as Amazon. While the explicit goal of the 12 principles was fairness to consumers, the implicit goal was to make the operation of markets fairer generally. If the rights of workers and suppliers were not addressed explicitly in the 12 principles, it was doubtless

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88. Matt Krantz, *Amazon Just Surpassed Walmart in Market Cap*, USA TODAY (July 23, 2015, 6:44 PM), http://www.usatoday.com/story/money/markets/2015/07/23/amazon-worth-more-walmart/30588783/.

89. *See* Rob Cox, *Why Amazon May Take a Page from Walmart's Labor Playbook*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/business/dealbook/why-amazon-may-take-a-page-from-walmarts-labor-playbook.html; *see also* Alex Planes, *To Win the Holidays, Amazon.com Pushes Employees to the Limit*, THE MOTLEY FOOL (Nov. 23, 2014, 4:00 PM), http://www.fool.com/investing/general/2014/11/23/to-win-the-holidays-amazoncom-strips-its-workers-o.aspx.

90. Anne Peters et al., *Toward Non-State Actors as Effective, Legitimate and Accountable Standard-Setters*, *in* NON-STATE ACTORS AS STANDARD SETTERS 492, 502 (Anne Peters et al. eds., 2009).

91. *Balloon Effect*, WIKIPEDIA, http://en.wikipedia.org/wiki/Balloon_effect (last visited Jan. 17, 2016).

because the drafters assumed that there would be other laws in place to maintain an acceptable minimum level of protection for workers and suppliers. If the drafters of the 12 principles could have foreseen that significant progress in implementation could only be achieved by the "Walmartization" of labor and producer markets, they might have drafted the principles differently.

The California Supply Chain Transparency Act of 2010 requires large retailers and manufacturers to provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains and to educate consumers on how to purchase goods that are produced by companies that responsibly manage their supply chains. [92] Accordingly, retailers and manufacturers doing business in California with worldwide gross receipts in excess of $100 million are required to publish annual reports describing their anti-slavery and anti-trafficking efforts. [93] The legislative purpose of the California law is to keep global supply chains free of products whose production involved human rights abuses. [94] A modified form of the California Supply Chain Transparency Act might help consumers understand whether the pricing policies of domestic American platforms like Amazon are based on unfair labor and trading practices.

Although few would claim that the business practices of Walmart or Amazon's operations in the United States violate the human rights of their employees or suppliers, many might argue that there is an unacceptably high social cost to the relentless pursuit of lower retail prices. [95] In recent years, the concept of a "living wage" has gained prominence in American politics and could be substituted for slavery and human trafficking in a mandatory disclosure law imposed on employers such as Amazon and Walmart. [96] Major employers including Facebook and Ikea have recently announced voluntary commitments to ensuring that their employees and contractors receive a living wage. [97] Massachusetts Institute of Technology has created an online living wage calculator to make it easy to estimate the cost of living in different locations around the country. [98] If living wage disclosures calibrated to variations in local cost of living were provided to American consumers pursuing "everyday low prices," they might

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92. Transparency in Supply Chains Act, S.B. 657, 2009–2010 Leg. Reg. Sess. (Cal. 2009–2010), codified as CAL. CIV. CODE § 1714.43 (West 2010).

93. *Id.*

94. Norman L. Greene & Eric Beinhart, *Combating Human Trafficking—The U.S. Government's Response*, 20 ILSA J. INT'L & COMP. L. 49, 79 (2013).

95. CHARLES FISHMAN, THE WAL-MART EFFECT: HOW THE WORLD'S MOST POWERFUL COMPANY REALLY WORKS, AND HOW IT'S TRANSFORMING THE AMERICAN ECONOMY (2006); Vern Kopytoff, *How Amazon Crushed the Union Movement*, TIME (Jan. 16, 2014), http://time.com/956/how-amazon-crushed-the-union-movement/.

96. Melena Ryzik, *'I, Too, Am America' Shares Snapshots from Workers Living on the Edge*, N.Y. TIMES, May 2, 2015, at C1.

97. *See* Jean McGregor, *Ikea to Raise Workers' Pay to a 'Living Wage,'* WASH. POST (June 26, 2014), http://www.washingtonpost.com/news/on-leadership/wp/2014/06/26/ikea-to-raise-workers-pay-to-a-living-wage/; *see also* Rebecca R. Ruiz, *White House and Labor Advocates Praise Move by Facebook for Higher Wages*, N.Y. TIMES, May 13, 2015, at B4.

98. Amy K. Glasmeier, MASS. INST. OF TECH., http://www.livingwage.mit.edu/ (last visited Jan. 17, 2016).

be in a better position to assess the impact their consumption decisions may have.[99]

While it is unclear precisely how much impact disclosure laws alone can have on consumer behavior,[100] it is clear that simply mandating the public disclosure of information likely to be viewed unfavorably by a significant proportion of the public might have some effect on the behavior of companies concerned about their brand.[101] On the other hand, any attempt by governments to impose "command and control" mandates dictating the terms and conditions under which transactions take place within "multi-sided platforms" would be almost certain to fail.[102]

CONCLUSION

The 12 principles of fair electronic commerce published by AFFECT in 2005 focused on empowering consumers acting in information markets. They were informed by public debate triggered by the drafting project first known as UCC Article 2B and later finalized as the Uniform Computer Information Transactions Act. They were drafted in broad, general terms in the hope of influencing public debate and law reform in the future. In the decade following publication of the 12 principles, there has been very little evidence that law reform efforts in the United States are moving generally in the direction of strengthening legal guarantees of the substantive fairness of online consumer transactions.

Even in the absence of law reform, however, many American consumers are treated very fairly either because they shop on Amazon or they shop at a different online retail site competing to provide the same high level of customer service that Amazon has achieved. Not only has Amazon as a private global regulator made more progress in implementing the 12 principles than any government has, it has also put pressure on American competitors to comply with European online consumer protection laws by its own example of voluntary compliance in America. At one level, the triumph of market-driven consumer protection in the absence of government mandates validates American confidence in the free market. At another level, however, if Amazon's zeal for customer satisfaction is being paid for by unfair treatment of its employees and suppliers, then that contradicts the social justice objectives underlying the 12 principles.

A global "secession of the successful" away from national commercial and consumer laws applied in public markets to private regulation applied in global platforms may not be inevitable, however. If the drafters of the 12

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99. *See* Ruiz, *supra* note 97.

100. Lauren Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1162–63 (2013).

101. Cory Bennett, *SEC Weighs Cybersecurity Disclosure Rules*, HILL (Jan. 14, 2015, 6:00 AM), http://thehill.com/policy/cybersecurity/229431-sec-weighs-cybersecurity-disclosure-rules.

102. *See* Christine Parker & Vibeke Lehmann Nielsen, *Introduction* to EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 1 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); *see also* Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71 MOD. L. REV. 59 (2008).

principles were given the opportunity to reframe their project in light of the last decade of experience with global platform operators, they might wish to complement the transactional focus of the principles with a focus on insuring that all stakeholder groups participating in global business "ecosystems" such as Amazon are treated fairly. One such complimentary strategy might involve incentives for businesses—especially those with business models focused on relentlessly lowering prices—to disclose publicly whether those low prices were compatible with their employees and suppliers earning a living wage.

This Article commemorates the life and work of Professor Jean Braucher, a tireless advocate for the application of social justice norms to the operation of markets. She helped develop principles aimed at assuring fair treatment for consumers engaged in transactions online or for digital products. She might have been surprised to learn that the first jurisdiction to implement systematically almost all of the principles she advocated was a private enterprise operating as a global platform. In any event, she would have expected global private regulators to be held to the same social justice norms as the governments whose national legal systems they displace.