# 1nc – fullertown 4

## off

### p – spec

#### Interpretation -- In addition to prohibited practices, the aff should specify the agent of antitrust authority and sanctions.

William **KOVACIC** Global Competition Professor of Law and Policy @ George Washington University Law School **’12** “The Institutions of Antitrust Law: How Structure Shapes Substance Substance” 110 MICH. L. REV. 1019 p. 1026

A more complete framework of the institutional elements of antitrust law enforcement might organize the examination of the system around the following questions:

What is the purpose of the statutes? What do the statutes prohibit?

By what means are infringements detected and evidence gathered? Which entities have authority to prosecute violations?

Which body decides guilt or innocence?

What sanctions are imposed for wrongdoers?

A classification scheme cast along these lines would help identify more clearly the volume's examination of the U.S. antitrust system and assist in illuminating connections among its elements.

#### Violation – the plan text does not specify agent, authority, or sanctions.

#### 1 – Negative ground. Institutional structure and agent of implementation key to antitrust outcomes. Any debate over only the preferred outcomes is hopelessly incomplete.

William **KOVACIC** Global Competition Professor of Law and Policy @ George Washington University Law School **’12** “The Institutions of Antitrust Law: How Structure Shapes Substance Substance” 110 MICH. L. REV. 1019 p. 1019-1020

Forty years ago, Graham Allison wrote the Essence of Decision' and transformed the study of foreign policy and public administration.2 Allison's analysis of the Cuban Missile Crisis appeared amid profound concerns about the competence of U.S. government institutions. "Few issues about the American government," he wrote, "are more critical today than the matter of whether the federal government is capable of governing."3 To Allison, better performance required greater insight into how the structure and operations of public institutions shaped policy results. "[B]ureaucracy is indeed the least understood source of unhappy outcomes produced by the U.S. government,"4 Allison wrote. "If analysts and operators are to increase their ability to achieve desired policy outcomes, . . . we shall have to find ways of thinking harder about the problem of 'implementation,' that is, the path between preferred solution and actual performance of the government."5 Essence of Decision quickly appeared on reading lists in political science departments and schools of public administration, and its analytical orientation and vocabulary have become enduring elements of academic discourse.

Daniel Crane's The Institutional Structure of Antitrust Enforcement ("InstitutionalStructure")7 may do for antitrust law what Essence of Decision did for public administration. Unlike most literature on antitrust law, this superb volume does not address pressing issues of substantive analysis (e.g., when can dominant firms offer loyalty discounts?).8 Instead, Institutional Structure studies the design and operation of the institutions of U.S. antitrust enforcement. Professor Crane skillfully advances a basic and powerful proposition: to master analytical principles without deep knowledge of the policy implementation mechanism is dangerously incomplete preparation for understanding the U.S. antitrust system, or any body of competition law. "Institutions," Professor Crane observes, "are a critical and underappreciated driver of an antitrust policy that interacts in many subtle ways with substantive antitrust rules and decisions" (p. xi). Institutional Structure demonstrates that the causes of observed policy outcomes, good and bad, often reside in the institutional framework. Seemingly potent conceptual insights may fizzle, or create mischief, if the institutions that must apply them are deformed. Good policy results depend on the strength of what Allison called "the path between preferred solution and actual performance." In the language of modem technology, one cannot deliver broadband-quality policy outcomes through dial-up institutions.

#### 2 – Voting issue – cross-ex is too late for counterplan competition. 2AC clarification destroys 1NC strategic coherence. Every branch is topical. Rule-making and common law don’t link to any of the same positions and reading both requires contradiction.

### cp – states

#### The fifty states and relevant subnational entities should increase prohibitions on anticompetitive business practices which cause net-harm on one side of platforms.

#### States solve.

Arteaga & Ludwig ’21 [Juan; 1/28/21; Partner @ Crowell & Moring LLP, JD @ Columbia; and Jordan; Partner @ Crowell & Moring LLP, JD @ Loyola Law School, Los Angeles; “The Role of US State Antitrust Enforcement,” *Global Competition Review*; https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement; AS]

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints. The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’. No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications. To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices. During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC. State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.

### da – court politics

#### The court has taken up a challenge to EPA climate authority under the non-delegation doctrine, but will refrain from a broad decision because of fear of public backlash

Smith 21 – Lexi Smith, former advisor to the Mayor of Boston on climate policy, currently JD candidate at Yale Law School, “Supreme Court to weigh EPA authority to regulate greenhouse pollutants,” 11/7/21, https://yaleclimateconnections.org/2021/11/supreme-court-to-weigh-epa-authority-to-regulate-greenhouse-pollutants/

The Supreme Court agreed to hear a case, West Virginia v. EPA, challenging the Environmental Protection Agency’s authority to regulate greenhouse gases as pollutants.

The case presents an opportunity for the Court to overturn key climate precedents and potentially change the relationship between federal agencies and Congress. The decision could have far-reaching consequences for federal climate policy and perhaps even for federal agencies more broadly.

How did we get here, how far might the Court go, and what consequences might the case have for climate change regulation and executive branch authority?

EPA’s authority to regulate greenhouse gases: Massachusetts v. EPA

In a groundbreaking decision in 2007, the Supreme Court held 5-4 that EPA has authority to regulate greenhouse gases under the Clean Air Act. During the Bush administration, environmentalists petitioned the agency to issue a rule on the regulation of greenhouse gases. The Bush EPA denied the petition, and environmental groups, states, and local governments challenged that decision in court. The Supreme Court’s decision turned on whether greenhouse gases like carbon dioxide fall under the definition of “air pollutants,” which the Clean Air Act authorizes EPA to regulate.

The Court concluded that carbon dioxide and other greenhouse gases are air pollutants under the Clean Air Act’s definition, and also noted that the EPA cannot refuse to regulate greenhouse gases for policy reasons outside the Clean Air Act itself, as the Bush administration had done. The Court ordered EPA to either issue a finding that greenhouse gases are dangerous to the public health and welfare, the first step toward regulation, or to give a reasoned explanation for why greenhouse gases do not meet the threshold of endangerment outlined in the Clean Air Act. The agency ultimately found that greenhouse gases are dangerous to the public health and welfare, which formed the foundation for EPA’s regulation of greenhouse gases.

That Supreme Court’s ruling in Massachusetts v. EPA was a 5-4 decision, and environmental advocates leading up to it were not at all certain that they would win the case. In fact, the case was controversial at the time because many environmentalists worried that it would result in a harmful adverse ruling. The four liberals on the Court in 2007, Justices Souter, Ginsburg, Breyer, and Stevens, were joined by Justice Kennedy to form a majority. But Chief Justice Roberts and Justices Thomas, Scalia, and Alito dissented.

Chief Justice Roberts’s dissent (joined by Justices Scalia, Thomas, and Alito) argued that the states, local governments, and environmental groups challenging the EPA should not have been allowed to sue in the first place because they lacked standing: One requirement of standing is a “concrete and particularized” injury. Chief Justice Roberts argued that harms from climate change affect everyone, so the injury in question was not sufficiently individualized and personal to support a lawsuit.

Justice Scalia’s dissent (joined by Chief Justice Roberts and Justices Thomas and Alito) focused on the Clean Air Act and argued that the Act is meant to address conventional air pollutants that harm human health directly through exposure, such as inhalation. He maintained that the Act was not meant to address the broader issue of climate change, and that greenhouse gases therefore did not fall under the definition of “air pollutants.”

Of course, the Supreme Court’s composition has changed significantly since 2007. With a 6-3 conservative-liberal divide, the conservative dissenters’ objections to Massachusetts v. EPA may now represent the majority view.

The ‘worst case scenario’: What could West Virginia v. EPA bring?

There are reasons to expect that the Court will show restraint when it hears the upcoming challenge to EPA’s authority in the West Virginia v. EPA case. But first, let’s walk through the worst potential outcomes from the perspective of climate advocates.

As suggested above, the Court could overturn its decision in Massachusetts v. EPA and effectively take away EPA’s authority to regulate greenhouse gases. With such a ruling, EPA could no longer issue rules directly regulating greenhouse gas emissions, and past greenhouse gas rules issued under its Clean Air Act authority would be invalid.

Richard Lazarus, a Harvard Law School professor who recently wrote a book about Massachusetts v. EPA, called the Court’s decision to hear West Virginia v. EPA “the equivalent of an earthquake around the country for those who care deeply about the climate issue.”

The consequences of the case could even reach far beyond climate regulation. The case presents an opportunity for the Court to revive the “nondelegation doctrine,” a mostly defunct principle that purported to limit Congress’s authority to delegate legislative power to executive branch agencies. The doctrine comes from Article I of the Constitution, which says that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.” The Supreme Court has not used the nondelegation doctrine to strike down agency action in more than 80 years.

Implications of enforcing nondelegation doctrine

The practical consequences of enforcing the nondelegation doctrine would debilitate the current system of executive branch rulemaking and regulation, subject to judicial review and congressional oversight. If Congress were to do all the rulemaking currently done by EPA, for instance, environmental regulation would become virtually impossible to enact. Congress in that case would have to make thousands of granular and technical decisions about environmental policy, even though we know it can barely pass major legislation as it is.

More broadly, nondelegation could mean that much of the work done by all federal agencies would have to be done instead by a clearly ill-equipped Congress. Even without current gridlock on Capitol Hill, the sheer volume of policy decisions Congress would have to make would be completely unworkable.

While this outcome sounds unlikely and illogical to those who support federal agency regulation, several of the current Justices at various times have expressed interest in weakening the administrative state and deregulating industry. For them, the nondelegation doctrine may be an attractive principle.

Notably, for instance, in a case called Gundy v. United States in 2019, four of the conservatives (Chief Justice Roberts and Justices Gorsuch, Thomas, and Alito) showed a willingness to revisit the nondelegation doctrine. At that time, Justice Kennedy had retired, and Justice Kavanaugh had not yet been confirmed, so the case was 4-4. With Justices Kavanaugh and Barrett now on the court, there appears to be some chance that reviving the nondelegation doctrine would garner the support of five or even six Justices.

The petitioners – West Virginia and North American Coal Corporation – that brought the appeal in West Virginia v. EPA explicitly suggested that this case could be an opportunity for the Court to reconsider nondelegation: “Nothing in the statute [the Clean Air Act] approaches the clear language Congress must use to assign such vast policymaking authority – assuming, of course, it can delegate enormous powers like these in the first place.”

In short, the worst-case scenario from the perspective of climate action advocates is that the Supreme Court takes away the EPA’s authority to regulate greenhouse gases and also revives the nondelegation doctrine, which would strip most federal agencies of much of their regulatory power.

Reasons for a less sweeping outcome

Let’s now consider some reasons the Court may be unlikely to completely overturn Massachusetts v. EPA or fully embrace the nondelegation doctrine.

First, Chief Justice Roberts, and increasingly Justices Kavanaugh and Gorsuch, appear keenly mindful and protective of the Court’s reputation and legacy. They have tended to look out for the public perception of the Court and avoid decisions that would have provoked especially strong public backlash. Recent examples include upholding the Affordable Care Act and civil rights protections for the LGBT community.

These cautious impulses may be heightened by the looming threat of court reform, which could gain more momentum if a particularly controversial conservative decision were issued. Given the strong public backlash likely to result from a decision taking away EPA authority to regulate greenhouse gases and/or reviving the nondelegation doctrine, the Court may proceed with caution.

#### The plan’s liberal ruling provides breathing room for a conservative decision on non-delegation

Bazelon 15 – Emily Bazelon, staff writer for the New York Times Magazine, Truman Capote Fellow at Yale Law School, “Marriage of Convenience,” 1/27/2015, https://www.nytimes.com/2015/02/01/magazine/marriage-of-convenience.html

More significant, if the court is seen as transcending partisan politics, Roberts will probably have more chances, over time, to accomplish what appears to be his primary long-term goal: to move the court in a more conservative direction on a range of issues. In particular, Roberts's brand of conservatism has manifested itself in two main areas. The first is in decisions that are sympathetic to corporations. A 2013 study found that he had been more likely to side with businesses than any justice in the previous 65 years, except for Samuel Alito. The second is in decisions that are antagonistic toward the idea of taking race into account in shaping law or policy. Roberts has voted repeatedly against affirmative action, writing last year that it was not hard to conclude that racial preferences may ''do more harm than good.'

When Roberts was nominated to be chief justice 10 years ago by President George W. Bush, he exuded calm neutrality at his confirmation hearing, comparing judges to umpires who call balls and strikes. At the end of his first term, he emphasized the importance of the court's ''credibility and legitimacy as an institution,'' in an interview with the George Washington University law professor Jeffrey Rosen.

But in 2010, Roberts supplied the fifth vote for the court's remarkably unpopular ruling in Citizens United. By striking limits that Congress set on campaign spending by corporations, the court was perceived as favoring the interests of the wealthy. The court's approval rating fell 10 percentage points, to barely break even, from 61 percent.

Since then, the court has fared better with the public when it pairs conservative decisions with progressive ones. And same-sex marriage is part of that equation. In 2013, the term ended with a splashy ruling in which five justices -- Roberts not among them -- struck down part of the Defense of Marriage Act, which restricted federal benefits for spouses to male-female couples. This decision came one day after the court gutted a central component of the Voting Rights Act, in a 5-to-4 decision written by Roberts.

#### Domestic U.S. climate regulations are key to avoiding dangerous climate change globally

Friedman 21 – Lisa Friedman, climate and energy reporter for the New York Times, “At Climate Talks, Biden Will Try to Sell American Leadership to Skeptics,” 10/31/21, https://www.nytimes.com/2021/10/31/climate/climate-change-biden-cop26.html

If Mr. Biden lacks a reliable plan for the United States to significantly cut its emissions this decade, it would “send a signal” to other major emitters that America is still not serious, she said. And it would be difficult for Mr. Biden to urge other countries to take more meaningful steps away from fossil fuels, others said.

“Some of these countries are saying, ‘Oh yeah, but look at what you did guys, and now you’re coming back and demanding after you were away for the past four years?’” said Andrea Meza, the environment and energy minister of Costa Rica.

Tensions were already running high ahead of the summit. China, currently the world’s top emitter, announced a new target on Thursday that was supposed to be a more ambitious plan to curb its pollution but is virtually indistinguishable from what it promised six years ago. President Xi Jinping has indicated he will not attend the summit in person, as have presidents of two other top polluting nations, Vladimir V. Putin of Russia and Jair Bolsonaro of Brazil.

Democrats close to President Biden said he is painfully aware that the credibility of the United States is on the line in Glasgow, particularly after a botched withdrawal from Afghanistan this summer and a dust-up with France over a military submarine contract.

Representative Ro Khanna, Democrat of California, met with the president recently to discuss how to salvage Mr. Biden’s legislative climate agenda.

“He indicated that many world leaders like Putin and Xi are questioning the capability of American democracy to deliver, so we need to show them that we can govern,” Mr. Khanna said.

Mr. Biden, who is accompanied in Glasgow by 13 Cabinet members, insists they have a story of success to tell, starting with his decision on his first day on the job to rejoin the 2015 Paris Agreement, an accord of nearly 200 countries to fight climate change, from which Mr. Trump had withdrawn the United States.

Since then, Mr. Biden has taken several steps to cut emissions, including restoring and slightly strengthening auto pollution regulations to levels that existed under President Barack Obama but were weakened by Mr. Trump. He has taken initial steps to allow the development of large-scale wind farms along nearly the entire coastline of the United States, and last month finalized regulations to curb the production and use of potent planet-warming chemicals called hydrofluorocarbons, which are used in air-conditioners and refrigerators.

But Mr. Biden is likely to emphasize the $555 billion that he wants Congress to approve as part of a huge spending bill. The climate provisions would promote wind and solar power, electric vehicles, climate-friendly agriculture and forestry programs, and a host of other clean energy programs. Together, those programs could cut the United States’ emissions up to a quarter from 2005 levels by 2030, analysts say.

That’s about halfway to Mr. Biden’s goal of cutting the country’s emissions 50 to 52 percent below 2005 levels. “We go in with a fact pattern that is pretty remarkable, as well as real momentum,” Ali Zaidi, the deputy White House national climate adviser, told reporters.

Mr. Biden plans to release tough new auto pollution rules designed to compel American automakers to ramp up sales of electric vehicles so that half of all new cars sold in the United States are electric by 2030, up from just 2 percent this year. His top appointees have also promised new restrictions on carbon dioxide emissions from coal and gas-fired power plants. And earlier this year, Biden administration officials said they would roll out a draft rule by September to regulate emissions of methane, a powerful planet-warming gas that leaks from existing oil and natural gas wells.

So far, the administration has not offered drafts of any of those rules. Several administration sources said that delay has been due in part to staff shortages, as well as an effort not to upset any lawmakers before they vote on Mr. Biden’s legislative agenda.

But time is running out. It can take years to complete work on such complex and controversial government policies, and several are likely to face legal challenges. On Friday, the U.S. Supreme Court, which has a conservative majority, said it would review the E.P.A.’s authority to regulate greenhouse gas emissions, potentially complicating Mr. Biden’s plans.

The U.S. track record

For three decades, American politics have complicated global climate efforts.

Former President Bill Clinton, a Democrat, joined the first global effort to tackle climate change, the 1997 Kyoto Protocol. His Republican successor, President George W. Bush, renounced the treaty. Mr. Obama, another Democrat, joined the 2015 Paris Agreement and rolled out dozens of executive orders to help meet his promises to cut emissions. His Republican successor, Mr. Trump, abandoned the accord, repealed more than 100 of Mr. Obama’s regulations and took steps to expand fossil fuel drilling and mining.

Mr. Biden is facing similar resistance. No Republicans in Congress back his current climate effort. Representative Frank Lucas of Oklahoma, the top Republican on the House science committee, said the international community should be skeptical of the Biden administration’s promises. “I think they’ll roll their eyes just as people will continue to do in the United States,” Mr. Lucas said.

The president has also struggled to win over two pivotal players within his own party. Senator Joe Manchin III, Democrat of West Virginia, has been steadfastly opposed to a central feature of Mr. Biden’s climate plan: a program that would have rapidly compelled power plants to switch from burning coal, oil and gas, to using wind, solar and other clean energy. Mr. Manchin’s state is a top coal and gas producer, and he has personal financial ties to the coal industry. He was able to kill the provision. Senator Kyrsten Sinema, Democrat of Arizona, has also withheld her support, saying she wants a more modest spending bill.

Environmental leaders said America’s past inconsistency on climate action makes it more important for Mr. Biden to succeed now.

“The U.S. has had to be dragged kicking and screaming to the climate table and has slowed down action that was needed to tackle the climate crisis,” said Mohamed Adow, director of Power Shift Africa, a Nairobi-based environmental think tank. “That is the legacy Biden has to deal with.”

What’s at stake

Average global temperatures have already risen about 1.1 degrees Celsius (2.7 degrees Fahrenheit), compared with preindustrial levels, locking in an immediate future of rising seas, destructive storms and floods, ferocious fires and more severe drought and heat.

At least 85 percent of the planet’s population has already begun to experience the effects of climate change, according to research published in the journal Nature Climate Change. This summer alone, more than 150 people died in violent flooding in Germany and Belgium. In central China, the worst flooding on record displaced 250,000 people. In Siberia, summer temperatures reached as high as 100 degrees, feeding enormous blazes that thawed what was once permanently frozen ground.

“Clearly, we are in a climate emergency. Clearly, we need to address it,” Patricia Espinosa, head of the U.N. climate agency, said Sunday as she welcomed delegates to Glasgow. “Clearly, we need to support the most vulnerable to cope. To do so successfully, greater ambition is now critical.”

If the planet heats even a half-degree more, it could lead to water and food shortages, mass extinctions of plants and animals, and more deadly heat and storms, scientists say.

#### Unchecked warming causes extinction

Peter Kareiva 18, Ph.D. in ecology and applied mathematics from Cornell University, director of the Institute of the Environment and Sustainability at UCLA, Pritzker Distinguished Professor in Environment & Sustainability at UCLA, et al., September 2018, “Existential risk due to ecosystem collapse: Nature strikes back,” Futures, Vol. 102, p. 39-50

In summary, six of the nine proposed planetary boundaries (phosphorous, nitrogen, biodiversity, land use, atmospheric aerosol loading, and chemical pollution) are unlikely to be associated with existential risks. They all correspond to a degraded environment, but in our assessment do not represent existential risks. However, the three remaining boundaries (climate change, global freshwater cycle, and ocean acidification) do pose existential risks. This is because of intrinsic positive feedback loops, substantial lag times between system change and experiencing the consequences of that change, and the fact these different boundaries interact with one another in ways that yield surprises. In addition, climate, freshwater, and ocean acidification are all directly connected to the provision of food and water, and shortages of food and water can create conflict and social unrest.

Climate change has a long history of disrupting civilizations and sometimes precipitating the collapse of cultures or mass emigrations (McMichael, 2017). For example, the 12th century drought in the North American Southwest is held responsible for the collapse of the Anasazi pueblo culture. More recently, the infamous potato famine of 1846–1849 and the large migration of Irish to the U.S. can be traced to a combination of factors, one of which was climate. Specifically, 1846 was an unusually warm and moist year in Ireland, providing the climatic conditions favorable to the fungus that caused the potato blight. As is so often the case, poor government had a role as well—as the British government forbade the import of grains from outside Britain (imports that could have helped to redress the ravaged potato yields).

Climate change intersects with freshwater resources because it is expected to exacerbate drought and water scarcity, as well as flooding. Climate change can even impair water quality because it is associated with heavy rains that overwhelm sewage treatment facilities, or because it results in higher concentrations of pollutants in groundwater as a result of enhanced evaporation and reduced groundwater recharge. Ample clean water is not a luxury—it is essential for human survival. Consequently, cities, regions and nations that lack clean freshwater are vulnerable to social disruption and disease.

Finally, ocean acidification is linked to climate change because it is driven by CO2 emissions just as global warming is. With close to 20% of the world’s protein coming from oceans (FAO, 2016), the potential for severe impacts due to acidification is obvious. Less obvious, but perhaps more insidious, is the interaction between climate change and the loss of oyster and coral reefs due to acidification. Acidification is known to interfere with oyster reef building and coral reefs. Climate change also increases storm frequency and severity. Coral reefs and oyster reefs provide protection from storm surge because they reduce wave energy (Spalding et al., 2014). If these reefs are lost due to acidification at the same time as storms become more severe and sea level rises, coastal communities will be exposed to unprecedented storm surge—and may be ravaged by recurrent storms.

A key feature of the risk associated with climate change is that mean annual temperature and mean annual rainfall are not the variables of interest. Rather it is extreme episodic events that place nations and entire regions of the world at risk. These extreme events are by definition “rare” (once every hundred years), and changes in their likelihood are challenging to detect because of their rarity, but are exactly the manifestations of climate change that we must get better at anticipating (Diffenbaugh et al., 2017). Society will have a hard time responding to shorter intervals between rare extreme events because in the lifespan of an individual human, a person might experience as few as two or three extreme events. How likely is it that you would notice a change in the interval between events that are separated by decades, especially given that the interval is not regular but varies stochastically? A concrete example of this dilemma can be found in the past and expected future changes in storm-related flooding of New York City. The highly disruptive flooding of New York City associated with Hurricane Sandy represented a flood height that occurred once every 500 years in the 18th century, and that occurs now once every 25 years, but is expected to occur once every 5 years by 2050 (Garner et al., 2017). This change in frequency of extreme floods has profound implications for the measures New York City should take to protect its infrastructure and its population, yet because of the stochastic nature of such events, this shift in flood frequency is an elevated risk that will go unnoticed by most people.

4. The combination of positive feedback loops and societal inertia is fertile ground for global environmental catastrophes.

Humans are remarkably ingenious, and have adapted to crises throughout their history. Our doom has been repeatedly predicted, only to be averted by innovation (Ridley, 2011). However, the many stories of human ingenuity successfully addressing existential risks such as global famine or extreme air pollution represent environmental challenges that are largely linear, have immediate consequences, and operate without positive feedbacks. For example, the fact that food is in short supply does not increase the rate at which humans consume food—thereby increasing the shortage. Similarly, massive air pollution episodes such as the London fog of 1952 that killed 12,000 people did not make future air pollution events more likely. In fact it was just the opposite—the London fog sent such a clear message that Britain quickly enacted pollution control measures (Stradling, 2016). Food shortages, air pollution, water pollution, etc. send immediate signals to society of harm, which then trigger a negative feedback of society seeking to reduce the harm.

In contrast, today’s great environmental crisis of climate change may cause some harm but there are generally long time delays between rising CO2 concentrations and damage to humans. The consequence of these delays are an absence of urgency; thus although 70% of Americans believe global warming is happening, only 40% think it will harm them (http://climatecommunication.yale.edu/visualizations-data/ycom-us-2016/). Secondly, unlike past environmental challenges, the Earth’s climate system is rife with positive feedback loops. In particular, as CO2 increases and the climate warms, that very warming can cause more CO2 release which further increases global warming, and then more CO2, and so on. Table 2 summarizes the best documented positive feedback loops for the Earth’s climate system. These feedbacks can be neatly categorized into carbon cycle, biogeochemical, biogeophysical, cloud, ice-albedo, and water vapor feedbacks. As important as it is to understand these feedbacks individually, it is even more essential to study the interactive nature of these feedbacks. Modeling studies show that when interactions among feedback loops are included, uncertainty increases dramatically and there is a heightened potential for perturbations to be magnified (e.g., Cox, Betts, Jones, Spall, & Totterdell, 2000; Hajima, Tachiiri, Ito, & Kawamiya, 2014; Knutti & Rugenstein, 2015; Rosenfeld, Sherwood, Wood, & Donner, 2014). This produces a wide range of future scenarios.

Positive feedbacks in the carbon cycle involves the enhancement of future carbon contributions to the atmosphere due to some initial increase in atmospheric CO2. This happens because as CO2 accumulates, it reduces the efficiency in which oceans and terrestrial ecosystems sequester carbon, which in return feeds back to exacerbate climate change (Friedlingstein et al., 2001). Warming can also increase the rate at which organic matter decays and carbon is released into the atmosphere, thereby causing more warming (Melillo et al., 2017). Increases in food shortages and lack of water is also of major concern when biogeophysical feedback mechanisms perpetuate drought conditions. The underlying mechanism here is that losses in vegetation increases the surface albedo, which suppresses rainfall, and thus enhances future vegetation loss and more suppression of rainfall—thereby initiating or prolonging a drought (Chamey, Stone, & Quirk, 1975). To top it off, overgrazing depletes the soil, leading to augmented vegetation loss (Anderies, Janssen, & Walker, 2002).

Climate change often also increases the risk of forest fires, as a result of higher temperatures and persistent drought conditions. The expectation is that forest fires will become more frequent and severe with climate warming and drought (Scholze, Knorr, Arnell, & Prentice, 2006), a trend for which we have already seen evidence (Allen et al., 2010). Tragically, the increased severity and risk of Southern California wildfires recently predicted by climate scientists (Jin et al., 2015), was realized in December 2017, with the largest fire in the history of California (the “Thomas fire” that burned 282,000 acres, https://www.vox.com/2017/12/27/16822180/thomas-fire-california-largest-wildfire). This catastrophic fire embodies the sorts of positive feedbacks and interacting factors that could catch humanity off-guard and produce a true apocalyptic event. Record-breaking rains produced an extraordinary flush of new vegetation, that then dried out as record heat waves and dry conditions took hold, coupled with stronger than normal winds, and ignition. Of course the record-fire released CO2 into the atmosphere, thereby contributing to future warming.

Out of all types of feedbacks, water vapor and the ice-albedo feedbacks are the most clearly understood mechanisms. Losses in reflective snow and ice cover drive up surface temperatures, leading to even more melting of snow and ice cover—this is known as the ice-albedo feedback (Curry, Schramm, & Ebert, 1995). As snow and ice continue to melt at a more rapid pace, millions of people may be displaced by flooding risks as a consequence of sea level rise near coastal communities (Biermann & Boas, 2010; Myers, 2002; Nicholls et al., 2011). The water vapor feedback operates when warmer atmospheric conditions strengthen the saturation vapor pressure, which creates a warming effect given water vapor’s strong greenhouse gas properties (Manabe & Wetherald, 1967).

Global warming tends to increase cloud formation because warmer temperatures lead to more evaporation of water into the atmosphere, and warmer temperature also allows the atmosphere to hold more water. The key question is whether this increase in clouds associated with global warming will result in a positive feedback loop (more warming) or a negative feedback loop (less warming). For decades, scientists have sought to answer this question and understand the net role clouds play in future climate projections (Schneider et al., 2017). Clouds are complex because they both have a cooling (reflecting incoming solar radiation) and warming (absorbing incoming solar radiation) effect (Lashof, DeAngelo, Saleska, & Harte, 1997). The type of cloud, altitude, and optical properties combine to determine how these countervailing effects balance out. Although still under debate, it appears that in most circumstances the cloud feedback is likely positive (Boucher et al., 2013). For example, models and observations show that increasing greenhouse gas concentrations reduces the low-level cloud fraction in the Northeast Pacific at decadal time scales. This then has a positive feedback effect and enhances climate warming since less solar radiation is reflected by the atmosphere (Clement, Burgman, & Norris, 2009).

The key lesson from the long list of potentially positive feedbacks and their interactions is that runaway climate change, and runaway perturbations have to be taken as a serious possibility. Table 2 is just a snapshot of the type of feedbacks that have been identified (see Supplementary material for a more thorough explanation of positive feedback loops). However, this list is not exhaustive and the possibility of undiscovered positive feedbacks portends even greater existential risks. The many environmental crises humankind has previously averted (famine, ozone depletion, London fog, water pollution, etc.) were averted because of political will based on solid scientific understanding. We cannot count on complete scientific understanding when it comes to positive feedback loops and climate change.

### cp – regulate

#### The United States federal government should:

#### substantially increase its competition regulations of practices which cause net-harm on one side of platforms, including at least banning platform self-preferencing and establishing a cybersecurity duty of care for the private sector; and

#### increase research and development into its own blockchain.

#### Non-antitrust enforcement is sufficient

Rill 2 – was an Assistant Attorney General for the Antitrust Division in the Department of Justice (James, "The Evolution of Modern Antitrust among Federal Agencies." George Mason Law Review, vol. 11, no. 1, Fall 2002, p. 135-142. HeinOnline)//gcd

Multiple federal enforcement agencies with competition-related authority, broadly defined, have evolved from several different roots. From the outset, these agencies were not uniformly consumer-welfare impelled or oriented, nor have they altogether evolved in that direction. Their focus has been as much on social and political, non-consumer-welfare concerns-a continuing condition more prevalent before the mid-1970s than today. Federal economic concerns with market power brought about the establishment of regulatory agencies prior to enactment of the Sherman Act.' The patriarch, the Interstate Commerce Act of 1887,2 was a congressional response to concerns with the alleged monopoly and political power of the nation's railroads. Over the ensuing years, numerous other non-antitrust agencies were vested with power to regulate competition. Evolving from concerns with "bigness" as a threat to markets and, indeed, to the political system, legislation was enacted to address particular industries. This legislation afforded specialized agencies authority to regulate competition, to some extent in the same vein as that vested in the traditional antitrust agenciese.g., the Packers and Stockyards Act of 19213 and the Public Utility Holding Company Act of 1935.' Specialized agencies were also created to deal with the competitive functioning of industries in markets which were believed to embrace public assets, for example, air space and airlines and, initially, spectrum and broadcast communications. Part of the concern with "bigness" derived from fear of "excessive" competition, leading to statutory and regulatory restrictions on low-level pricing and limitations on market entry. The antitrust statutes were not immune from infection by this concern, as evidenced by enactment of the Robinson-Patman Act in 1936.' While the jurisdiction of sectoral agencies over competition and the relevant industries was often expressed in the governing statues as antitrust concerns, the overarching mandate was, and is, to protect and advance "the public interest." This ambiguous standard continues to provide sectoral agencies with more latitude to address industry competitive and other attributes beyond consumer welfare. The unfortunate ambiguity of this standard is brilliantly illuminated in an address by Judge Henry Friendly in the 1962 Oliver Wendell Holmes lectures at Harvard Law School and in a subsequent article in the Harvard Law Review.

#### Duty of care standard solves big tech cybersecurity

Wheeler 21 – Tom Wheeler, visiting fellow in governance studies at Brookings, “Protecting the cybersecurity of America’s networks,” 2/11/21, https://www.brookings.edu/blog/techtank/2021/02/11/protecting-the-cybersecurity-of-americas-networks/

Build Back Better means thinking anew. The industry standard-setting process that produced the cyber option for 5G networks can be a model for how the FCC manages its cyber responsibilities. Old style regulation with its detailed compliance instructions can be replaced by applying to cyber the centuries-old common law duty of care. Such a duty of care holds that it is the responsibility of a provider of a commercial service to anticipate and mitigate the potential harmful effects of that service (e.g., negligence is an implementation of the duty of care). Failure to do so becomes an enforceable event.

Simply establishing a cyber duty of care standard at the FCC would open the door to new cybersecurity engagements between the agency and the providers. The regulatory question would evolve from strict “thou shalt” micromanagement to a more agile oversight of whether an effective duty of care had been realized.

### da – econ

#### Current antitrust law fosters innovation and competition – the plan crushes growth

Wright 21 – Joshua D. Wright, Executive Director of the Global Antitrust Institute at the Antonin Scalia Law School, former commissioner of the U.S. Federal Trade Commission from 2013 to 2015, “A Time for Choosing: The Conservative Case Against Weaponizing Antitrust,” Summer 2021, https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust

It has long been vogue among liberal advocates to champion expansion of government control over firms, their decisions, and internal workings. Perhaps no better present example can be found than in the area of antitrust, where the policy landscape looks eerily similar to the progressive view articulated 60 years ago, littered with a hodgepodge of proposals to “break up” large firms, prohibit all mergers and acquisitions, assign burdens of proof to the accused, and control the design of products. Today’s progressives offer much of the same medicine for what allegedly ails the modern economy. Senator Warren has proposed, for example, to “break up big tech” platforms such as Amazon, Apple, Facebook, and Google, and to make technology companies criminally liable for misinformation presented on their platforms.[ii] While the large and successful American tech firms—the envy of the global economy—make a convenient target for these proposals, do not be fooled. This wolf comes as a wolf. The modern progressive antitrust agenda is part of a broader, more radical program—self-described as Neo-Brandeisian Antitrust—to turn antitrust law upside down so that it may be weaponized to shape and plan all sectors of the economy.

These proposals, while unfortunate and misguided, draw heavily upon standard liberal orthodoxy that has tended to be largely suspect of markets and the agency of individuals. One can hardly be surprised to see a staunch progressive like Senator Warren or Bernie Sanders advocate greater government control over private life. Perhaps one even grows to expect it.

What is more surprising, however, is the company Senator Warren and the Neo-Brandeisian Antitrust movement have attracted with the siren call of using the antitrust laws to centrally plan the tech sector (among others things), and to achieve greater government control of the interactions between individuals and the technology we use in our daily lives. Stalwart conservatives like Senator Hawley, for example, among others, have offered policy proposals to “deal” with “Big Tech” that eerily mimic those of Senator Warren and the command and control left. Senator Hawley has proposed legislation that would rewrite Section 230 of the Communications Decency Act and usher in a quasi-Conservative Fairness Doctrine for the internet.[iii] Indeed, Hawley’s proposal would place the Federal Trade Commission in the Big Brother position of determining when a social media platform’s moderation decision was “designed to” or “motivated by an intent to” negatively impact a political party. Attorney General Barr has offered a similar refrain, announcing that antitrust is an appropriate tool to police political bias.[iv] And President Trump recently signed an executive order that directs the Federal Trade Commission to explore using its consumer protection authority to sue social media platforms for content moderation decisions.[v]

Without question, the emotional appeal undergirding these actions is understandable. Conservative voices and opinions too often face a stacked deck when dealing with technology companies and social media, in particular. And this bias against conservative voices has taken on new life in the Trump era. But the hallmark of conservative values has been to rightfully eschew government control over economic life and to value principle over expediency. What is at stake, however, with the current proposals to upend modern antitrust to address tech markets is more important than whatever fleeting satisfaction is gained from exacting policy revenge on firms perceived to squelch conservative voices and ideas. At stake are conservative commitments to the rule of law and the role of the judiciary—newly stocked with immense talent by the Trump administration—in preventing government expansion and overreach. And if we resign ourselves to transient political wins, and debase the belief that entrepreneurs rather than bureaucrats should shape technology markets, we risk not only undermining these great causes conservatives have championed for decades but also the enormous economic gains to Americans that arise in our highly competitive tech markets.

Readers less familiar with antitrust law may not understand its critical role in the conservative legal movement. Modern antitrust law—and its consumer welfare standard—is a complex product of powerful ideas, extant economic evidence, and jurists like Bork, Thomas, Scalia, Easterbrook, and Doug Ginsburg taking on the wobbly intellectual foundations of 1960s competition law. That their efforts were so successful in persuading their liberal counterparts on the Supreme Court and lesser federal courts to join in the dismantling of the stale and obsolete antitrust that was then the law of the land is powerful evidence of the force of their ideas. It is difficult to find an area of law where the conservative legal movement enjoyed as much success as quickly and with such resounding results.

No doubt it helped that yesteryear’s antitrust was intellectually bankrupt and an insult to the rule of law. It pursued an unfortunate amalgamation of contradictory doctrines, including undefined notions of populism, protection of individual industries, and reducing firm size, that could be used to justify nearly any result. For instance, antitrust law allowed the market-leading frozen pie manufacturer in Utah to successfully sue its three national-brand competitors for eroding its high market share through a series of price cuts—thereby preventing precisely the type of competition the law was intended to protect. Antitrust law was so unprincipled and incoherent at the time that it led Justice Potter Stewart to observe while reviewing a government suit to block a merger between two grocery stores with a combined market share of 7.5% that, “The sole consistency that I can find is that, in litigation under [the merger laws], the Government always wins.”[vi]

The conservative legal movement, powered by the intersection of economic analysis and law, brought the rule of law to the wild and untamed progressive antitrust vision of the 1960s. Grounding antitrust law in a disciplined and tractable framework not only promotes the rule of law while preventing arbitrary and capricious enforcement, it also creates a stable and predictable environment for private actors and firms to invest and innovate. Of course, no doctrine is perfect and today’s antitrust is not without its own flaws. But it is tethered to robust economic evidence and common-law developments that promote competitive outcomes and, like the common law, has built-in mechanisms to improve and evolve in response to empirical evidence. But the coherent and principled makeup of antitrust should not and cannot be taken for granted.

Proposals today that are attracting conservatives and liberals alike aim to unwind these gains in exchange for granting those who happen to have power in the government a dominant hand in controlling tech firms on the fleeting hope that the power will be deployed for the greater social good. We have experience with this approach to antitrust in the United States. It is what we used to do. And we know better. Shifting power from judges to regulators, and then allowing those regulators to pick winners and losers to achieve political and social goals, is a recipe for abandoning conservative commitment to the rule of law while simultaneously sacrificing economic growth and innovation. The price is too high, with little or nothing to offer those who value individual liberty, the rule of law, and economic growth. While progressive ideology is contiguous with increasing government control over economic and social interactions in technology markets for its own sake, conservative principles are not. The proposed bargain is also remarkably short-sighted. It should go without saying that empowering partisan regulators to enforce a Fairness Doctrine for conservatives is not likely to work out so well when the other side is in control.

Conservatives traditionally have been wary of proposals by liberals and other big government proponents seeking to substitute the judgment of regulators and bureaucrats for those of entrepreneurs and innovators. And rightfully so. Such proposals, even when well intentioned, risk making Americans worse off. Progressives and populists now seek to commandeer antitrust to usher in a new era of central planning in order to achieve social policy objectives that they could not accomplish otherwise. But at what cost? The risks are not trivial. Using antitrust to redesign tech companies and their products will undermine the competitive dynamics that have brought Americans countless modern benefits, including smartphones, fast and easy online shopping, on-demand ride hailing, easy-to-access streaming media, and a bevy of free services including email, maps, and video conferencing. It also will threaten the incredible economic growth and job creation that these companies have brought to America’s shores. And while politicians surely will make promises akin to, “if you like the digital platform you have, you’ll get to keep it,” it is all too clear that when you expand government discretion and limit judicial oversight, those in positions of power will increasingly impose their preferences on the broader society. Ask yourself, do you really want the government designing the iPhone?

The reality is that the U.S. digital economy is highly competitive and serves Americans well. Fueled by investment, innovation, and entrepreneurship, the digital economy has contributed substantially to America’s economic growth. According to the Bureau of Economic Analysis, the digital economy accounted for 6.9 percent of gross domestic product in 2017, growing at an annual rate of 9.9 percent since 1998 as compared to 2.3 percent for the economy overall.[vii] That economic growth has been driven by some of the world’s most successful tech companies, such as Amazon, Apple, Facebook, Intel, Google, and Microsoft, each of which calls the United States home. These firms are investing ever-increasing amounts on research and development to innovate new products and stay competitive. In fact, the United States leads the world in research and development spending, and tech companies lead in the United States—representing the nation’s top five spenders with investments totaling more than $75 billion in 2018.[viii] Tech companies rank second (behind the telecom sector) in U.S. capital expenditures, with Alphabet (Google’s parent company), Amazon, Apple, Facebook, Intel, and Microsoft together spending more than $45 billion in 2017.[ix] And these investment figures are only expected to continue to grow. These are hardly the actions of monopolists resting on their laurels, secure in belief that they are untouchable by competition.

#### Independently, expanded antitrust regulation increases inflation

Bork 9/8 – Robert H. Bork, president of the Washington-based Antitrust Education Project, “Biden's antitrust demagoguery will drive inflation, not cure it,” 9/8/21, https://thehill.com/opinion/finance/571009-bidens-antitrust-demagoguery-will-drive-inflation-not-cure-it

The Biden administration, finally beginning to worry about the political impact of the rising cost of food, fuel and other basic consumer necessities, is neatly dovetailing its push for aggressive antitrust enforcement by blaming inflation on big business and market concentration.

Politically speaking, it is a neat fix. It drives one of the central policies of the Biden administration — to shift antitrust enforcement from the consumer welfare standard of the past 45 years back to an earlier era’s more nebulous standard against “bigness.” And it deflects blame for inflation.

President Biden lacks the theatrical flourish of a Huey Long, but he is nevertheless trying out his best version of the Kingfisher routine. “I’ve directed my administration to crack down on what some major players are doing in the economy that are keeping prices higher than they need be,” Biden said in August. The cause of higher prices, he argued, is greedy big business and its stranglehold on the American consumer.

It is clear what drives White House anxiety. Food prices have risen about 3.4 percent from last year. After years of low gasoline prices, Americans now pay above $3 a gallon in most parts of the country. Biden is tasking Federal Trade Commission Chair Lina Khan with targeting Big Ag and Big Oil for antitrust action to drive down prices for consumers.

If left unchallenged, the Biden administration may succeed in diverting some heat over rising inflation. Large corporations are not in good order with voters on both the left and right. The president cannot be allowed, however, to use a political diversionary tactic that would perversely do the opposite of what he claims to do: Biden’s antitrust policies would raise the prices of basic needs for consumers.

Let’s start with food prices and Big Ag.

Two University of Idaho economics professors, Philip Watson and Jason Winfree, wrote in The Idaho Statesman that larger farms and agricultural companies, which have the capital to invest in expensive technology and economies of scale, actually have been making food steadily more affordable. It is precisely because of these economies of scale that the cost of food, until the disruption of the pandemic, was taking less out of household budgets. The professors conclude that “breaking up Big Ag could have the disastrous effect of raising food prices, which would likely have a disproportionate impact on poorer households.”

If the Biden approach to agriculture and food is demagogic, its approach to oil and gas is risible. The current increase in gasoline prices results from the supply chain disruption caused by the pandemic, exacerbated by recent hurricanes and storms. It also may be partly because of the unrelenting hostility of the Biden administration to American energy, putting public lands off limits, killing the Keystone XL pipeline and using regulation to harass the fracking industry, despite the fact that cleaner-burning natural gas has helped reduce America’s greenhouse gas emissions. Technological advances led the United States to surpass Saudi Arabia and Russia in 2018 to become the world’s leading producer of oil. Biden’s antitrust policy also may be contributing to the sudden reversal of this energy glut. It was out of antitrust concerns that Berkshire Hathaway pulled out of a major natural gas pipeline deal earlier this year.

What has been the Biden administration’s response to recent shortages? It has not been to stimulate production at home or to help clear pipeline bottlenecks. Instead, national security adviser Jake Sullivan issued a statement pleading with OPEC and Russia to come to our rescue. OPEC demurred and Russian President Vladimir Putin used Sullivan’s entreaty to issue a humiliating “nyet.”

The real cause of inflation, of course, is recovery from a pandemic and the temporary economic depression it caused. It also might be driven by the reckless spending by presidents and Congresses of both parties. Our national debt is now 125 percent of our gross domestic product — higher than the previous high in 1946, when we won a victory over Germany and Japan rather than losing a war to the Taliban.

Blaming Big Ag and Big Oil for high prices will be popular. It also will be perverse. The abandonment of the consumer welfare standard will, if anything, lead to higher prices in both food and fuel for those least able to pay for it.

#### Inflation is contained now, but rising prices cause the Federal Reserve to hike interest rates – that quickly destroys the economy

Cox 21 – Jeff Cox, finance editor for CNBC.com where he manages coverage of the financial markets and Wall Street, “The Fed can fight inflation, but it may come at the cost of future growth,” 3/20/21, https://www.cnbc.com/2021/03/20/the-fed-can-fight-inflation-but-it-may-come-at-a-cost.html

One of the main reasons Federal Reserve officials don’t fear inflation these days is the belief that they have tools to deploy should it become a problem.

Those tools, however, come with a cost, and can be deadly to the kinds of economic growth periods the U.S. is experiencing.

Hiking interest rates is the most common way the Fed controls inflation. It’s not the only weapon in the central bank’s arsenal, with adjustments to asset purchases and strong policy guidance also at its disposal, but it is the most potent.

It’s also a very effective way of stopping a growing economy in its tracks.

The late Rudi Dornbusch, a noted MIT economist, once said that none of the expansions in the second half of the 20th century “died in bed of old age. Every one was murdered by the Federal Reserve.”

In the first part of the 21st century, worries are growing that the central bank might become the culprit again, particularly if the Fed’s easy policy approach spurs the kind of inflation that might force it to step on the brake abruptly in the future.

“The Fed made clear this week that it still has no plans to raise interest rates within the next three years. But that apparently rests on the belief that the strongest economic growth in nearly 40 years will generate almost no lasting inflationary pressure, which we suspect is a view that will eventually be proven wrong,” Andrew Hunter, senior U.S. economist at Capital Economics, said in a note Friday.

As it pledged to keep short-term borrowing rates anchored near zero and its monthly bond purchases humming at a minimum $120 billion a month, the Fed also raised its gross domestic product outlook for 2021 to 6.5%, which would be the highest yearly growth rate since 1984.

The Fed also ratcheted up its inflation projection to a still rather mundane 2.2%, but higher than the economy has seen since the central bank started targeting a specific rate a decade ago.

Competing factors

Most economists and market experts think the Fed’s low-inflation bet is a safe one – for now.

A litany of factors is keeping inflation in check. Among them are the inherently disinflationary pressures of a technology-led economy, a jobs market that continues to see nearly 10 million fewer employed Americans than a decade ago, and demographic trends that suggest a longer-term limit to productivity and price pressures.

“Those are pretty powerful forces, and I’d bet they win,” said Jim Paulsen, chief investment strategist at the Leuthold Group. “It may work out, but it’s a risk, because if it doesn’t work and inflation does get going, the bigger question is, what are you going to do to shut it down. You say you’ve got policy. What exactly is that going to be?”

The inflationary forces are pretty powerful in their own right.

An economy that the Atlanta Fed is tracking to grow 5.7% in the first quarter has just gotten a $1.9 trillion stimulus jolt from Congress.

Another package could be coming later this year in the form of an infrastructure bill that Goldman Sachs estimates could run to $4 trillion. Combine that with everything the Fed is doing plus substantial global supply chain issues causing a shortage of some goods and it becomes a recipe for inflation that, while delayed, could still pack a punch in 2022 and beyond.

The most daunting example of what happens when the Fed has to step in to stop inflation comes from the 1980s.

Runaway inflation began in the U.S. in the mid ’70s, with the pace of consumer price increases topping out at 13.5% in 1980. Then-Fed Chairman Paul Volcker was tasked with taming the inflation beast, and did so through a series of interest rate hikes that dragged the economy into a recession and made him one of the most unpopular public figures in America.

Of course, the U.S. came out pretty good on the other side, with a powerful growth spurt that lasted from late -1982 through the decade.

But the dynamics of the current landscape, in which the economic damage from the Covid-19 pandemic has been felt most acutely by lower earners and minorities, make this dance with inflation an especially dangerous one.

“If you have to prematurely abort this recovery because we’re going to have a kneejerk stop, we’re going to end up hurting most of the people that these policies were enacted to help the most,” Paulsen said. “It will be those same disenfranchised lower-comp less-skilled areas that get hit hardest in the next recession.”

The bond market has been flashing warning signs about possible inflation for much of 2021. Treasury yields, particularly at the longer maturities, have surged to pre-pandemic levels.

That action in turn has raised the question of whether the Fed again could become a victim of its own forecasting errors. The Jerome Powell-led Fed already has had to backtrack twice on sweeping proclamations about long-term policy intentions.

“Is it really going to be all temporary?”

In late-2018, Powell’s statements that the Fed would continue raising rates and shrinking its balance sheet with no end in sight was met with a history-making Christmas Eve stock market selloff. In late 2019, Powell said the Fed was done cutting rates for the foreseeable future, only to have to backtrack a few months later when the Covid crisis hit.

“What happens if the healing of the economy is more robust than even the revised projections from the Fed?” said Quincy Krosby, chief market strategist at Prudential Financial. “The question for the market is always, is it really going to be all temporary?’”

Krosby compared the Powell Fed to the Alan Greenspan version. Greenspan steered the U.S. through the “Great Moderation” of the 1990s and became known as “The Maestro.” However, that reputation became tarnished the following decade when the excesses of the subprime mortgage boom triggered wild risk-taking on Wall Street that led to the Great Recession.

Powell is staking his reputation on a staunch position that the Fed will not raise rates until inflation rises at least above 2% and the economy achieves full, inclusive employment, and will not use a timeline for when it will tighten.

“They called Alan Greenspan ‘The Maestro’ until he wasn’t,” Krosby said. Powell “is telling you there’s no timeline. The market is telling you it does not believe it.”

To be sure, the market has been through what Krosby described as “squalls” before. Bond investors can be fickle, and if they sense rates rising, they’ll sell first and ask questions later.

Michael Hartnett, the chief market strategist at Bank of America, pointed to multiple other bond market jolts through the decades, with only the 1987 episode in the weeks before the Oct. 19 Black Monday stock market crash having “major negative spillover effects.”

He doesn’t expect the 2021 selling to have a major impact either, though he cautions that things could change when the Fed finally does pivot.

#### Turns *advantage one* and the *growth impact* on advantage two.

### da – tradeoff

#### Plan trades off with FTC resources in other areas

Reinhart 21 – Tara Reinhart, head of the Antitrust/Competition Group in Skadden’s Washington, D.C. office, “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement,” 6/18/21, https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

#### Resources are key to FTC privacy leadership.

Hoofnagle et al. ’19 [Chris; 8/8/19; Adjunct Professor of Information and Law @ Cal; Woodrow Hartzog; Professor of Law and Computer Science @ Northeastern University; and Daniel Solove; John Marshall Harlan Research Professor of Law @ George Washington; “The FTC can rise to the privacy challenge, but not without help from Congress”; https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/; AS]

We think the FTC is still the right agency to lead the US privacy regulatory effort. In this essay, we explain the FTC’s structural and cultural strengths for this task, and then turn to reforms that could help the FTC rise to modern information privacy challenges. Fundamentally, the FTC has the structure and the legal powers necessary to enforce reasonable privacy rules. But it does need to evolve to meet the challenge of regulating modern information platforms.

THE FTC WIELDS GREAT POWERS TEMPERED WITH EXPERIENCE

The FTC has remarkable powers. At its creation a century ago, Congress gave it unprecedented investigatory and enforcement tools. These have been broadened over time as the FTC has faced new wrongs. Today, the FTC can examine business practices even where there is no investigatory predicate, and as a general-purpose consumer protection agency, it can sue almost any business.

As a result, the FTC is nimble and can adapt to new technologies without an act of Congress. Founded in the days of misleading newspaper advertising, the FTC was quick to pivot to radio, television, and internet fraud. The breadth and generality of its powers are also a source of strength. Much more than just data protection, modern consumer problems involve platforms, power, information asymmetries, and market competition. In theory, the FTC has a broad enough jurisdiction and charge to handle diverse issues often labeled as “privacy,” such as algorithmic manipulation and accountability.

In the information economy, privacy is among the most important values that law and norms should protect. Yet at the same time, privacy must also accommodate other important values, including the risks inherent in economic development. In our view, privacy is a means to the ends of freedom and autonomy in our personal lives and in our polity. It is a key component for human flourishing.

THE FTC HAS ACHIEVED MUCH WITH LIMITED RESOURCES AND WITHOUT CONSISTENT CONGRESSIONAL SUPPORT

Many privacy issues are thought to be new. But the FTC has decades of experience handling privacy problems, particularly in credit reporting and debt collection. The FTC’s earliest information privacy matters, in 1951 and then a series of cases in the 1970s, recognized the general consumer preference against commercialization of personal data. Using its enforcement powers, the FTC sued companies for deceptive data collection, and for the sale of data collected in preparing tax returns. The agency brought its first internet-related fraud case in 1994, long before most consumers shopped online. Since then, the FTC has pursued the biggest names in internet commerce. It has steadily broadened the duties for fair information handling, particularly in the information security domain.

The FTC’s broadest jurisdiction is its enforcement against unfair and deceptive practices under Section 5 of the FTC Act. Despite a wide reach, however, Section 5 has some significant limits in power. The FTC generally cannot issue a fine for Section 5 violations initially—fines can only be issued for violations of consent decrees, as happened in the Facebook case.

Resources are the FTC’s greatest constraint. It is a small agency charged with a broad mission in competition and consumer protection. It carries out this mission with a budget of just over $300 million and a total staff of about 1,100, of whom no more than 50 are tasked with privacy. In comparison, the U.K.’s Information Commissioner’s Office (ICO) has over 700 employees and a £38 million budget for a mission focused entirely on privacy and data protection. In addition, for much of modern history, Congress has kept the FTC on a short leash. In 1980, Congress punished the agency for being too aggressive, causing it to shut down twice. Congress has held authorization over the agency’s head and used oversight power to scrutinize what members of Congress perceive as the expansive use of FTC legal authority, including its interpretation of privacy harm.

Given these constraints, FTC attorneys make pragmatic choices in their case selection. At any given time, line attorneys are investigating many companies and weighing decisions on where to target limited enforcement resources. The FTC can only bring actions against a small fraction of infringers, and it has chosen cases wisely to make loud statements to industry about how to protect privacy.

Even with these severe limitations, it has managed to bolster important norms and send strong signals to industry that have influenced the practices of many companies. It has become a significant enforcement agency that industry pays attention to. It has an enforcement record that compares quite well to other agencies in the US as well as around the world.

Some critics of the Facebook settlement have focused only on its shortcomings. Despite flaws and limits in the consent order, the five-billion-dollar fine was the biggest privacy settlement worldwide by far. It is an order of magnitude greater than the highest fine under the EU’s General Data Protection Regulation so far (the UK ICO’s €183 million fine against British Airways) and roughly double the record fine under EU competition law, which privacy advocates have urged as the reference for privacy fines.

The settlement also contains significant and noteworthy measures, such as forcing Facebook to make privacy a board-level concern and requiring Mark Zuckerberg to verify compliance. As dissenting Commissioners Chopra and Slaughter note, the FTC’s settlement doesn’t solve every problem; Facebook’s structure and business model remain the same. But no existing enforcement agency has come close to matching the FTC’s impact in this case, and foreign data protection agencies similar to proposed in the U.S. as FTC alternatives have not demonstrated the power or political capital to do so. As privacy enforcers go, the FTC stacks up well to others in many regards.

#### Privacy regulation is key to the liberal order – US leadership resolves the current patchwork of rules.

Slaughter & McCormick ’21 [Matthew; Paul Danos Dean and Earl C. Daum 1924 Professor of International Business in the Tuck School of Business @ Dartmouth College, Former Member @ White House Council of Economic Advisers; and David; CEO @ Bridgewater Associates Former Senior Positions @ U.S. Commerce Department, the National Security Council, and U.S. Treasury Department; “Data Is Power: Washington Needs to Craft New Rules for the Digital Age,” *Foreign Affairs* 100(3), p. 54-63; AS]

A PATCHWORK OF RULES

Current international institutions are not equipped to handle the proliferation of data. Nor are they prepared to address the emerging fault lines in how to approach it. The institutional framework for international trade-that of the World Trade Organization and its predecessor, the General Agreement on Tariffs and Trade-was built at a time when mainly agricultural and manufactured goods crossed borders and data flows were in the realm of fiction. The wTO's framework depends on two key classifications: whether something is a good or a service and where it originated. Goods are governed by different trade rules than are services, and a product's origin defines what duties or trade restrictions apply.

Data defies this basic categorization for several reasons. One is that vast amounts of data-such as one's online browsing before ordering clothes-are unpriced consequences of the production and consumption of other goods and services. Another is that it is often hard to determine where data is created and kept. (From which country does data on an international flight's engineering performance originate? In which country does a multinational firm's cloud storage of its clients' data reside?) Moreover, there is no agreed-on taxonomy for valuing data. In the event of a trade dispute, WTO members may seek legal recourse and ask the organization to make a one-off correction, but such fixes do not address the fundamental inconsistencies between the WTO's framework and the nature of data.

The lack of an internationally accepted framework governing data leaves big questions about the global economy and national security unanswered. Should sovereign governments be able to limit the location and use of their citizens' data within national borders? What does this concept even mean when the cloud and its data are distributed across the Internet? Should governments be able to tax the arrival of data from other nations, just as they levy tariffs on the import of many goods and services? How would this work when the data flows themselves are often unpriced, at least within the firms that gather the data? What controls can sovereign governments impose on data entering their countries? Can they demand that data be stored locally or that they be given access to it?

The absence of an international framework also threatens people's privacy. Who will ensure that governments or other actors do not misuse people's data and violate their economic, political, and human rights? How can governments protect their citizens' privacy while allowing data to move across borders? Today, the United States and the EU do not agree on answers to these questions, causing friction that hurts cooperation on trade, investment, and national security. China, for its part, has shown little commitment to privacy. Without common and verifiable methods of anonymizing data to protect personal privacy, the innovative potential of personal data will be lost-or fundamental rights will be violated.

In the absence of coherent and collective answers to these questions, countries and trade blocs are improvising on their own. This has left the world today with a collection of inconsistent, vague, and piecemeal regulations. Recent regional trade deals have included several provisions regarding data and e-commerce. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which does not include the United States, prohibits requirements that data be stored within a given country and bans duties on cross-border flows of electronic content. It recognizes the growing importance of the digital services sector, and it forbids signatories from demanding access to the source codes of companies' software. The U.S.-Mexico-Canada Agreement (USMCA) has similar provisions. Both free-trade agreements aim to allow unencumbered flows of data, but they are largely untested and, by virtue of being regional, are limited.

The EU sharpened its data rules on privacy in the General Data Protection Regulation. The GDPR attempts to empower individuals to decide how companies can use their data, but many have voiced concerns that the GDPR has effectively established trade barriers for foreign firms operating in EU member countries by requiring expensive compliance measures and raising the European market's liability risks. Moreover, the EU's rules are the subject of continual dispute and litigation.

Of much greater concern to the United States is China's distinct digital ecosystem. Over a generation ago, China began building its "Great Firewall," a combination of laws and technologies that restrict the flow of data in and out of China, in part by blocking foreign websites. China has since adopted a techno-nationalist model that mandates government access to data generated in the country. The sheer quantity of that data fuels China's innovation but also enables the country's repressive system of control and surveillance-and at the expense of open, international flows of data.

Beijing now seeks to expand this model. It has clear plans to use its indigenous technology industry to dominate the digital platforms that manage data, most immediately 5G telecommunications networks. To that end, it has unveiled an audacious plan, China Standards 2035, to set global standards in emerging technologies. And through the so-called Digital Silk Road and the broader Belt and Road Initiative, it is working to spread its model of data governance and expand its access to data by building Internet infrastructure abroad and boosting digital trade.

And the United States? At the federal level, the country has not settled on any legal framework. Nor, beyond the USMCA, has it engaged in any meaningful cross-border agreements on data flows. So far, the United States has not answered China's efforts with a coherent plan to shape technology standards or ensure widespread privacy protections. The United States' ad hoc responses and targeted efforts to encourage other countries to reject the Chinese company Huawei's 5G technology may work in the near term. But they do not constitute an effective long-term plan for harnessing the power of data.

#### LIO prevents global great power war.

Beckley ’20 [Michael; Associate Professor of Political Science @ Tufts University; “Rogue Superpower Why This Could Be an Illiberal American Century”; *Foreign Affairs* 99(6), p. 73-87]

What would happen to the world if the United States fully embraced this kind of “America first” vision? Some analysts paint catastrophic pictures. Robert Kagan foresees a return to the despotism, protectionism, and strife of the 1930s, with China and Russia reprising the roles of imperial Japan and Nazi Germany. Peter Zeihan predicts a violent scramble for security and resources, in which Russia invades its neighbors and East Asia descends into naval warfare. These forecasts may be extreme, but they reflect an essential truth: the postwar order, although flawed and incomplete in many ways, has fostered the most peaceful and prosperous period in human history, and its absence would make the world a more dangerous place.

Thanks to the U.S.-led order, for decades, most countries have not had to fight for market access, guard their supply chains, or even seriously defend their borders. The U.S. Navy has kept international waterways open, the U.S. market has provided reliable consumer demand and capital for dozens of countries, and U.S. security guarantees have covered nearly 70 nations. Such assurances have benefited everyone: not just Washington’s allies and partners but also its adversaries. U.S. security guarantees had the effect of neutering Germany and Japan, the main regional rivals of Russia and China, respectively. In turn, Moscow and Beijing could focus on forging ties with the rest of the world rather than fighting their historical enemies. Without U.S. patronage and protection, countries would have to get back in the business of securing themselves and their economic lifelines.

Such a world would see the return of great-power mercantilism and new forms of imperialism. Powerful countries would once again try to reduce their economic insecurity by establishing exclusive economic zones, where their firms could enjoy cheap and secure access to raw materials and large captive consumer markets. Today, China is already starting to do this with its Belt and Road Initiative, a network of infrastructure projects around the world; its “Made in China 2025” policy, to stimulate domestic production and consumption; and its attempts to create a closed-off, parallel Internet. If the United States follows suit, other countries will have to attach themselves to an American or a Chinese bloc—or forge blocs of their own. France might seek to restore its grip on its former African colonies. Russia might accelerate its efforts to corral former Soviet states into a regional trade union. Germany increasingly would have to look beyond Europe’s shrinking populations to find buyers for its exports—and it would have to develop the military capacity to secure those new far-flung markets and supply lines, too.

As great powers competed for economic spheres, global governance would erode. Geopolitical conflict would paralyze the UN, as was the case during the Cold War. NATO might dissolve as the United States cherry-picked partners. And the unraveling of the U.S. security blanket over Europe could mean the end of the European Union, too, which already suffers from deep divisions. The few arms control treaties that remain in force today might fall by the wayside as countries militarized to defend themselves. Efforts to combat transnational problems—such as climate change, financial crises, or pandemics—would mimic the world’s shambolic response to COVID-19, when countries hoarded supplies, the World Health Organization parroted Chinese misinformation, and the United States withdrew into itself.

The resulting disorder would jeopardize the very survival of some states. Since 1945, the number of countries in the world has tripled, from 46 to nearly 200. Most of these new states, however, are weak and lack energy, resources, food, domestic markets, advanced technology, military power, or defensible borders. According to research by the political scientist Arjun Chowdhury, two-thirds of all countries today cannot provide basic services to their people without international help. In short, most countries depend critically on the postwar order, which has offered historically unprecedented access to international aid, markets, shipping, and protection. Without such support, some countries would collapse or be conquered. Fragile, aid-dependent states such as Afghanistan, Haiti, and Liberia are only some of the most obvious high-risk cases. Less obvious ones are capable but trade-dependent countries such as Saudi Arabia, Singapore, and South Korea, whose economic systems would struggle to function in a world of closed markets and militarized sea-lanes.

### pic – platforms

#### The United States federal government should use a multiple-markets approach when evaluating prima facie harm to the competitive process.

#### Using general analysis without specifying “platform conduct” solves platform dominance without creating confusing legal processes.

Katz and Sallet, 18 – Economics Prof @Berk, Senior Fellow @ Benton

(Michael Katz &Amp; Jonathan Sallet, Michael Katz is the Sarin Chair Emeritus in Strategy and Leadership at the Haas School of Business and Professor Emeritus in the Department of Economics at the University of California, Berkeley. Jonathan Sallet is Senior Fellow at the Benton Foundation. Katz served as the government’s economic expert in United States v. American Express. Sallet, as Deputy Assistant Attorney General for Litigation. "Multisided Platforms and Antitrust Enforcement," No Publication, https://www.yalelawjournal.org/feature/multisided-platforms-and-antitrust-enforcement, 2018)//Neo

In summary, our recommended legal standard proceeds as follows. If the plaintiff can show harm to the competitive process and that the resulting change in the platform's price structure has harmed one or more user groups, then the burden of proof should shift to the defendant to show that its challenged conduct does not harm the competitive process. The antitrust treatment of multisided platforms has become increasingly important. We are concerned that both the single-market approach to market definition and net-effect approach to assessing harm advocated by some economists and attorneys risk creating unnecessary confusion and hindering sound antitrust enforcement. In particular, these forms of analysis misunderstand both the fundamental precepts that govern antitrust law and the economic principles that explain and predict the behavior of multisided platforms and other types of firms alike. In this Feature, we have concluded that enforcers and courts should use a multiple-markets approach, in which different groups of users on different sides of a platform belong in different product markets. This approach appropriately accounts for cross-market network effects without collapsing all of a platform's users into a single product market. Furthermore, we advocate the use of a separate-effects analysis, which rejects the view that anticompetitive conduct harming users on one side of a platform can be justified so long as that harm funds benefits for users on another side. By applying these tools, the courts can apply economic reasoning to multisided platforms in a manner that respects the foundational purposes of antitrust while accounting for how a platform's interaction with multiple groups of users affects its incentives and ability to engage in anticompetitive conduct.

## advantage – innovation

### turn – innovation – 1nc

#### Keeping current BoP for Vertical Mergers is key to maintain innovation – the alternative chills startups.

Parker et al., 21 – Prof of Engineering @ Dartmouth, Postdoctoral Associate @ the MIT Initiative on the Digital Economy, Prof @ Boston University

(Geoffrey Parker, Georgios Petropoulos, Marshall Van Alstyne, Geoffrey Parker, Georgios Petropoulos is a Postdoctoral Associate at the MIT Initiative on the Digital Economy. Professor of Engineering Director at Dartmouth. Marshall W. Van Alstyne is a professor at Boston University and research associate at the MIT Initiative on the Digital Economy. His work focuses on the economics of information. 9-7-2021, "Platform mergers and antitrust," OUP Academic, https://academic.oup.com/icc/advance-article/doi/10.1093/icc/dtab048/6365871, 10-19-2021)//Neo

Some scholars have argued that we need to reverse the burden of proof in merger cases of large platforms.42 This reversal would imply that gatekeeper platforms should provide an objective justification over the efficiency defense for their acquisitions. However, we should note that such a policy can have a potential negative impact on entrepreneurship and start-ups. As already discussed in Section 3, many small firms launch their business in order to convince investors to support and help them to innovate with the purpose of becoming acquired by bigger firms.

Reversing the burden of proof universally, which basically suggests that there is a presumption that all mergers in the digital sector are anticompetitive. This is excessive and unnecessary, especially, given the negative impact it can have on entrepreneurship. It is preferable to reverse the burden of proof for a limited number of horizontal merger cases where they seem to be the most problematic with respect to their potential anticompetitive effects.

In the case of vertical mergers, the in situ access and the vertical mechanism discussed in proposals 1 and 2 should be sufficient to ensure that the social value of mergers exceeds the potential competitive harm. As a result, under the proposed regulatory approach, it is not recommended to reverse the burden of proof for vertical mergers because it will mainly distort investments and innovation by small firms.

#### Innovation creates a paradox – altering burdens inevitably runs into issues with new inventions and how to classify them.

Jacobson and Mufarrige, 20 – JD @ Brooklyn Law, Law student @ George Mason

(Jacobson, Jonathan, and Christopher Mufarrige. Acquisitions of “Nascent” Competitors. The Antitrust Source, 2020, www.wsgr.com/a/web/28843/jacobson-0820.pdf.)//Neo

With the issues we are discussing here, a key question is whether, but for the acquisition, the target would erode the buyer’s monopoly power. The indirect nature of the competition is an important consideration in that inquiry. A smaller company might threaten to take away some of the dominant firm’s customers, but its product might just as easily prove to be more of a complement than a substitute—such that combining the two would benefit users rather than harm them. One can imagine many different approaches to these issues. We might, for example, continue to rely solely on Marine Bancorporation’s criteria. But given the need to prove that the target is one of a very few potential rivals, and the requirement of proving that, but for the acquisition, the target would significantly decrease market concentration, continued reliance of Marine Bancorporation would come close to a regime of per se legality. It would potentially leave many harmful acquisitions untouched, especially in technology fields. At the opposite end, we can immediately discard any suggestion of simply blocking all small firm acquisitions by dominant players. Doing so would eliminate all of the many benefits these transactions can provide. The proposal of the Stigler Center Committee for the Study of Digital Platforms does not go nearly that far but would increase agency intervention considerably. They argue: Mergers between dominant firms and substantial competitors or uniquely likely future competitors should be presumed to be unlawful, subject to rebuttal by defendants. This presumption would be valuable, not because it would identify anticompetitive mergers with precision, but because it would shift the burden to the party with the best access to relevant information on issues of competitive effects and efficiencies from the merger. 64 We do not recommend altering burdens of persuasion. Although the Stigler Committee proposal addresses the issue of Section 7 underenforcement in these instances, it has two problems. First, as the preceding discussion of actual outcomes demonstrates, there is really no case for substantially altering merger rules for nascent rival acquisitions. Second, although the qualification of “uniquely likely” makes the Committee’s proposal more limited and more sensible, defining that term would be essential for the proposal to work. Does unique mean one? Three? Since we are talking about inventions of new things, and new things can come out of teenagers’ garages, divining whether a rival is “uniquely” situated to compete in the future will not be easy. It is surely correct, however, when the Committee points out that the merging firms have the best (and sometimes the only) information on the potential efficiencies from the merger. But the solution is not to alter the burden of persuasion. It is to make sure that the merging parties bear the burden of persuasion (or “going forward”) on these points.

### turn – china – 1nc

#### **Antitrust expansion cedes leadership, especially in the 5G race.**

Abbott et al. '21 [Alden; 3/10/21; Senior Research Fellow, formerly served on the Federal Trade Commission’s General Counsel, J.D. from Harvard Law School, M.A. in Economics from Georgetown University; "Aligning Intellectual Property, Antitrust, and National Security Policy," https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf/]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

III. Overly Aggressive Antitrust Enforcement Hinders American Technological Leadership and Threatens National Security

As companies from around the world develop the technology and standards for 5G mobile devices and networks, American companies are under threat by aggressive antitrust enforcement that ultimately redounds to the benefit of these foreign companies, which are economic competitors in countries that are also military competitors of the U.S. Over the past five years, foreign governments, particularly in Asia, have subjected U.S. companies to antitrust investigations that failed to follow basic norms of the rule of law, such as providing basic due process protections.14 These antitrust investigations were a thinly-disguised effort by these countries to force the transfer of U.S. patented technology to their own domestic companies, or to insulate their domestic companies from American competition. In recent years, Chinese, Korean, and Taiwanese antitrust authorities have brought nearly 30 investigations against 60 foreign companies across a range of industries, including manufacturing, life sciences, and technology.15

Antitrust challenges undermine intellectual property rights by forcing companies to license their products on non-market-based terms. One prominent example in U.S. history is when the Department of Justice wrung a concession from AT&T to license royalty-free the entire portfolio of 8,600 patents held by Bell Labs in a 1956 antitrust consent decree with the company.16 Today, the White House Office of Trade and Manufacturing Policy has observed that “China uses the Antimonopoly Law of the People’s Republic of China not just to foster competition but also to force foreign companies to make concessions such as reduced prices and below-market royalty rates for licensed technology.”17 Companies have also complained about poor policy guidance and procedural protections under China’s competition laws.18 Others have complained about China’s use of its competition laws to promote policy objectives rather than protect competition and advance consumer welfare.19 In one example, companies raised concerns with Article 7 of China’s State Administration of Industry Commerce (SAIC) 2015 Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights.20 Under this provision, intellectual property constitutes an “essential facility,” which could allow parties to raise abuse of intellectual property rights claims against patent owners for a unilateral refusal to license their patents.21

Predatory antitrust enforcement actions threaten the ability of U.S. companies to continue to be leaders in 5G technological development. China and other nations with similarly restrictive regulatory frameworks can weaken the ability of the United States to compete in global markets by exacting high monetary penalties from U.S. intellectual property owners or forcing the transfer of their intellectual property to domestic commercial rivals. As a penalty for violations of its competition laws, China can impose exorbitant fines that range up to 10% of a foreign company’s entire revenue in the prior year.22 This is not a legal rule observed in the breach; it has already resulted in fines just shy of $1 billion.23

Another way in which courts in China and other foreign countries are harming U.S. companies is through the use of anti-suit injunctions. One example of this is in the recent patent infringement lawsuit brought by InterDigital, an American high-tech company that has developed key technologies in wireless telecommunication, against Chinese company Xiaomi. In June 2020, Xiaomi filed a lawsuit in the Wuhan Intermediate Court in China requesting that the court set global licensing rates for InterDigital’s patents on standardized technologies. In July 2020, InterDigital sued Xiaomi in India for infringement of InterDigital’s Indian patents. The Wuhan Intermediate Court then ordered InterDigital to stop its lawsuit with its request for an injunction in India. The Chinese court further prohibited InterDigital from suing Xiaomi and requesting an injunction or damages in the form of reasonable licensing rates, or even to enforce a previously-issued injunction, in any other country. If InterDigital does not comply with this worldwide injunction against pursuing legal relief for the violation of its patents in any other country, the company faces a significant fine in China. The type of judicial order issued by the Wuhan court is known as an anti-suit injunction and its purpose is to force an intellectual property dispute to play out solely in a Chinese court at the behest of the Chinese government. These court orders demonstrate China’s desire to become the source of 5G innovation and to dictate the licensing terms of the technology, and the anti-suit injunctions hamstring U.S. companies like InterDigital from enforcing their intellectual property rights anywhere in the world.

The unfair use of antitrust enforcement and related legal actions like anti-suit injunctions to weaken U.S. intellectual property rights around the world risks diminishing U.S. global competitiveness in critical technologies like 5G, and further empowers China and others to expand their influence over the evolving 5G technological ecosystem. To the extent the U.S. cedes its dominance in 5G standards development, China will continue its focused efforts to fill that void. Huawei, a China-based company, has increased its R&D spending while growing its share of patents on the standardized technologies comprising 5G.24 The President’s Council on Science and Technology issued a report concluding that Chinese actions in the semiconductor industry, which include a range of policies backed by over $100 billion in government funds, threaten U.S. leadership in the industry and present risks to U.S. national security.25 China’s “Made in China 2025” plan called for China to become a leader in 5G technology, including in the development of the standards for the technology, by 2020.26 The plan expressly favors Chinese domestic producers, calling for raising the domestic content of core components in high-tech industries like 5G to 70% by 2025.27

This issue, however, extends far beyond simply the ability and willingness of U.S. companies to engage in the requisite R&D to participate in the 5G race. Reduced U.S. influence on 5G standard-setting would force the U.S. government to rely on untrusted foreign companies for its 5G product supply. The Department of the Treasury has expressed concern about the “well-known” U.S. national security risks posed by Huawei and other Chinese telecommunications companies.28

### AT: china impact – 1nc

#### No U.S.-China war.

Abraham Denmark et al 20 is director of the Asia Program at the Woodrow Wilson International Center for Scholars and a former deputy assistant secretary of defense for East Asia, April 16, “SAME AS IT EVER WAS: CHINA’S PANDEMIC OPPORTUNISM ON ITS PERIPHERY”, <https://warontherocks.com/2020/04/same-as-it-ever-was-chinas-pandemic-opportunism-on-its-periphery/>

While Washington and Beijing’s overheated rhetoric and mutual recriminations amid the ongoing coronavirus pandemic are grabbing headlines, equally important is what has been playing out across China’s eastern and southern peripheries over the past several weeks. At a moment when the Chinese Communist Party has been touting the generosity of its approach to COVID-19, there has been a marked increase in the number of incidents between China and its neighbors. Beijing has used its naval and paramilitary forces as well as its increasingly sophisticated information operations to ratchet up tensions, probe responses, and see how much it can get away with. This raises the question of what exactly China is up to. Has Beijing truly embraced a new approach of cooperation with its neighbors? Is it trying to take advantage of the COVID-19 mess to assert its interests more aggressively? Or is this simply an extension — albeit an opportunistic one — of its pre-pandemic strategy? BECOME A MEMBER The novel coronavirus pandemic has not curtailed geopolitics — in fact, it seems to be intensifying preexisting tensions. Understanding if and how China’s foreign policy has shifted is critical for assessing what is happening along China’s periphery and what Beijing might do next. Answering these questions is necessary for the United States and its allies to fashion a proper response. This, in turn, demands understanding what Beijing was doing before the crisis and thinking through what might actually signal a significant shift toward a more confrontational foreign policy. How Did I Get Here? China’s Latest Moves Chinese ships and aircraft have been involved in a spate of recent incidents across China’s maritime periphery. While there have been no fatalities, lives were certainly put at risk. Considering these incidents have involved two of China’s primary regional rivals — Japan and Vietnam — as well as Taiwan, the possibility that Beijing may see the COVID-19 pandemic as an opportunity to press an advantage during a time of geopolitical distraction and uncertainty should be considered. In mid-March, a group of People’s Liberation Army (PLA) aircraft crossed the median line in the Taiwan Strait — an unofficial demarcation line between Taiwan and China — in an exercise intended to intimidate Taiwan by demonstrating China’s ability to conduct operations at night while also testing Taiwan’s ability to react. While PLA ships and aircraft have been operating within the vicinity of Taiwan for several years, the pace and assertiveness of these activities have noticeably increased in recent years: The latest incident was the fourth time in two months that PLA aircraft forced Taiwan’s air force to scramble and intercept. Considering the impending second inauguration of Taiwan’s leader, President Tsai Ing-wen, as well as dwindling levels of support in Taiwan for Beijing’s “One Country, Two Systems” formulation, these exercises are likely to grow even more common and assertive. In late March in the East China Sea, a Chinese fishing vessel collided with a Japanese destroyer. The collision ripped a hole in the destroyer, but the ship was able to move on its own, and its crew suffered no casualties. Beijing announced that one Chinese fisherman had been hurt and blamed the Japanese vessel for the incident, calling for Japan’s cooperation to prevent future incidents. It is unclear if the Chinese vessel was a part of China’s “maritime militia,” described by the U.S. Department of Defense as “an armed reserve force of civilians available for mobilization” that plays a “major role in coercive activities to achieve China’s political goals without fighting.” The South China Sea has also seen several recent incidents involving Chinese vessels. In early March, a Vietnamese fishing vessel was moored near a small island in the Paracel archipelago — islands claimed by both Vietnam and China, among others — when a Chinese vessel chased it and fired a water cannon, causing the boat to sink after hitting some rocks. The crew was rescued by another Vietnamese fishing boat, with Hanoi claiming that the fishing boat was rammed by the Chinese vessel. The U.S. State Department issued a statement in early April expressing its serious concerns about the incident and calling on China “to remain focused on supporting international efforts to combat the global pandemic, and to stop exploiting the distraction or vulnerability of other states to expand its unlawful claims in the South China Sea.” The State Department also noted that since the outbreak of the pandemic, “Beijing has also announced new ‘research stations’ on military bases it built on Fiery Cross Reef and Subi Reef, and landed special military aircraft on Fiery Cross Reef.” Most recently, a Chinese coast guard (CCG) ship — one of several Chinese ships that harassed a Philippine commercial vessel in September 2019 — was seen patrolling near the Scarborough Shoal, representing one of many CCG ships that have been patrolling nearly all of the disputed areas between China and the Philippines in the South China Sea. Are these incidents merely a coincidence? Are they a sign that Beijing is distracted by COVID-19 and the resulting historic economic slowdown, and aggressive local commanders are pushing the envelope of their own accord? Or is this merely the result of China fielding more ships and more aircraft, leading to a predictable increase in incidents and exercises? While these explanations are all plausible, a more likely driver of China’s actions is, in fact, continuity. These incidents are not unprecedented and likely do not indicate a new, post-pandemic Chinese strategy. Rather, these incidents are consistent with a Chinese approach to foreign affairs under CCP General Secretary Xi Jinping’s leadership that even before the outbreak of COVID-19 demonstrated flexibility, assertiveness, and a singular desire to exploit opportunities of external weakness and distraction in order to advance China’s interests. For more than a decade, Chinese leaders have come to see their external security environment as generally favorable, representing a “strategic window of opportunity” in which China could achieve its primary objective of national revitalization through economic and social development, military modernization, and the expansion of its regional and global influence. Since the 2008 to 2009 global financial crisis, Beijing has perceived an opportunity to expand its geopolitical power relative to the United States yet does not seek an explicit conflict with the United States or its allies. As a result, Beijing has intensified its use of “gray zone” tactics that seek to gradually advance Chinese interests using ambiguity and tactics that are tailored to not provoke a military retaliation. These activities also serve as “probing behavior” that tests how far China can go before encountering determined resistance. In recent years, Beijing has used this approach to increase pressure on Japan in the East China Sea and advance Beijing’s territorial claims in the South China Sea against the Philippines, Vietnam, Malaysia, and Indonesia. Throughout, Beijing’s approach to regional geopolitics has been adaptive to specific conditions, flexible to broader strategic trends, and opportunistic to perceptions of weakness or distraction in its adversaries. Chinese actions are not the reckless gambles they may initially appear to be. Rather, they are premeditated probes seeking to identify weakness and opportunity. Chinese pressure is carefully calibrated to fit, but not necessarily to exceed, a given situation. This approach reflects a maxim of Vladimir Lenin, whom the Chinese Communist Party continues to revere to this day: “Probe with a bayonet: if you meet steel, stop. If you meet mush, then push.” In multiple instances, Beijing has continued to push when it perceives that its actions are unlikely to cause a significant response. But when Chinese assertiveness has been met with resolute counterpressure, Beijing’s response has not been predictably escalatory.Beijing has demonstrated flexibility when confronted with determined opposition. Examples include Japan’s response to China’s rollout of an air defense identification zone in the East China Sea in 2013 and President Obama’s reported drawing of a red line around Scarborough Shoal to Xi Jinping in March 2016. Moreover, India’s response to Chinese activities in Doklam did not lead to war.

### AT: iran internal – 1nc

#### Iran doesn’t make sense.

#### Their fintech uniqueness cards are about AI/5G BUT their internal link cards are about consumer-focused tech start-ups.

#### Iran can use fintech inevitably. US fintech can’t *take down the internet.*

#### Dollar decline inevitable.

Harrell and Rosenberg, 19 – Former Senior Fellows @ CNAS

(Peter E. Harrell and Elizabeth Rosenberg, Peter Harrell is a former adjunct senior fellow at the Center for a New American Security. He is a leading expert on U.S. economic statecraft, including sanctions, export controls, trade policy, and other geoeconomic tools. Elizabeth Rosenberg is a former Senior Fellow and Director of the Energy, Economics, and Security Program at the Center for a New American Security. In this capacity, she published and spoke on the national security and foreign policy implications of the use of sanctions and economic statecraft as well as energy market shifts. “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” Center for a New American Security, 2019, pp.31-32, <http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic_Dominance-final.pdf>)//Neo

That said, there are at least some indications that the dollar will not necessarily maintain its present level of overwhelming dominance. Over the past several years, for example, there has been a modest but noticeable reduction in the share of global reserves denominated in dollars.90 Russia, fearing additional U.S. sanctions, led this shift, cutting the share of its reserves held in dollars by roughly half in 2018. And several countries have seen extremely rapid shifts in the nature of their domestic payment systems: India, for example, launched a new Unified Payments Interface (UPI) in 2016, and after less than three years, the network now processes more than 500 million transactions a month.91 China became the world leader in mobile payments, by a massive margin, in a period of just five years.92 As the number of Chinese mobile payments users increases in Chinese diaspora communities and among global customers of China, including those in the countries receiving China’s Belt and Road Initiative infrastructure investments, China’s global financial footprint will likely expand at the expense of other major financial systems and currencies. Moreover, although transitioning cross-border payment systems is a substantially more challenging task than modernizing domestic payment infrastructures, emerging financial technologies, such as blockchain-based clearing mechanisms, could potentially play a key role in simplifying one of the most challenging parts of developing a cross-border payment network: converting between currencies. As economist Barry Eichengreen has argued, financial technologies will probably reduce the contemporary barriers to a world where there are multiple international currencies, rather than one dominant one, and could enable a return to the type of multicurrency world that existed prior to the 20th century.93 The dollar could remain the largest currency block in such a multicurrency world, but alternatives could nonetheless reach a scale sufficient to enable targets of U.S. sanctions, such as Iran or North Korea, to continue economically significant quantities of trade with Asian countries while avoiding financial institutions that touch the U.S. financial system.

#### Iran can’t use bitcoin effectively.

Sexton and Sudetic, 21 – Director of Cyber Security Initiative @ Middle Easter Institute, Foreign Affairs Consultant @ Gulf State Analytics

(Michael Sexton and Brett Sudetic, Michael Sexton is a Fellow and Director of the Cybersecurity Initiative at the Middle East Institute. Brett Sudetic is a foreign affairs consultant and advisor to Gulf State Analytics, a Washington DC-based geopolitical risk consulting firm.1-22-2021, "Bitcoin: A dirty solution to Iran’s economic troubles?," Middle East Institute, https://www.mei.edu/publications/bitcoin-dirty-solution-irans-economic-troubles, 10-29-2021)//Neo

Bitcoin, despite its recent popularity, may not be as promising as some Iranians would hope. The cryptocurrency is seldom used or usable in everyday transactions, and its value is notoriously unstable. Volatility of the currency and uncertainty around government regulations have led many Investors and financial analysts - including legendary investor Warren Buffet - to assert that the cryptocurrency possesses no value and is likely to collapse at some point. Others fear that while cryptocurrencies are inherently designed to give people more freedom and privacy in conducting financial transactions, potential government regulations could hamper adoption of the cryptocurrency in the near future.

Iran’s embrace of bitcoin is also likely to attract greater scrutiny from anti-money laundering and counter-terrorism finance investigators. All bitcoin transactions are public, although the identities behind the transactions are hidden behind random (but static) numerical addresses. This means that, while the currency is attractive for terrorists, criminals, and other users who cannot rely on traditional banking, it can also be a treasure trove of intelligence for governments and even open-source researchers. The United States government has previously exposed the bitcoin addresses of sanctioned Iranians to clamp down on illicit transactions.

Bitcoin mining is not a solution to Iran’s economic troubles, but a symptom of them. To arrest the harm that this emerging industry is causing to Iran’s energy infrastructure and environment, Iran and the P5+1 will need to prepare Iran to gainfully participate in the global economy without relying on quixotic and problematic enterprises like cryptocurrency mining.

### AT: iran impact – 1nc

#### Internal link is a two-line hypothetical and Avery’s quals are in physics – who cares.

#### No Iran prolif----multiple checks

Mark Fitzpatrick 20. Associate Fellow at the International Institute for Strategic Studies. 1-17-2020. "Is Iran building the bomb?" The Article. https://www.thearticle.com/is-iran-building-the-bomb.

No, Iran has not restarted its nuclear weapons programme. Commentators such as the New York Times columnist Thomas Friedman blithely assume so, based on Iran’s decision on 5 January to retreat from the enrichment limits in the 2015 nuclear deal, known as the Joint Comprehensive Plan of Action (JCPOA). Others wrongly conclude that Tehran has abandoned the deal. Yet Iran is still keeping a foot in the accord, abiding by the crucial inspection requirements, while insisting it will resume full compliance if the US resumes its JCPOA obligations to loosen sanctions. What Iran has done is advance the timeline toward a nuclear weapons capability in line with its nuclear hedging strategy. How much so is a matter of conjecture among experts. Some say that if Iran decided to make an all-out dash for a bomb, and experienced no hiccups along the way — what its adversaries call a worst-case scenario — Iran could produce a bomb’s worth of highly enriched uranium (HEU) in as little as 4-5 months. But such assessments of the so-called break-out period are based on uncertain data and questionable assumptions. The Israeli Defense Force (IDF), which presumably has a clearer window into Iran’s program, assesses that Iran will be able to produce enough HEU by the end of the year and to assemble a weapon in less than two years. Alarming as this might sound, it is not significantly different than when the JCPOA went into effect in 2016. And it is a much better situation than when negotiations began in 2013, at which point the break-out period was judged to be only a couple of months. The IDF also assesses that Iran is currently not interested in developing an atomic bomb as quickly as possible. A key goal of Iran’s negotiating partners was to extend the break-out period to at least a year. The deal succeeded in doing so by eliminating 98 per cent of Iran’s stockpile of low-enriched uranium, all of its stockpile of 20 per cent enriched uranium, which is just below the threshold of being weapons-usable, and two-thirds of the centrifuges that do the enriching. Before those cuts, Iran’s stockpile was enough for up to ten weapons, if further enriched. Afterwards, it had less than a quarter of the feed stock for one bomb Now that Iran has removed restrictions, the stockpile of low-enriched uranium is growing, centrifuges are being reinstalled and more efficient centrifuges are being developed at a faster pace. We will know by how much each of these steps has advanced when the International Atomic Energy Agency (IAEA) releases its next quarterly report in the latter half of February. The enriched uranium feedstock will still be less than a bomb’s worth, but the pace of acceleration will be concerning. One question is whether Iran will resume 20 per cent enrichment, a level it first reached ten years ago, in an escalating stand-off with western states which were imposing ever-more biting sanctions. Today, Iran can again use the 20 per cent step as a bargaining chip in efforts to forestall the re-imposition of UN sanctions. Do not be spooked by the alarmist assessments that will surely follow when the next IAEA report comes out. Remember that worst-case assumptions assume that Iran would be able to get everything right the first time it attempts the tricky task of producing weapons-grade uranium without it exploding prematurely, and that assembling a warhead small enough to fit in the nosecone of Iran’s missiles would go like clockwork. Remember, too, that Iran would be [foolish] ~~suicidal~~ to try to rush to produce HEU at sites that are intrusively monitored.

## advantage – conduct

### AT: cyber internal – 1nc

#### Big Tech companies are driving increased cybersecurity now

Page 21 – Carly Page, writer at TechCrunch, “Big Tech pledges billions to bolster US cybersecurity defenses,” 8/26/21, https://techcrunch.com/2021/08/26/big-tech-pledges-billions-to-bolster-u-s-cybersecurity-defenses/

Tech giants Apple, Google and Microsoft have pledged billions to bolster U.S. cybersecurity following a meeting with President Joe Biden at the White House on Wednesday.

The meeting, which also included attendees from the financial and education sectors, was held following months of high-profile cyberattacks against critical infrastructure and several U.S. government agencies, along with a glaring cybersecurity skills gap; according to data from CyberSeek, there are currently almost 500,000 cybersecurity jobs across the U.S that remain unfilled.

“Most of our critical infrastructure is owned and operated by the private sector, and the federal government can’t meet this challenge alone,” Biden said at the start of the meeting. “I’ve invited you all here today because you have the power, the capacity and the responsibility, I believe, to raise the bar on cybersecurity.”

In order to help the U.S. in its fight against a growing number of cyberattacks, Big Tech pledged to invest billions of dollars to strengthen cybersecurity defenses and to train skilled cybersecurity workers.

Apple has vowed to work with its 9,000-plus suppliers in the U.S. to drive “mass adoption” of multi-factor authentication and security training, according to the White House, as well as to establish a new program to drive continuous security improvements throughout the technology supply chain.

Google said it will invest more than $10 billion over the next five years to expand zero-trust programs, help secure the software supply chain and enhance open-source security. The search and ads giant has also pledged to train 100,000 Americans in fields like IT support and data analytics, learning in-demand skills including data privacy and security.

“Robust cybersecurity ultimately depends on having the people to implement it,” said Kent Walker, Google’s global affairs chief. “That includes people with digital skills capable of designing and executing cybersecurity solutions, as well as promoting awareness of cybersecurity risks and protocols among the broader population.”

And, Microsoft said it’s committing $20 billion to integrate cybersecurity by design and deliver “advanced security solutions.” It also announced that it will immediately make available $150 million in technical services to help federal, state and local governments with upgrading security protection, and will expand partnerships with community colleges and nonprofits for cybersecurity training.

Other attendees included Amazon Web Services (AWS), Amazon’s cloud computing arm, and IBM. The former has said it will make its security awareness training available to the public and equip all AWS customers with hardware multi-factor authentication devices, while IBM said it will help to train more than 150,000 people in cybersecurity skills over the next five years.

#### The plan destroys cybersecurity – only digital monocultures have the money to invest in advanced cybersecurity tech

Longe 20 – Edward Longe, policy manager at the American Consumer Institute, “A Serious Casualty of Antitrust Legislation: Cybersecurity,” 9/24/20, https://www.theamericanconsumer.org/2020/09/a-serious-casualty-of-antitrust-legislation-cybersecurity/

When advocates of antitrust legislation discuss reigning in large technology companies such as Apple, Facebook, or Google, they often do not fully consider the implications more stringent antitrust legislation will have on cybersecurity and the protection of consumer data.

Proposals to break up large technology companies would be profoundly damaging to consumer privacy and cybersecurity as smaller technology companies and startups lack the resource capabilities of making substantial capital investments required to ensure consumer data is protected or deal with the newly emerging cyberthreats associated with new technology devices such as the Internet of Things (IoT).

Every year, Microsoft faces about 7 trillion cyberthreats, many of which are becoming increasingly sophisticated. To combat these cyberattacks, Microsoft invests “over $1 billion to cybersecurity” and recently created a dedicated Cyber Defense Operations Center that is staffed around the clock to ensure its consumer data is protected.

Microsoft is not the only major tech corporation to invest significant amounts into protecting its consumer data. In 2018, Apple reported it would invest $10 billion dollars over the next few years on new U.S. Data Centers that are responsible for ensuring the protection of consumer data. These data centers do not just hold the companies’ sophisticated cybersecurity technology, but also employ those who are responsible for monitoring emerging threats and ensure that the company can provide superior cybersecurity to its consumers.

Outside of this direct investment in cybersecurity and cybersecurity facilities, big tech companies like Facebook, Amazon, Google, Apple, invested approximately $2.5 billion dollars into supporting cybersecurity companies that develop products which protect everything from login credentials, credit card information and social security numbers.

Without the significant investment large technology companies make in protecting consumer data and deterring cybercrime, consumers would have significantly fewer protections. Some smaller technology companies simply do not have the sources to invest in sophisticated cybersecurity technology, leaving their data vulnerable to cyberattacks and crime. Breaking up the large technology companies would therefore weaken cybersecurity and increase the vulnerability of consumer data.

As communication technology becomes more advanced, significant investment in cybersecurity will also be needed to ensure it is protected. While IoT technology allows the interconnection various internet of computing devices (cameras, smart appliances, and smart home gadgets) and enables them to receive and send to your home computer and smartphone, they could be vulnerable to a number of threats. Mobile Network Mapping is one threat that home networks could face and is where “attackers can create maps of devices connected to a network, identify each device and link it to a specific person.”

To meet these and other cyberthreats, networks and network devices will require significant investment in security that will undoubtedly run into the billions of dollars and require collaboration between industry and government. Given the billions that will be required to protect against online threats, it is clear that currently larger tech companies will have the means to invest and meet the demands for cybersecurity.

The protection of consumer data and cybersecurity is undoubtedly one of the biggest challenges the technology industry faces and one that should be of paramount concern to every consumer. Within the realm of cybersecurity and protecting consumer data, it is apparent that limiting the size of technology companies on the false “Big is Bad” assumption could have significant repercussions that would leave consumers worse off and their important information more vulnerable.

### AT: cyber impact – 1nc

#### No catastrophic cyberattacks---25 years of empirics prove they stay low-level and non-escalatory.

Lewis 20---senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies). Lewis, James. 2020. “Dismissing Cyber Catastrophe.” Center for Strategic & International Studies. August 17, 2020. https://www.csis.org/analysis/dismissing-cyber-catastrophe.

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack. To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge. It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted. More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are: Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals. There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.) No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare. State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war. This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation. The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability. One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild. This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1 This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often? Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer. The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

### AT: growth impact – 1nc

#### SMEs are fine – have fully recovered from COVID.

Dane Stangler 10/13/21. Contributor. “State Of Small Business: What Recent Surveys Say At End Of 2021”. Forbes. Dec 13 2021. https://www.forbes.com/sites/danestangler/2021/12/13/state-of-small-business-what-recent-surveys-say-at-end-of-2021/?sh=7f60f7806c0b

Overall Sentiment: On One Hand, On the Other

First, the good news. In its Q3 report, released in October, Yelp found that “the vast majority [85%] of businesses that experienced a temporary closure during the pandemic have reopened.” In the most recent Small Business Pulse Survey data from the Census Bureau (now in Phase 7, through the first week of December), 36% of respondents expect recovery to take longer than six months. That is the best reading since July and far better than a year ago, when nearly half of small businesses saw prolonged recovery.

This improvement in small business outlook may reflect the banner day that many experienced two days after Thanksgiving, on what’s become known as Small Business Saturday. An American Express survey said consumer spending at small businesses hit an all-time high of $23.3 billion this year. That was an 18% increase from 2020. Over half (58%) of respondent shoppers said they bought something from a small business online. That was just 43% in 2019.

Fortified optimism among small businesses is also reflected in new business openings, the total number of which is higher through the first three quarters of 2021 than during the same time period in 2019, according to Yelp. Increases have been seen especially among hotels, nightlife (dance clubs, comedy clubs, lounges), and beauty services.

#### COVID and 08 disprove the impact.

#### Countries will exercise restraint.

Christina L. Davis & Krzysztof J. Pelc 17. \*Professor of Politics and International Affairs at Princeton. \*\*Associate Professor of Political Science at McGill University. “Cooperation in Hard Times: Self-restraint of Trade Protection.” *Journal of Conflict Resolution* 61(2): 398-429. Emory Libraries.

Conclusion Political economy theory would lead us to expect rising trade protection during hard times. Yet empirical evidence on this count has been mixed. Some studies find a correlation between poor macroeconomic conditions and protection, but the worst recession since the Great Depression has generated surprisingly moderate levels of protection. We explain this apparent contradiction. Our statistical findings show that under conditions of pervasive economic crisis at the international level, states exercise more restraint than they would when facing crisis alone. These results throw light on behavior not only during the crisis, but throughout the WTO period, from 1995 to the present. One concern may be that the restraint we observe during widespread crises is actually the result of a decrease in aggregate demand and that domestic pressure for import relief is lessened by the decline of world trade. By controlling for product-level imports, we show that the restraint on remedy use is not a byproduct of declining imports. We also take into account the ability of some countries to manipulate their currency and demonstrate that the relationship between crisis and trade protection holds independent of exchange rate policies. Government decisions to impose costs on their trade partners by taking advantage of their legal right to use flexibility measures are driven not only by the domestic situation but also by circumstances abroad. This can give rise to an individual incentive for strategic self-restraint toward trade partners in similar economic trouble. Under conditions of widespread crisis, government leaders fear the repercussions that their own use of trade protection may have on the behavior of trade partners at a time when they cannot afford the economic cost of a trade war. Institutions provide monitoring and a venue for leader interaction that facilitates coordination among states. Here the key function is to reinforce expectations that any move to protect industries will trigger similar moves in other countries. Such coordination often draws on shared historical analogies, such as the Smoot–Hawley lesson, which form a focal point to shape beliefs about appropriate state behavior. Much of the literature has focused on the more visible action of legal enforcement through dispute settlement, but this only captures part of the story. Our research suggests that tools of informal governance such as leader pledges, guidance from the Director General, trade policy reviews, and plenary meetings play a real role within the trade regime. In the absence of sufficiently stringent rules over flexibility measures, compliance alone is insufficient during a global economic crisis. These circumstances trigger informal mechanisms that complement legal rules to support cooperation. During widespread crisis, legal enforcement would be inadequate, and informal governance helps to bolster the system. Informal coordination is by nature difficult to observe, and we are unable to directly measure this process. Instead, we examine the variation in responses across crises of varying severity, within the context of the same formal setting of the WTO. Yet by focusing on discretionary tools of protection—trade remedies and tariff hikes within the bound rate—we can offer conclusions about how systemic crises shape country restraint independent of formal institutional constraints. Insofar as institutions are generating such restraint, we offer that it is by facilitating informal coordination, since all these instruments of trade protection fall within the letter of the law. Future research should explore trade policy at the micro level to identify which pathway is the most important for coordination. Research at a more macro-historical scope could compare how countries respond to crises under fundamentally different institutional contexts. In sum, the determinants of protection include economic downturns not only at home but also abroad. Rather than reinforcing pressure for protection, pervasive crisis in the global economy is shown to generate countervailing pressure for restraint in response to domestic crisis. In some cases, hard times bring more, not less, international cooperation.

# 2NC

### 2NC – O/V

#### No deficits – states cause federal follow-on, but the aff fails because it causes state backlash.

Arteaga & Ludwig ’21 [Juan; 1/28/21; Partner @ Crowell & Moring LLP, JD @ Columbia; and Jordan; Partner @ Crowell & Moring LLP, JD @ Loyola Law School, Los Angeles; “The Role of US State Antitrust Enforcement,” *Global Competition Review*; https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement; AS]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general have sued to block the transaction even though the DOJ, along with seven state attorneys general, have approved the deal after securing certain structural and behavioural remedies. After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who has been leading the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’
* The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees)in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.
* None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support. In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.
* After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’
* After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.

#### All deficits to the counterplan are deficits to the plan – they require state AGs for enforcement.

Arteaga & Ludwig ’21 [Juan; 1/28/21; Partner @ Crowell & Moring LLP, JD @ Columbia; and Jordan; Partner @ Crowell & Moring LLP, JD @ Loyola Law School, Los Angeles; “The Role of US State Antitrust Enforcement,” *Global Competition Review*; https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement; AS]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring parens patriae suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations. Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices. These laws had their intended effect of reinvigorating state antitrust enforcement.

### 2NC – AT Duncan

#### No preemption.

Rauch ’20 [Daniel; JD @ Yale Law School; “Sherman's Missing Supplement: Prosecutorial Capacity, Agency Incentives, and the False Dawn of Antitrust Federalism”; *Cleveland State Law Review* 68(2), p. 172-216; AS]

C. Federal Government "Displacement"?

A third argument, sometimes suggested but rarely precisely elaborated, is that federal antitrust law somehow "displaced" state enforcement. On this account, once state officials saw that the federal government had enacted the Sherman Act, they decided to stop enforcing their own statutes in response. Describing this approach, Werner Troesken writes:

The work of Gabriel Kolko suggests another way the trusts might have perceived a federal antitrust law as beneficial. According to Kolko, businesses of all kinds - railroads, banks, insurance companies, and so on - lobbied for increased federal regulation and control because they believed it would forestall more hostile forms of regulation taking place at the state and local level.1 10

On this reading, as one commenter asserted, the Sherman Act's passage, in and of itself, "sounded the death knell for state enforcement efforts.""

Such appeals to an ill-defined federal "displacement" of state law leave much to be filled in. It is possible the "displacement" they refer to is the formal displacement of federal preemption. If so, then the doctrinal arguments outlined earlier would seem to conclusively dispose of this. Yet in any case, once again, the data do not support such an interpretation, since if the federal government had broadly "displaced" state prosecutions, one would not expect to find so much of it in the "high enforcement" states. And, if the Sherman Act really was supposed to "displace" state antitrust laws, it proved an unambiguous failure, as a host of states adopted new antitrust laws or strengthening old ones in the decade following the Act's passage. 1 12

#### No preemption in antitrust.

HLR ’20 [Harvard Law Review; “Antitrust Federalism, Preemption, and Judge-Made Law,” *Harvard Law Review* 133(8), p. 2557-2578; AS]

Even when it is not a constitutional hurdle, federalism is still a relevant constitutional value. The Framers embraced federalism for its policy virtues,11 and contemporary judges and scholars laud federalism for its modern-day policy perks. 1 2 The Supreme Court often invokes federalism in the form of a presumption that Congress does not lightly intrude on state sovereignty.13 One example is the Court's presumption against preemption: a party alleging federal preemption of state law faces a judicial presumption that Congress did not intend to make that choice.14 That presumption is validated by Congress's choice to refrain from preempting state law in the antitrust arena: state and federal antitrust laws have coexisted since the federal government's first steps into the arena in 1890.15

#### State backlash wrecks aff solvency. Amex proves differences are possible.

Grosso ’21 [Jacob; JD Candidate @ University of Richmond School of Law; “The Preemption of Collective State Antitrust Enforcement in Telecommunications,” *University of Richmond Law Review* 55(2), p. 615-656; AS]

While states may differ with respect to their enforcement policies, previous collective state action has led to several disagreements with federal enforcement decisions. In 1994, the DOJ and several states filed suit against Microsoft in the United States District Court for the District of Columbia, alleging violations of Sections 1 and 2 of the Sherman Act. 159 In the end, multiple states disagreed with the settlement forged by the federal enforcement agency.160 Nine states joined the DOJ settlement, while nine other states proposed substantially different remedies. 161 The dissenting states demanded concessions beyond the scope of the federal settlement, including forcing Microsoft to license significant intellectual property cheaply and to change the company's product offerings.16 2 Here, the states undercut a federally engineered settlement, resulting in delays to the suit and continued argument over the appropriate remedy.1 63 The undercutting of the Microsoft settlement is comparable to the T-Mobile-Sprint merger, where the DOJ and FCC negotiated for divestitures to ensure the national goals of both agencies were satisfied, but still faced pushback from a group of states. If the states and federal enforcers do not agree on the terms of a settlement, the states become a complication to the adjudication process. 164 The inability to rely upon a negotiated settlement agreement also creates uncertainty for merger parties.

In 2015, during the AT&T-Time Warner merger, twenty states investigated; none joined DOJ's action. 165 The DOJ had filed suit to block the vertical merger, alleging violations of Section 7 of the Clayton Act.166 Nine states filed amicus briefs opposing the DOJ's suit.167 The DOJ eventually lost the appeal, and the merger proceeded. 168 Instead of a national industry facing a unified enforcement front, the enforcement efforts became fragmented and contradictory. The divergence in enforcement policies showed the competing interests at issue for each enforcer. This split is also apparent in the divergence between the states opposing the T-MobileSprint merger and the DOJ, FCC, and states supporting it.

In an action against American Express in the Second Circuit, the DOJ-the original lead plaintiff-resorted to opposing an appeal by its co-plaintiff states. 169 The DOJ and a group of states had filed suit in 2010 in the Eastern District of New York alleging violations of Section 1 of the Sherman Act. 170 Following a Second Circuit decision against the DOJ and plaintiff states, the DOJ maintained the Second Circuit opinion was incorrect but filed a brief in opposition to the states' petition for a writ of certiorari. 171 The DOJ advocated for further "percolation in the lower courts," arguing that conflict between the lower courts on the issue was necessary before the Supreme Court should resolve the issue. 172 The plaintiff states maintained their writ for certiorari, and eventually lost in the Supreme Court. 173 The three aforementioned splits in enforcement choices show that the divergence between state and federal enforcement leads to uncertain outcomes, decreases the effectiveness of settlements, and prevents nonenforcement policies that may serve a broader goal.

### 2NC – AT Rogue State DA

#### No impact to overdeterrence.

HLR ’20 [Harvard Law Review; “Antitrust Federalism, Preemption, and Judge-Made Law,” *Harvard Law Review* 133(8), p. 2557-2578; AS]

Like the patchwork regime critique, the overdeterrence critique is weakened if the federal regime has failed to achieve proper balancing. Many antitrust regimes around the globe adopt different balances than the United States does. The European Union, for example, differs from the United States on remedial structure, the standard for illegal unilateral conduct, and market definition, among other issues. 68 Moreover, many scholars argue that the U.S. antitrust balance is off and that more enforcement is needed.6 9 Even if U.S. antitrust policies are getting the balance generally right, it is unlikely that the federal regime is so finely tuned that any added deterrence will destroy the balance.

### AT Patchwork

#### No uniformity deficits – multistate task forces solve.

Arteaga & Ludwig ’21 [Juan; 1/28/21; Partner @ Crowell & Moring LLP, JD @ Columbia; and Jordan; Partner @ Crowell & Moring LLP, JD @ Loyola Law School, Los Angeles; “The Role of US State Antitrust Enforcement,” *Global Competition Review*; https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement; AS]

Coordination among state antitrust enforcers

State attorneys general often coordinate their investigation and prosecution of antitrust matters with their counterparts in other states. To help ensure that these coordinated efforts are conducted in an efficient and effective manner, the NAAG has created an Antitrust Committee, which ‘is responsible for all matters relating to antitrust policy’. This committee is comprised of five state attorneys general and is responsible for promoting effective state antitrust enforcement by developing the NAAG’s antitrust policy positions and by facilitating communications among state enforcers regarding investigations, litigation, legislative matters and competition advocacy initiatives, among other things.

In 1983, the NAAG established a Multistate Antitrust Task Force that is ‘comprised of state staff attorneys responsible for antitrust enforcement in their states’. This task force ‘recommends policy and other matters for consideration by the Antitrust Committee, organizes training seminars and conferences, and coordinates multistate investigations and litigation’. The task force is chaired by a person appointed by the head of the NAAG’s Antitrust Committee and has a representative from each NAAG member state. The chair of the task force serves as ‘the principal spokesperson for the states on antitrust enforcement’.

The NAAG’s Multistate Antitrust Task Force does not handle actual investigations or litigation. Instead, such coordination usually occurs through working groups established by the states involved in an investigation or litigation. In most multistate investigations, the working group will designate a state responsible for leading the investigation. The lead state is often a state that has the most relevant experience and can dedicate the appropriate level of resources to the investigation, and has a sufficient interest in ensuring that the investigation is handled in an effective and efficient manner (i.e., the transaction or business practice in question could potentially impact a significant number of consumers or commerce within its state). (If an investigation is sufficiently large or complex, such as a mega-merger involving numerous markets, the states may create an executive committee that oversees the working group as well as designate multiple lead states.)

#### Collective action solves uniformity issues.

Grosso ’21 [Jacob; JD Candidate @ University of Richmond School of Law; “The Preemption of Collective State Antitrust Enforcement in Telecommunications,” *University of Richmond Law Review* 55(2), p. 615-656; AS]

II. PRIOR DIVERGENCES BETWEEN STATE AND FEDERAL ENFORCERS

Despite the recent significant overlap between state and federal enforcement actions, the two levels of government generally have different areas of expertise for antitrust. The current antitrust system is multilayered with different domains, enforcement abilities, and motives. The degree of federal enforcement has risen and fallen based upon different executive administrative goals. 144 Recent state action reflects the established trend of state involvement increasing in times of more lax federal enforcement.145

State and federal enforcers vary in organization and purpose. The primary federal antitrust enforcers, the DOJ and FTC, generally divide sectors of the economy based on their enforcement history. The DOJ is a federal law enforcement agency with a greater range of remedies than is enjoyed by the FTC, including criminal prosecution. 146 The FTC is a bipartisan group with the dual missions of promoting competition and protecting consumers, and may target more extensive ranges of behavior by enforcing the Federal Trade Commission Act against "unfair competition." 14 7 The states' domain is consumer protection of their citizens. States are not limited to suing under federal law and may bring actions available to them under their respective state's law. 148 Even with application of the same law, there are many different logistical considerations, such as limited staff and resources devoted to antitrust. These logistical difficulties cause most multistate actions to be led by larger states, with smaller states only contributing their limited sized antitrust sections as support.149 Another significant difference between the enforcers is that state enforcers are generally elected officials while federal enforcers are appointed officials. 150 As elected officials, States' Attorneys General are representing their constituents and will enforce antitrust in a manner that best benefits those constituents.

State action is continuing to rise, with collective action becoming a cemented enforcement strategy. 151 The National Association of Attorneys General ("NAAG") serves to help organize disparate state enforcers and gives them a forum to discuss enforcement policies and cooperation. 15 2 The NAAG emulates a federal agency in geographic breadth of enforcement but is comprised of individual states and their elected officials (the States' Attorneys General).1 53 It achieves its influence through standing committees and task forces, including its Multistate Antitrust Task Force. 154

## ADV 1

### T/

#### Using platforms categorically is too broad for predictable antitrust law.

Katz, 18 – Economics Prof @Berk

(Katz, ML. Platform economics and antitrust enforcement: A little knowledge is a dangerous thing. J Econ Manage Strat. 2019; 28: 138– 152. https://doi.org/10.1111/jems.12304)//Neo

As has been widely noted among academics, there is a lack of consensus regarding the definition of a multisided platform.7 The absence of a consensus definition has not hindered the development of a large stream of high‐quality empirical and theoretical research. But the lack of a definition is problematical when the application of the multisided platform label potentially drives antitrust enforcement outcomes. Perhaps the most widely used definition in the academic literature is that there are significant “cross‐platform network effects,”8 which Weyl (2010, p. 1644) describes as arising when “[u]sers’ benefits from participation depend on the extent of user participation on the other side of the market, which varies with market conditions.” But if one interprets “the extent of user participation” as meaning simply that users on one side find a platform more attractive if there are more users on the other side, then one is left with an extremely broad definition of multisided platforms. To see why, suppose one can express net benefits to a user on side i of the platform as B t pt i()− i , where t is the number of transactions in which the user engages through the platform, B t i( ) is the user’s total willingness to pay for those transactions, and pi is the per‐transaction price charged to users on side i. Suppose further that a side‐i user is an input supplier and B t i( ) is equal to minus one times its cost function. Then any time input suppliers would rather sell more at the current prices (i.e., the price exceeds the marginal cost of supplying the input), the buying firm would constitute a multisided platform subject to cross‐platform network effects because, the more customers that firm has, the more desirable that firm is as an input buyer. Rysman (2009, p. 127) downplays concern regarding an overly broad definition and asserts that “[t]he interesting question is often not whether a market can be defined as two‐sided—virtually all markets might be two‐sided to some extent—but how important two‐sided issues are in determining outcomes of interest.” Although this is a sensible approach to academic research, courts often seek to draw bright lines, and there is considerable concern that whether a firm is labeled as “multisided platform” could have significant effects on its legal treatment.9 In order for the presence of cross‐platform network effects to be a useful basis of distinction, there needs to be a limiting condition. One approach to line drawing is to treat a firm as a multisided platform if and only if the welfare of some user group i depends on the size and composition of user group j patronizing that firm even when holding the price and quantity consumed by side‐i users (as well as other dimensions of quality of the firm's output) constant. Formally, if ni denotes the number of users on side i of the platform, then the simplest possible expression for the benefits of a side‐i users would be B tn pt i i (, )− − i . 10 This functional form strongly suggests that equilibrium in the market could be fully understood only by analyzing the effects of the firm’s conduct on users on both sides. In Ohio v. American Express Co. (138 S. Ct. 2274 at 2280), the Supreme Court singles out platforms (such as credit and charge card networks) that facilitate direct transactions between users on different sides (e.g., merchants and consumers) and “cannot make a sale to one side of the platform without simultaneously making a sale to the other.” The academic literature similarly distinguishes between: (a) “transactions platforms,” which facilitate direct transactions between users on different sides of the platform and are largely paid based on the volume of completed transactions, and (b) “non‐transactions platforms,” such as “media platforms” which sell advertising on one side and sell or give away content on the other. One of the earliest definitions of two‐sided markets or multisided platforms applies only to transactions platforms and is due to Rochet and Tirole (2006). Consider a platform charging per‐transaction prices p1 and p2 to users on sides 1 and 2, respectively. According to their definition, the platform is multisided if and only if the volume of transactions realized on that platform varies as pi changes even when the two‐sided price, p + p 1 2, remains constant. In other words, under this approach, the defining feature of “multi‐sidedness” is whether the structure of prices (i.e., the individual values of p1 and p2) matters, or if solely the level (i.e., the two‐sided price, p + p 1 2) matters. This definition, too, risks being overly broad as a definition for antitrust analysis: Almost any firm can then be characterized as a multisided platform because raising the price it pays for inputs and the price it charges for output by the same amount will lead to a change in the volume of “transactions” that the firm facilitates between its input suppliers and output buyers. Rochet and Tirole (2006, pp. 648–649) recognize this problem and resolve it by concluding that, at least in competitive environments, such firms “are often de facto one‐sided platforms” on the ground that they have little “wriggle room” to change the price structure. To explore this issue further, let p ( )t i denote the price that the firm must charge user group i to support transactions volume t (input suppliers are charged negative prices). Then the firm’s profits associated with volume t are πt t pt ( )= ( ) ∑i i . If the firm is a price taker in input markets, and output is sold to users in group 0, then π t t{p t p ( )= ( )+ } 0 ∑i i . p (t) 0 is the inverse demand curve for the firm’s output, and − p ∑i i is the marginal cost of output. In this case, most issues of interest center on the output side, and the interactions with input suppliers can largely be ignored (i.e., they can be treated parametrically). This scenario might be seen as a justification for the fact that antitrust analyses often focus on output markets while giving little attention to input markets. However, even in this case, if pi does not equal the input supplier’s marginal cost of providing input i to the firm, then there will be welfare effects on the input‐supply side of the firm. This fact raises the question of whether antitrust enforcement should, in fact, treat most firms as multisided platforms or, at least, pay more attention to the welfare of a firm’s input suppliers when assessing the firm’s conduct. In many situations, a buyer has some degree of market power with respect to some of its input suppliers. Should any firm with market power with respect to both suppliers and customers (as those terms are commonly understood) be considered to operate in a two‐sided market? Or is it appropriate to treat some class of such firms as operating in “one‐sided markets”? One avenue for exploring the answer to this question is to examine the institutions by which users choose their degree of participation with the firm under examination. For instance, suppose “users” on all sides of the platform make participation decisions at the transaction level. In this case, many types of conduct will generate welfare effects on different sides of the firm that go in the same direction as one another. For example, conduct that raises p0 and lowers t, will harm input suppliers by suppressing their sales opportunities. By contrast, some firms generally considered to be multisided platforms (e.g., credit card networks) have business models where users on at least one side of the platform (e.g., card‐accepting merchants) do not make marginal transactions decisions but, rather, agree to accept all transactions offered to them through the platform. As shown by example in Section 5, under such a business model, lowering the price to users on one side of a platform can sometimes increase transaction volume in ways that harm users on the other side, which suggests that conducting a multisided analysis is especially important. Lastly, Weyl (2010, p. 1644) identifies a group of characteristics that are common among firms considered to be multisided platforms: The firm facilitates interactions between two or more groups of users, can set distinct prices to different user groups and has market power with respect to those groups, and cross‐platform network effects occur in at least one direction. The discussion above indicates that a firm with all of these characteristics should be treated as a multisided platform, but further study is needed to determine if and when a proper subset of these characteristics would be sufficient. The need to address this issue is particularly acute given the Supreme Court’s recent decision in American Express, which can be read as affording multisided platforms special antitrust treatment but failing to provide a clear definition of what it means to be multisided.11

#### Broad definitions massively increase the ambiguity of court decisions.

Katz, 18 – Economics Prof @Berk

(Katz, ML. Platform economics and antitrust enforcement: A little knowledge is a dangerous thing. J Econ Manage Strat. 2019; 28: 138– 152. https://doi.org/10.1111/jems.12304)//Neo

A key theme above is that some parties claiming to apply modern platform economics are, in fact, committing the fundamental error of failing to recognize that users on different sides of a platform generally have divergent interests and that the microstructure of how platform choices are made can have powerful effects on the equilibrium outcome. This error underlies misguided attempts to define a single, two‐sided market rather than two, closely interrelated ones, as well as to treat changes in the two‐sided price or transactions volume as sufficient statistics for changes in consumer welfare.40

Economic researchers can potentially make very large contributions to the sound antitrust treatment of multisided platforms. To do so, economists need to recognize that antitrust enforcement is dominated by judges and enforcement agency staff who are not economists and that many judges preside over at most a few antitrust cases in the courses of their careers. Moreover, these decision makers are tasked with enforcing statutes, not the laws of economics. Because antitrust enforcement is a legal matter, economists should continue to engage in the debate regarding how to define harm to competition and, in doing so, should build on statutory language and relevant case law. Similarly, when analyzing approaches to market definition, economists need to be highly aware that market definition can have very strong implications for the legal treatment of a firm.

Because most judges are not antitrust experts, highly complex or ambiguous recommendations tend to be of relatively little value. It would thus be valuable for economists to continue to refine the definition of what should constitute a multisided platform for antitrust purposes. This definitional exercise needs to be closely linked to the development of the antitrust implications of being a multisided platform. Perhaps the greatest contribution economists can make is to identify rebuttable presumptions and practical rules of thumb that can aid—rather than mislead—the courts as they address what can be very complex issues.

#### Even if the plan’s remedy is good, it sets precedent---kills growth.

Huddleston ’20 [Jennifer; December 18; Director of Technology and Innovation Policy at the American Action Forum, J.D. from the University of Alabama; American Action Forum, “Antitrust Actions Beyond the Federal Government: The Potential Impact of State and Private Litigation,” <https://www.americanactionforum.org/insight/antitrust-actions-beyond-the-federal-government-the-potential-impact-of-state-and-private-litigation/>]

With a growing number of likely divergent claims, the current tech antitrust battles could continue for some time and lead to more confusion around the application of antitrust to this dynamic sector of economy. This may appear to be a short term problem, but uncertainty around the application of competition policy could impact numerous sectors of the economy. Regulators already appear to be increasing scrutiny of acquisitions related to the technology sector well-beyond the tech giants. Multiple court cases with a wide-range of theories that do not follow traditional antitrust applications could further the uncertainty or thought that previously justified actions might be subject to greater scrutiny. If a court chooses to embrace the creative and expansive theories at the center of these state-led cases, it could set precedent that changes the application of antitrust law in the future not only for the technology industry, but in many other areas of the economy as well. Regardless of the impact of these cases—and there is reason to think that these antitrust actions would [not remedy](https://www.americanactionforum.org/insight/continuing-a-principled-approach-to-antitrust/) the underlying policy concerns—the uncertainty and broad reach created by these competing state cases would likely stifle economic growth and innovation.

#### Negativity bias---businesses are pessimists---reactions will be short-term and cascade.

Barkin ’19 [Tom; July 11; the president and CEO of the Federal Reserve Bank of Richmond, where he is responsible for monetary policy, bank supervision, payment services and the Fed’s National IT organization, M.B.A. from Harvard University; the Federal Reserve Bank of Richmond, “Confidence, Expectations and Implications for Monetary Policy,” https://www.richmondfed.org/press\_room/speeches/thomas\_i\_barkin/2019/barkin\_speech\_20190711]

In addition, the business reaction function has gotten faster. Short-termism has increased as activism in the market for corporate control has shifted companies’ focus. Just as with consumers, I think firms’ resilience is down. They start with lower confidence—another “hangover” from the Great Recession. At the same time, businesspeople tell me the length of the current upturn makes them nervous that another recession might be right around the corner.

The speed of the reaction function may be exacerbated by higher leverage. Corporate debt as a percentage of GDP is at an all-time high. Levered companies—and their creditors—have a bias toward taking action on negative news. This can mean cutting costs, reducing staff or pricing for volume.

Taken together, all these factors lead to an asymmetry in which firms are much more cautious about the downside than they are optimistic about the upside.

Perhaps both consumers and businesses have a higher bar for spending decisions. It’s possible that some of the tepid recovery from the Great Recession was a self-fulfilling lack of belief in the strength of the economy. Firms’ fear of failure could have prevented them from making investments even in the presence of reasonable returns.

This negative tilt, or asymmetry, continues today. Firms are frustrated with political polarization and uncertainty about trade and regulation. This limits their pricing courage and caps the upside on their spending and investment decisions.

For these reasons, a drop in confidence could lead to lower investment, lower output and eventually lower employment. If employment is placed at risk, consumption won’t be far behind. And that would place us in more serious difficulty. Put another way, I don’t discount the idea that we could talk ourselves into a recession.

### AT Context Specific

#### Rule of reason is a massive burden on courts because of expertise issues alone. It’s not about plaintiff burden but defendants and judicial knowledge.

OMI, 18 – Open Markets Institutes provides expertise on antitrust law and competition policy to Congress

(Open Markets Institute, The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. “The Urgent Need for Strong Vertical Merger Guidelines,” Federal Trade Commission, <https://www.ftc.gov/system/files/documents/public_comments/2018/12/ftc-2018-0091-d-0017-163568.pdf>, 2018)//Neo

The rule of reason approach also makes extraordinary demands on the judiciary. Federal judges are generalists who typically do not have experience or specialized knowledge in antitrust. Under the standards governing vertical mergers, however, the judiciary must set “sail on a sea of doubt”74 and “ramble through wilds of economic theory.”75 Both the government and defendants devote significant resources—assigning or hiring large teams of lawyers and economists—to review all relevant facts and build cases on why a merger likely will, or will not, hurt competition. This type of “cost-benefit analysis” is more akin to legislative or regulatory deliberation than litigation in court.76 Ultimately, a judge, or a panel of judges, must decide whether the government or the merging parties’ story of the future is more credible. As a result, vertical merger litigation is unwieldy, costly, and unpredictable.77

#### Courts will use rule of reason analysis to water down new and past precedent

Sipe 18 – JD Yale Law, 2017-2018 Supreme Court Fellow, Current Professor of Law at the University of Baltimore (Matthew, "The Sherman Act and Avoiding Void-for-Vagueness." Florida State University Law Review, vol. 45, no. 3, Spring 2018, p. 709-762. HeinOnline)//gcd

Consider the case law governing boycotts. In Klor's, Inc. v. Broadway-Hale Stores, Inc., the Court examined a group of appliance manufacturers and distributors boycotting a particular retail store.8 2 The Court unambiguously stated that such boycotts were per se Sherman Act violations: Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . . Even when they operated to lower prices or temporarily to stimulate competition they were banned.... It clearly has, by its "nature" and "character," a "monopolistic tendency."83 Without explicitly overruling this seemingly bright-line and straightforward per se rule, the Court has blurred its boundaries significantly. 84 For example, in Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., the Court reversed the Ninth Circuit's application of the per se rule against boycotts to a purchasing cooperative's boycott of a certain retailer.8 5 Although reaffirming that "group boycotts are so likely to restrict competition . . . that they should be condemned as per se violations of § 1 of the Sherman Act," the Court warned that "[e]xactly what types of activity fall within the forbidden category is, however, far from certain."8 6 The Court's analysis provided a number of threshold factors to be considered prior to application of the per se rule, which the Ninth Circuit later summarized as whether: "(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition." But these threshold inquiries-market structure, efficiency, and market power-are classic components of the more flexible and amorphous rule of reason. In other words, the case law dictates that ''courts must apply the rule of reason in order to determine whether the per se rule applies" in the first place.88 To the extent that the ambiguities inherent in the rule of reason are effectively imported into per se analyses as a step-zero inquiry, the latter category is no less vaguely defined.

### 2NC – AT Low Now

#### Economy is surging---particularly small business---BUT they expect no intervention in the market.

TW ’9-29 [WRAL Tech Wire; 2021; citing a survey by Gus Faucher, chief economist for PNC Bank; “Survey: Small business optimism at all-time high but consumer confidence drops,” https://www.wraltechwire.com/2021/09/29/survey-small-business-optimism-at-all-time-high-but-consumer-confidence-drops/]

RALEIGH – Small business owners are feeling more optimistic than at any point in the prior 19 years, a new survey from PNC found. But consumers aren’t nearly as excited about the future.

Owners with a higher share of employees reporting they’ve been fully vaccinated against COVID-19 are even more optimistic.

The survey, which was conducted throughout the month of August 2021, asked small business owners about the actions taken to encourage or require employee vaccination against COVID-19.

Eight in 10 business owners reported that they’d taken at least one step to encourage–or require–their employees to become fully vaccinated against COVID-19, according to the study, and 48% reported they’ve required vaccinations against COVID-19.

The survey results indicated 53% of business leaders with fewer than 100 full-time employees have required their employees to receive the vaccine. But for those businesses with 100 or more full-time employees, only 26% had required vaccination against COVID-19.

“And this was before the Biden Administration mandate,” said Gus Faucher, chief economist for PNC Bank, which commissioned the study. “So that number may increase.”

CONSUMER CONTRAST

The positive news contrasts with that of consumers. U.S. consumer confidence declined for the third straight month in September, according to The Associated Press.

The Conference Board said Tuesday consumer confidence index fell to a reading of 109.3 in September, down from 115.2 in August. September’s reading is lowest level for the index since it sank to 95.2 in February.

Lynn Franco, senior director of economic indicators for the Conference Board, said that consumer confidence is still high by historical standards but noted that the index has fallen by nearly 20 months since reaching 128.9 in June. “These back-to-back declines suggest consumers have grown more cautious and are likely to curtail spending going forward,” Franco said, according to The AP.

The view of consumers on both the present situation and future expectations continued to degrade as intentions for spending on big items likes homes, autos and major appliances all retreated again, the board said.

Concerns about inflation are also dampening consumer sentiment.

BUSINESS OWNERS OPTIMISTIC, DESPITE CONCERNS

Despite increasing concerns about the Delta variant, labor shortages, and inflation, small business owners are optimistic about the future of their business and about the future of the economy, the study found.

And small business owners who reported higher vaccination rates among their employees were more optimistic than their peers, Faucher noted.

“Those businesses that have the highest number of share of employees vaccinated feel more optimistic about their prospects,” said Faucher.

“There are different reasons,” Faucher noted. “Presumably, areas with higher rates among employees will also have higher vaccination rates among customers.”

Businesses may also believe there will be fewer disruptions to their business with a higher share of their employees vaccinated, said Faucher, and may also feel more optimistic, generally.

“Businesses have a better sense of how to respond now, they’ve been going through this for more than a year,” said Faucher. “They know what they can do to keep their businesses open, they know what they can do to have employees work remotely, they have procedures in place.”

“They believe that as long as things don’t get worse, they can handle the Delta variant,” said Faucher.

And that’s leading businesses to be optimistic, Faucher noted the survey results indicate. In fact, according to the study, business owners profit expectations doubled in this survey compared to the prior PNC survey that was conducted in the spring, and sales and demand have reached the highest levels in the survey’s 19-year history, PNC said in a statement.

“I think the key thing is that businesses generally are feeling optimistic,” said Faucher. “They view vaccinations as key to the economy over the next couple of years.”

### 2NC L – Mergers and Acquisitions [Hovenkamp]

#### Nascent MnAs incentivize innovation by augmenting feature growth between companies, incentivizing startups with big payouts, etc. But framing them through a technology gap problem stalls innovation.

Jacobson and Mufarrige, 20 – JD @ Brooklyn Law, Law student @ George Mason

(Jacobson, Jonathan, and Christopher Mufarrige. Acquisitions of “Nascent” Competitors. The Antitrust Source, 2020, www.wsgr.com/a/web/28843/jacobson-0820.pdf.)//Neo

We do not recommend altering burdens of persuasion. Although the Stigler Committee proposal addresses the issue of Section 7 underenforcement in these instances, it has two problems. First, as the preceding discussion of actual outcomes demonstrates, there is really no case for substantially altering merger rules for nascent rival acquisitions. Second, although the qualification of “uniquely likely” makes the Committee’s proposal more limited and more sensible, defining that term would be essential for the proposal to work. Does unique mean one? Three? Since we are talking about inventions of new things, and new things can come out of teenagers’ garages, divining whether a rival is “uniquely” situated to compete in the future will not be easy. It is surely correct, however, when the Committee points out that the merging firms have the best (and sometimes the only) information on the potential efficiencies from the merger. But the solution is not to alter the burden of persuasion. It is to make sure that the merging parties bear the burden of persuasion (or “going forward”) on these points.

Kevin Bryan and Erik Hovenkamp have offered another solution that does not go quite as far as the Committee’s, but would lead to significantly increased intervention. They “argue in favor of intervention in situations where a highly dominant incumbent acquires a startup whose technology could plausibly influence competition if rivals are excluded from using it.”65 Alternatively, they would prevent acquisitions by firms with a “pattern of acquiring promising startups and then declining to license competitors.” They believe such a policy would improve market conditions by reducing acquisitions they believe enhance the “technology gap” between startups and “superstar” firms. They assert that the problem is not the traditional antitrust concern that future ‘potential competitors’ are being bought, but rather that startup acquisitions affect the technological gap and thereby influence competition and market structure.

Although the factors Bryan and Hovenkamp identify can be significant in a given case, we do not agree that the “technology gap” or “superstar firms” are the problem or are even a problem. In fact, recent scholarship by David Autor and his coauthors suggests that increased productivity by “superstar firms” has driven the recent observed increase in concentration. They find that, “[i]f globalization or technological change push sales towards the most productive firms in each industry, product market concentration will rise as industries become increasingly dominated by superstar firms.”66 The authors further find that the industries concentrating the fastest are the ones with the fastest growth in productivity. Finally, and most importantly, the authors find that these effects are consistent across international jurisdictions, ruling out the assertion that more lax antitrust scrutiny in some jurisdiction is the cause. With all of the technological advances seen over the past 50 years, much of it from large firms or firms that became large, antitrust policy needs to be careful not to adopt measures that would inhibit further innovations

Framing the issue as a “technology gap problem” means preventing large firms from one of the most promising ways to improve their product and benefit users, and would be counterproductive. If a large firm improves, the gap is larger. That is a good thing. If the same benefits are obtained by a large firm able to expand output, the greater number of users translates into greater aggregate consumer benefits. Google buying DoubleClick may “increase the technology gap” by increasing use of both, forcing everyone else to catch up. That is what antitrust encourages because it leads to concrete consumer benefits.

If nascent competitor acquisitions present a problem at all, it is when and if they eliminate significant potential competition that would otherwise occur. If the acquisition retards the development of new products or features, consumers are harmed and the transaction should be prevented. If the acquisition does not have that effect, however, then preventing acquisitions would ~~retard~~ [inhibit] innovation by eliminating the incentive of a profitable exit ramp and by stopping the acquiror from using one of the best methods of improving its product offering. We should not want any of those consequences.

### AT Small Players

#### Innovation is frothy, monopolies don’t prevent startups, AND startups are irrelevant.

Atkinson ’18 [Robert and Michael Lind; March 30; PhD from the University of North Carolina; professor of practice at the Lyndon B. Johnson School of Public Affairs at the University of Texas, JD from the University of Texas Law School, International Relations MA from Yale University; Big is Beautiful: Debunking the Myth of Small Business, “Understanding US Firm Size and Dynamics,” Ch. 3]

Why Did Startups Decline?

So why have the Justin and Ashley startups declined? The “business startup sky is falling” narrative implies that if we get more new businesses, the economy will grow faster. But what if the economy’s performance has affected the rate of new business formation, rather than the other way around? A Federal Reserve Bank of Cleveland study finds that the rate of aggregate demand, largely after the Great Recession, influences firm startup rates. The authors write: “We find that cyclical factors have contributed to recent low levels of self-employment. … Decreasing demand leads to an increase in exit from entrepreneurship but has countervailing effects on entry.”38

In other words, slower economic growth has reduced the opportunities for new firms. We see this in the fact that the twenty metro areas with the highest rates of new firm formation were all in faster-growing “Sunbelt” states while the twenty with the lowest rates were all in slower-growing “rust belt” states.39 As the US economy over the last three decades has come to more resemble the rust belt than the Sunbelt, it shouldn’t come as a surprise that there are fewer new firms.

But slower US growth is not the only factor. To understand the decline, it’s important to look at startups by industry. When you do that it becomes evident that not all industries have seen declines. While almost 100,000 fewer new firms formed in 2011 than in 2003, in about 40 percent of 290 industries more firms formed in 2011 than in 2003. For example, mining startups increased 30 percent, largely because of the oil and gas shale boom. Educational services startups increased 11 percent as new technology offered new market opportunities. Startup rates in professional, scientific, and technical services; information (e.g., software, telecom, broadcasting); and health care and social assistance industries remained unchanged.

Moreover, some industries that saw declines were ones that felt the impacts of the global recession particularly acutely. The collapse of the construction industry after the housing bust meant that construction startups fell 26 percent and real estate and rental and leasing fell 13 percent. Why start a new construction firm when home building is in tank? Similarly, with the financial crises and the bankruptcy of multiple financial services firms, why start a new firm in the financial services industry, where startups fell 29 percent?

And in some industries where the rate of startups did fall, concentration ratios actually fell or were stable, suggesting that excessive market power favored by antimonopolist narratives was not the cause. For example, in “other services,” startups fell by 24 percent, but the C4 and C8 ratios (the share of sales in industry by the top four and top eight firms, respectively) fell 1 percent. In the wholesale trade and arts, entertainment, and recreation industries, startups declined 16 percent and 14 percent, respectively, but C4 and C8 concentration ratios were unchanged.

In manufacturing, where new firm formation was down 20 percent from 2003 to 2011, the decline was not due to big manufacturers taking market share and crushing the new guy, as evidenced by the average C4 and C8 concentration ratios in manufacturing increasing by less than one percentage point. The most likely reason manufacturing startups fell is because stiff international competition from nations such as China, much of it unfair and based on mercantilist policies such as currency manipulation, intellectual property theft, and government subsidies, made it hard for budding US entrepreneurs to break in.40 Why start a manufacturing firm if you are likely to face predatory competition not from big US firms but from Chinese competitors backed by their state? Unfair foreign competition, coupled with the absence of a national US competitiveness policy, is a major reason why inflation-adjusted US manufacturing output fell more than 10 percent in the 2000s, with over 65,000 manufacturing establishments closing their doors.41 And when output is falling, that is hardly a good time to start a new manufacturing firm.

Between 2000 and 2014 (China joined the World Trade Organization in 2000), the number of small manufacturing establishments (one to four workers) in the United States fell by 14 percent, while the number of large establishments (1,000+ workers) fell by 42 percent. One reason for the difference was the slow movement of smaller firms into the large size class. In 1980, 110 establishments with more than 1,000 workers were three years old or less. That figure fell every decade, to just eighteen establishments by 2014, a decline of 84 percent. In contrast, the growth of younger small establishments fell between 52 and 62 percent. At the firm level, the share of manufacturing workers employed by firms employing 5,000 or more workers fell from 46 percent in 1977 to just 15 percent in 2005.42

Notwithstanding the stiff headwind from competition, a few manufacturing sectors saw an increase in new firm formation, but these sectors were mostly ones that produced products less subject to import competition. For example, bakery and tortilla manufacturing startups expanded by 17 percent, “other food manufacturing” by 14 percent, and beverage manufacturing by 74 percent (in part because of the expansion of craft beer and healthy drink products such as Honest Tea).43 But if the antimonopoly story is right and decreased competition was the cause of fewer startups, we should have seen declining new firm formation in the beverage industry since the C4 and C8 concentration levels increased by ten percentage points over the last decade.

To be sure, the assertion that larger firms are crowding out startups is valid in some sectors. The fact that technology has enabled larger and more efficient firms in many nonmanufacturing sectors means there are fewer opportunities for small and new firms. This is why David Audretsch has argued, “The likelihood of new-firm survival should be lower in industries exhibiting greater scale economies.”44 This is not about predation but about space for new firms in any particular industry.

We see this trend in some industries, especially retail trade. Retail industry startups fell 16 percent from 2003 to 2011, but not because large firms abused their market power to kill startups. Rather, technologies such as software-enabled logistics systems and web-based e-commerce enabled the average retail firm to get larger, meaning there was less market space for startups unless they had something truly unique to offer or local convenience.

For example, it was once not too hard to open a book or music store. When one of us was younger, he used to take a trip after school to the local record store, Pauls (owned by Paul), to sample the latest 45s. Now we get our music from iTunes and Pandora. This is why book and music store startups fell 58 percent from 2003 to 2011, while the total number of establishments shrank by one-third.45 At the same time, the market share of the largest four firms increased from 48 percent to 66 percent. But these changes came about because of technology and efficiency, not predation. Large specialty bookstores such as Barnes & Noble, and then later in the decade online retailers such as Amazon.com, and the rise of e-book sellers such as Apple’s iTunes store and Amazon’s Kindle, meant that more people bought books and music at large brick-and-mortar stores and at online stores because they could save money and have a wider choice of products.

We have seen the same dynamic with hardware stores. Forty years ago someone who was good with tools might think of opening a hardware store. Today they would likely think twice about doing so since big box stores such as Home Depot and Lowes serve this market very well, having gained market share from small, independently owned hardware stores. But they didn’t gain it by predation and unfair practices that crushed the little guy. They gained it by providing a much wider selection of products at a significantly lower price. The typical Home Depot store is around 105,000 square feet (almost the size of two football fields), more than ten times larger than the typical neighborhood hardware store.46 And the big box stores stock upward of 25,000 different products, significantly more than the neighborhood stores do.47 This volume lets them be much more efficient, with sales per square feet of store two-thirds higher than at neighborhood stores and 25 percent more per employee.48

This story has played out in many retail sectors where large retailers have gained market share by providing goods or services that consumers want at prices they can afford. Owner-operator barbershops have been superseded by Supercuts, coffee shops by Starbucks, donut shops by Dunkin’ Donuts, stationery stores by Staples and Office Depot, local pharmacies by CVS and Walgreens. Among the many retail industries that saw increasing average employment size per firm were food and beverage stores (7 percent), furniture stores (10 percent), sporting goods (15 percent), banks (29 percent), electronics and appliance stores (33 percent), and general merchandise stores (35 percent).49

These retail giants have tapped into the substantial benefits of scale, which are passed on to customers. Moreover, large retailers compete directly against each other, spurring innovation, technology investment and adoption, and efficiency. Indeed, technological innovation (particularly computer-based supply chain ordering) has enabled size increases. The effects have nowhere been more dramatic than in those sectors that have always been most congenial to individual proprietorships, such as retail, services, farming, and small manufacturing. These were the sectors and the activities most affected, for instance, by the type of “roll-up” strategies pioneered by financiers like Mitt Romney’s Bain Capital. In the case of the office-supply retailer Staples, Bain’s investment helped propel the company from a one-store operation to a 2,000-store international behemoth. Similar plays resulted in Home Depot capturing a vast proportion of the nation’s hardware business, in Best Buy capturing a vast proportion of America’s electronics business, and in Macy’s capturing a vast proportion of all department store sales. Just one company, Wal-Mart, now has upward of 50 percent of some lines of grocery and general merchandise business—commerce that a generation ago was divided among tens of thousands of family businesses—with shoppers the big beneficiary. And, of course, emerging web-based businesses such as Amazon promise even more competition, efficiency, convenience, and scale.

This transition from local Justin and Ashley stores to chain stores has been going on for more than a century, starting with stores like A&P and Sears, and has occurred largely independently of government policy. If anything, government policy has leaned into this wind, providing big subsidies to the mom-and-pop businesses, and in some communities actively restricting the large stores.

Yet for the antimonopolists, this is a decidedly bad thing. As Thompson writes, “Today, in a lot where several mom-and-pop shops might once have opened, Walmart spawns another superstore.”50 This is supposedly a bad thing because it is stifling “entrepreneurship.” But this fetishization of small business misses the point. New business formation is not an end; it is a means. The end is more and better goods at lower prices for consumers, not maximizing the number of owners of small, inefficient businesses.

What Kinds of Firms Are Starting?

To assess whether the overall slowdown in new firm formation is a problem, we also need to look carefully at the types of firms that are being started. As Antoinette Schoar writes,

It is crucially important to differentiate between two very distinct sets of entrepreneurs: subsistence and transformational entrepreneurs. Recent evidence suggests that people engaging in these two types of entrepreneurship are not only very distinct in nature but that only a negligible fraction of them transition from subsistence to transformational entrepreneurship. These individuals vary in their economic objectives, their skills, and their role in the economy.51

Justin and Ashley, the owners of the new local pizza parlor, are not likely to be very much like Sergey Brin and Larry Page or Jeff Bezos. Schoar also found that

[The] founders of venture-backed startups in the majority were previously employed at larger technology firms such as Microsoft, Intel, or similar firms. An alternative group of founders of transformational entrepreneurs were serial entrepreneurs who had previously started a high-growth firm. In contrast, almost none of them were running small subsistence businesses before they started a high-growth business.52

Nor does there appear to be any correlation between startup numbers and economic growth. A study of entrepreneurship data by Catherine Fazio and coworkers notes that “quantity-based measures of entrepreneurship have little relationship to GDP growth. Yearly fluctuations in counts of firm births appear to hold little relationship to medium-term measures of economic performance.”53

To be clear: starting yet another small bookstore or pizza parlor is not entrepreneurship; it’s small business. In other words, Justin and Ashley are not likely to be Sergey and Larry and Jeff. And what Justin and Ashley do or do not do has little effect on economic growth. If Justin and Ashley don’t start that pizza parlor, then Brianna and Jalen or someone else will.

Indeed, using the term “entrepreneur” for someone who opens a conventional small business such as a pizza parlor uses the term in a sense completely different from that of Joseph Schumpeter, the economist who pioneered modern innovation theory. Schumpeter famously wrote,

The function of entrepreneurs is to reform or revolutionize the pattern of production by exploiting an invention or, more generally, an untried technological possibility for producing a new commodity or producing an old one in a new way, by opening up a new source of supply of materials or a new outlet for products, by reorganizing an industry and so on.54

He did not say the function of an entrepreneur is to start a business. Only certain kinds of business founders are entrepreneurial. In other words, the startups that really matter are those that are able to exploit market opportunities through technological and/or organizational innovation.55 As one study of firm formation trends stated, “Poorly performing economies seem to have too many subsistence entrepreneurs and too few high-growth transformational entrepreneurs.”56

This difference in the kind of new firm startups is why dire claims that the sky is falling on new business formation can exist parallel to claims that we are living in a time of robust innovation and entrepreneurship, with Silicon Valley and other tech hubs throughout the nation enjoying frothy and dynamic innovation. As Silicon Valley venture capitalist Marc Andreessen tweeted, “There’s too much entrepreneurship: Disruption running wild!” “There’s too little entrepreneurship: Economy stalling out!”57 A big reason for this contradiction is that the above studies (which are endlessly quoted) don’t differentiate between Justin and Ashley, on the one hand, and Serge and Larry and Jeff on the other. The real question is what has happened to the entrepreneurship exemplified by Sergey and Larry and Jeff, and why.

Researchers who have tried to differentiate between the two types are MIT professors Jorge Guzman and Scott Stern. They looked at trends in high growth entrepreneurship for fifteen large states from 1988 to 2014 and found that “in contrast [to] the secular decline in the aggregate quantity of entrepreneurship … the growth potential of startup companies has followed a cyclical pattern that seems sensitive to the capital market environment and overall economic conditions.”58 In other words, while the Justins and Ashleys are starting fewer firms than before, the Sergeys, Larrys, and Jeffs are starting almost the same number. Moreover, Fazio and her colleagues found that when they compared the original “birth dates” of firms that achieved successful exits (defined as an IPO or acquisition at a multiple of the firm’s valuation within six years) relative to overall firm births, again, they could find no apparent relationship.59

Indeed, in another study Guzman and Stern found that even after controlling for the size of the US economy, the second highest rate of high-growth entrepreneurship occurred in 2014.60 This research indicates that the entrepreneurial potential (successful startups as a share of GDP) by founding year hit its low point in 1990, peaked in 2000 at almost twice as high, fell after the dot-com bust, and then rose to 2007, fell again with the global recession of 2008–2009, but then bounced back to almost record highs by 2014. As Fazio and colleagues note, “Quantity-based measures document a troubling, three-decade-long decline in the U.S. rate of entrepreneurship. … Conversely, outcome-based measures indicate that the rate of entrepreneurship is rising. Early-stage angel and venture capital financing of new ventures has been on a significant upswing over the past several years.”61

The contradiction that Marc Andreessen tweeted about becomes clearer when one digs into the startup data. The studies that warn of a decline in startups rely on Census data that ask people if they started a business, regardless of whether it is “subsistence” or a “transformational” business. This explains why Kauffman’s “2015 Index on Startup Activity, State Trends” finds that the two most entrepreneurial states are Montana and Wyoming.62 Real high-tech powerhouses such as California and Massachusetts rank just fourteenth and thirty-fourth respectively. As Fazio, et al. write, this “mismatch between index rankings and top hotspots of entrepreneurial activity (like Silicon Valley and Kendall Square) signals strongly that, to the extent that trends in entrepreneurial growth potential are being captured, they have been swamped by the effects of more local or regional businesses.”63

#### Size does matter, and bigger is better. Large companies innovate more.

Kennedy ’20 [Joe; November 9; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; Information Technology and Innovation Foundation, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones]

The Assumption That Small Firms Are Inherently More Innovative Than Large Firms Is Not Borne Out by the Evidence

One core argument made by anti-monopolists who oppose large companies and argue that kill zones and killer acquisitions are real and harmful is that small firms are inherently more innovative than large firms. As FTC Commissioner Christine Wilson argued, “[M]any today believe that small firms are inherently more innovative than large ones, so that the acquisition of a small firm by a large one necessarily reduces innovation.”45 For example, Tim Wu recently testified before Congress that innovation in technology sectors would increase if government imposed greater regulations and increased antitrust enforcement because “[o]ver the last century, competitive, open sectors—ecosystems—have proved themselves superior to those monopolized or dominated by a ‘big three’ or ‘big four.’”46

In fact, large companies are as or more innovative than small firms. In a 1996 paper, Wesley M. Cohen and Steven Klepper found that large firms invest more in R&D as a share of sales.47 The number of patents and innovations produced per R&D dollar decline with increasing firm size. But they argued that this reflects a mismeasurement of innovation outputs. Large firms benefit from “cost spreading,” because they can spread the benefits from one innovation across more units and products, leading to a greater overall level of innovation per unit of R&D. They wrote, “Not only does cost spreading provide the basis for explaining the R&D-size relationship, it also challenges the consensus that has emerged from the R&D literature that large firm size imparts no advantage in R&D competition.”48

More recently, in 2016, business professors Anne Marie Knott and Carl Vieregger estimated that a 10 percent increase in the number of employees increases R&D by 7.2 percent, and a 10 percent increase in firm revenues increases R&D productivity by 0.14 percent. This shows that large firms not only invest more in R&D activities, they also enjoy higher returns on innovation output per dollar invested in R&D.49

Other research has found that “small firms prevail in the early stages and innovation tends to concentrate in larger firms as industries evolve towards maturity.”50 In the 1990s, many small firms emerged and competed to be the winners in IT platforms. But only a few firms could emerge as winners, and the ones that did continue to invest in innovation.

### AT Iran

#### Iran can’t use bitcoin effectively.

Sexton and Sudetic, 21 – Director of Cyber Security Initiative @ Middle Easter Institute, Foreign Affairs Consultant @ Gulf State Analytics

(Michael Sexton and Brett Sudetic, Michael Sexton is a Fellow and Director of the Cybersecurity Initiative at the Middle East Institute. Brett Sudetic is a foreign affairs consultant and advisor to Gulf State Analytics, a Washington DC-based geopolitical risk consulting firm.1-22-2021, "Bitcoin: A dirty solution to Iran’s economic troubles?," Middle East Institute, https://www.mei.edu/publications/bitcoin-dirty-solution-irans-economic-troubles, 10-29-2021)//Neo

Bitcoin, despite its recent popularity, may not be as promising as some Iranians would hope. The cryptocurrency is seldom used or usable in everyday transactions, and its value is notoriously unstable. Volatility of the currency and uncertainty around government regulations have led many Investors and financial analysts - including legendary investor Warren Buffet - to assert that the cryptocurrency possesses no value and is likely to collapse at some point. Others fear that while cryptocurrencies are inherently designed to give people more freedom and privacy in conducting financial transactions, potential government regulations could hamper adoption of the cryptocurrency in the near future.

Iran’s embrace of bitcoin is also likely to attract greater scrutiny from anti-money laundering and counter-terrorism finance investigators. All bitcoin transactions are public, although the identities behind the transactions are hidden behind random (but static) numerical addresses. This means that, while the currency is attractive for terrorists, criminals, and other users who cannot rely on traditional banking, it can also be a treasure trove of intelligence for governments and even open-source researchers. The United States government has previously exposed the bitcoin addresses of sanctioned Iranians to clamp down on illicit transactions.

Bitcoin mining is not a solution to Iran’s economic troubles, but a symptom of them. To arrest the harm that this emerging industry is causing to Iran’s energy infrastructure and environment, Iran and the P5+1 will need to prepare Iran to gainfully participate in the global economy without relying on quixotic and problematic enterprises like cryptocurrency mining.

## ADV 2

### Digital Monocultures – 2NC

#### The aff makes malware spread easier – digital monocultures provide critical gatekeeping functions – less consolidated companies release garbage apps that spread viruses

Lewis 21 – James A. Lewis, Senior Vice President and Director, Strategic Technologies Program, CSIS, “Competition and Security,” 12/14/21, https://www.csis.org/analysis/competition-and-security

Light-touch regulation damaged public trust—not just in the United States, but around the world. The European Union wants to be a regulatory superpower and tame U.S. tech giants. China punishes its own tech giants. In the United States, four out of five voters want the government to rein in big tech. Even companies say they want updated internet regulation, and there is bipartisan support for legislation to reduce the power of big tech, create accountability, and curb intrusive behaviors. Unfortunately, some proposed legislation may do more harm than good. Some proposals inadvertently put security and innovation at risk. The public reaction to unbound tech was predictable and change is needed, but if policy went too far in accommodating tech two decades ago, it now must avoid going too far in the other direction

The dilemma with removing app store “gatekeeper” functions is that it also eliminates the possibility for security reviews and excluding malicious apps. Legislators may underestimate the cybersecurity benefits of this review. An app is an ideal delivery vehicle for malware. The user cannot assess the security of the app's code, has no way to independently assess the bona fides of the app supplier, and does not know the supply chain behind the app or the source of the code used in it. In one recent incident, hundreds of thousands of unsuspecting consumers installed apps for things like QR-code readers that also contained malware. If criminal coders do things right, the poisoned app gives them access to everything on a phone or other device without the consumer knowing or having a way to know.

Some apps are developed by subcontractors from countries known for espionage and cybercrime activities, such as Russia, China, and even North Korea (a result of former leader Kim Jong-il’s decision to build a software industry). High-profile public events like the Olympics provide an opportunity to supply poisoned apps to unsuspecting consumers, and cybercriminals and spies are quick to seize that opportunity. Removing gatekeeper functions by app stores would unleash a wave of cybercrime.

There is a larger geopolitical question of whether hobbling or dismantling “national champions”—companies that have a leadership position in global technology markets—is the right thing to do in a tech-centered contest with powerful authoritarian states. This deserves a longer discussion, but being in a contest with China over economic and technological leadership suggests that now may not be the moment to dismantle national champions. The 1980s decision to break up the telecom monopoly is not a good precedent since this is a different kind of international contest and a different kind of industry. Facebook should be regulated, but it is preferable for security and privacy to have Facebook rather than Chinese tech giants as global social network providers.

Whether breaking up tech giants will ultimately accelerate innovation is an unresolved question. Some of the tech giants (according to those who work at them) have lost their entrepreneurial zeal. That said, the current U.S. practice, where start-ups are acquired by larger companies as a source of innovation and talent, works better than what is found in countries that discourage mergers. Policymakers should be cautious in replacing the existing model in the middle of a contest to avoid damaging U.S. tech sector dynamism. This does not mean that the giants should be unregulated; it means that breaking the tech acquisition model risks harm to innovation and the ability to compete at scale in global markets.

#### Their arguments are driven by the availability heuristic

Atkinson 21 – Rob Atkinson, founder and president of the Information Technology and Innovation Foundation, interviewed by Alden Abbott, senior research fellow at the Mercatus Center, “Antitrust Law Shouldn’t Be Used to Break Up Big Tech,” 8/27/21, <https://www.discoursemagazine.com/economics/2021/08/27/antitrust-law-shouldnt-be-used-to-break-up-big-tech/>

The compliance costs, if the United States Congress were to adopt the GDPR [General Data Protection Regulation], the European bill and the California bill, we’re talking about $130 to $140 billion a year that consumers are going to pay, ultimately. We can and should have a good privacy bill, but it should be opt-out—if you don’t like this thing, you can opt out of it—and it should give companies the ability to use data in legitimate ways and not the ability to use them in unfair ways. Not that hard, but it’s not an antitrust issue by any stretch of the imagination.

In fact, one last thing on that. If you look at cybersecurity on average—of course, these are all averages—the small firms have much worse cybersecurity and computer security than big firms because they just don’t have the sophistication. Again, we talk about big first with cybersecurity because when Fred’s Hardware Store has a cybersecurity breach, nobody notices, but when a big company has one, we notice. Actually, small companies are the ones that have the worst practices for cybersecurity and are putting consumers’ information most at risk.

# 1NR

### add on – 1nr

#### Says alliance-building and coop with the EU is key – either there is political will to do those now, which solves the case, OR there isn’t and a Supreme Court overturn can’t jumpstart a whole new Biden diplomatic agenda, including a post-inauguration summit. Maybe Ethan and I just learned how to read differently, but I am pretty sure this is *not an aff card*.

Wheeler 21 – Visiting fellow in governance studies at the Brookings Institution. Former FCC chairman.

Tom Wheeler, “Time for a U.S.-EU digital alliance,” *The Brookings Institution*, 21 January 2021, https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/.

The European Union—which has led in the attempt to establish oversight of the dominant digital companies—is also leading in the effort to build a democratic alliance. Lost in the attention paid to the EU’s proposed sweeping rules for the regulation of online platforms, is its proposal for a “specific dialog with the US on the responsibilities of online platforms and Big Tech” as part of a post-inauguration summit with President Biden.

Such strategic discussions should be the beginning of an alliance of liberal democracies to protect the open and free values, as well as the economic strengths, of those societies. The North Atlantic Treaty Organization (NATO) was created as a military alliance in the sharply divided world of the 20th century. Now is the time for a Western digital alliance for the interconnected yet increasingly splintered 21st century.

Such an alliance could embrace two broad categories: protecting supply chains and protecting consumers and competition. Robert Knake, writing for the Council on Foreign Relations, has proposed a Western “digital free trade zone” to insulate democratic nations from autocratic regime control over hardware and software. This paper addresses the creation of an alliance of Western democracies—beginning with the U.S. and EU—to focus on the power of autocratic corporate empires and their effects on competition and consumers.

#### Convergence with EU now – aff authors run the Biden administration.

Michaels & Kendall ’21 [Daniel; 7/15/21; Brussels Bureau Chief @ The Wall Street Journal; and Brent; Legal Affairs Reporter in the Washington Bureau @ The Wall Street Journal “U.S. Competition Policy Is Aligning With Europe, and Deeper Cooperation Could Follow”; https://www.wsj.com/articles/u-s-competition-policy-is-aligning-with-europe-and-deeper-cooperation-could-follow-11626334844; AS]

The European Union’s top antitrust regulator foresees greater alignment with the U.S. on competition enforcement, particularly in the tech sector, amid a broader policy reorientation under the Biden administration.

EU Executive Vice President Margrethe Vestager, the bloc’s competition commissioner, said she expects “much more intense work when it comes to technology and the digitized market” between her team and Washington.

President Biden’s policy statements and appointments, plus legislative proposals from Congress, indicate the U.S. is moving closer to positions long held in the EU regarding internet giants, pharmaceutical firms and other industries with diminishing competition.

As the world’s two most powerful antitrust regulators, the U.S. and the EU can shape global competition discourse and rein in many of the world’s largest companies, so greater cooperation could have significant impact.

For supporters of aggressive enforcement, “it will certainly be a marriage made in heaven,” said Jeffrey Jacobovitz, a Washington-based antitrust lawyer with Arnall Golden Gregory LLP. “I think they’ll work hand in hand. Increased coordination makes enforcement stronger.”

That alignment will make it even more incumbent on companies in the crosshairs to develop broad, cross-Atlantic strategies on how to respond to that scrutiny, Mr. Jacobovitz said.

While tech companies say similar policies in multiple jurisdictions can simplify operations, some worry about the U.S. adopting some of Europe’s more aggressive positions.

“The U.S. should be wary of copying EU-style experimental regulation,” said Christian Borggreen, vice president and head of the Brussels office at the Computer & Communications Industry Association, which represents companies including Amazon.com Inc., Facebook Inc. and Google. “As a leader in tech innovation, the U.S. would have much more to lose if they get it wrong.”

Mr. Biden’s appointments of high-profile U.S. progressives who have criticized tech giants—Lina Khan to run the Federal Trade Commission, and Tim Wu to the White House Economic Council—have been widely seen as indicating that Mr. Biden plans to turn up the heat on internet conglomerates. Companies such as Microsoft Corp. , Apple Inc. and Google parent Alphabet Inc. previously felt little pressure from Democrats, including former President Barack Obama, who criticized past EU efforts to restrain U.S. tech companies.

Ms. Vestager held an initial meeting with Ms. Khan by videoconference on July 2. Mr. Biden has yet to appoint someone to lead antitrust enforcement at the Justice Department. That nomination could provide further clues to his administration’s approach.

In parallel, House Democrats recently introduced a package of bills with bipartisan support that target big tech companies’ practices considered by critics as anticompetitive. The proposed legislation could go as far as breaking up, or at least shrinking, Amazon and other top tech companies.

New York state could go a step further with proposed antitrust legislation that would forbid companies from abusing a dominant market position—a prohibition central to EU competition regulation that is much stricter than U.S. federal antitrust rules.

Mr. Biden last week issued an executive order seeking to curb the power of companies across the U.S. economy that dominate their markets.

The jockeying for new policy approaches comes as officials on both continents have faced enforcement challenges in limiting digital giants’ activities. Ms. Vestager has imposed billions of dollars in penalties on U.S. tech companies but had little impact on their ability to control markets, according to critics including consumer advocates and some smaller competitors.

In the U.S., a federal judge last month dismissed cases brought by the FTC and most U.S. states against Facebook, though the FTC is expected to try again with an amended lawsuit.

“I believe there is a greater consensus that competition enforcement has not always delivered on its promise,” said University of Oxford law professor Ariel Ezrachi, who is director of Oxford’s Centre for Competition Law and Policy. He said the new U.S. approach is “a real tectonic shift.”

#### FTC DA solves it better – internal says privacy leadership is crucial to sustaining EU cooperation. Another card.

#### US leadership is key to combat data localization.

Limbago ’19 [Andrea; 5/8/19; Computational Social Scientist Specializing in the Intersection of Technology, National Security, and Society, PhD in Political Science @ University of Colorado-Boulder, Vice President of Research and Analysis @ Interos, Former Adjunct Professor in Political Economy @ NYU, Former Senior Fellow and Program Lead for Emerging Technology in the National Security Institute @ George Mason University-Antonin Scalia Law School; “Internet Data Privacy Regulation: Not If, but How and by Whom”; https://www.rsaconference.com/library/blog/internet-data-privacy-regulation-not-if-but-how-and-by-whom; AS]

Internet Data Privacy Regulation: Not If, but How and by Whom

When it comes to security and privacy legislation, what happens abroad does not stay abroad. While the United States remains muddled in a complex patchwork of state and industry-focused regulations, other countries are moving full-speed ahead to shape the future of digital security and privacy, with authoritarian frameworks gaining traction globally. We are at a significant inflection point, where decisions made now will dramatically shape the future of the internet, security, and privacy for generations. The United States originally created and shaped the internet with utopian aspirations, but U.S. leadership continues to wane in the creation of both formal and informal standards. There is too much at stake to give in to the growing digital authoritarianism that leaves US companies and citizens in reactive mode to external forces that infringe on security and privacy.

Absent global leadership, there are two distinct frameworks that are gaining traction – the digital authoritarianism best epitomized by China’s national standards and a democratic counterweight under the European Union’s General Data Protection Regulation (GDPR). Given this leadership vacuum and the absence of global cyber norms, the authoritarian model is gaining traction with significant impact on democracy and the future of security and privacy.

In China, personal data protection falls under the umbrella of cybersecurity and thus must be viewed within this broader framework and government activities. China’s recent cybersecurity law is far-reaching and includes government-led security reviews of technology products, including source code and data. While it has been haphazardly implemented, China can ramp up these reviews under the auspices of national security. China also requires data to be stored on local servers, and has forced encryption keys to be stored within its borders.

In many regards, the description of personal data protection may sound similar to the GDPR with China’s updated national standard on personal information protection focused on how data is collected, stored, and shared. Implementation, however, will be difficult as the standard runs up against the Cybersecurity Law and China’s social credit system that rates citizen trustworthiness based on a broad range of inputs, and can impact everything from dating sites to loan qualifications. Recent breaches also offer dystopian insights into data collections focused on tracking citizens via DNA and assessing women’s fertility status.

This approach to data localization and cyber sovereignty is gaining traction. Roughly half of all countries have enacted some form of data localization laws, with many mimicking aspects of the Chinese approach. Vietnam’s cybersecurity law came into effect earlier this year, and requires data storage within their borders, outlaws government criticism, again justified as “ (protects) national security and ensures social order and safety on cyberspace, and responsibilities of agencies.” Thailand’s government recently passed cybersecurity act offers sweeping governmental powers to access computer data and networks, make copies of information, and seize computers or any devices.

Other countries are seeking even greater control and aspiring toward complete sovereign control over cyberspace. Attempting to copycat China’s Great Firewall, Venezuela, Iran, and Russia are all seeking their own sovereign internet. Venezuela introduced a bill that would create an all-powerful authority to manage and control the internet over cyberspace. In Russia, a recent bill similarly called for an autarkic internet that would allow the Russian government to flip the switch on the internet. Iran similarly has aspirations for a sovereign internet, and seeks to block and control the flow of information within its borders. Across the globe, many governments experiment in internet blackouts and censorship to address domestic instability and opposition.

In each of these cases, these new laws are justified under national security. This is an important point as weakened encryption is currently justified under same auspices in democracies, providing authoritarian regimes no recourse in making similar claims. Australia’s new law requires access to data that essentially weakens encryption, and was passed despite significant opposition from the security community. Fergus Hanson, head of International Cyber Policy Centre at the Australian Strategic Policy Institute was prescient when he stated, “What happens here will ricochet everywhere.”

In fact, India is considering new rules where tech companies would be required to hand over any information demanded of them by government or law enforcement agencies and “enable tracing out of such originator of information on its platform.” This is specifically aimed at WhatsApp to trace original sourcing of viral disinformation and would require WhatsApp to break its end-to-end messaging encryption. The law also would prohibit unlawful information or content, which has many worried about growing censorship.

As these growing infringements on data privacy spread globally, the EU’s GDPR currently is the dominant counterweight in favor of individual data privacy and protections. With core features such as consumers’ right of access to their data, the right to be forgotten, breach notification, and consent requirements, the GDPR seeks to empower individuals – not governments – with better data protections.

While the GDRP tackles the data access issues, it also similarly opposes the data localization and storage requirements and advocates for the free flow of information. With the EU created based on the free flow of goods and services, the GDPR similarly allows for the free flow of data across borders but requires similar protections for that data abroad. Preferential trade agreements are another source countering local data storage. The CPTPP requires the free flow of data and may well be the first test for Vietnam’s data storage requirements. The USMCA (aka NAFTA 2.0) – which is still under discussion – also includes the free flow of data and runs counter to Canada’s data storage requirements.

As countries across the globe progress with new cybersecurity and data privacy regulations, the U.S. continues to muddle through with a patchwork of state and industry-specific regulation. There are currently over 90 different digital privacy proposals in state capitols, many of which follow the lead of the California Consumer Privacy Act (CCPA), which comes into force in 2020. There are also over 50 different data breach notification laws, one for each state as well as Washington, DC, Guam, Puerto Rico, and the Virgin Islands.

Despite muddling through, there finally seems to be some movement toward a federal data privacy regulation within the U.S. Over the last year, public opinion has shifted in large part due to the confluence of unauthorized data access thanks to high profile breaches such as Marriott, the Cambridge Analytica scandal, as well as the GDPR coming into effect. Tech companies – potentially seeking preemption from the CCPA – have also acquiesced that some regulation may be needed.

From hearings to a range of potential data privacy proposals, the world is watching the U.S. for leadership in data privacy that could reverberate globally. There is a significant need for a U.S. data privacy model focused on privacy as a fundamental right to counter the spread of the authoritarian approach to data access and storage.

As Cybersecurity Policy fellow at New America Samm Sacks has noted - “..the United States is becoming more isolated globally on data policies, with U.S. companies in reactive mode as new data rules increasingly shape operations in major markets globally.” While there certainly is a need for a public debate surrounding the details of a U.S. federal data privacy law, there isn’t much time to lose. The longer the absence of U.S. global leadership in this area, the easier it is for the authoritarian model to spread.

### AT A/O turns – 1nr

#### FTC’s increasing enforcement in privacy now---it’s focused on algorithmic bias.

James V. Fazio 21. Special counsel in the Intellectual Property Practice Group at Sheppard, Mullin, Richter & Hampton LLP, with Liisa M. Thomas, 3/11. “What Is FTC’s Course Under Biden?” https://www.natlawreview.com/article/what-ftc-s-course-under-biden

The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

### AT uq from econ – 1nr

#### Card says Biden/FTC announced stuff, no cases actually brought – just a perception card but not about substantive agenda.

#### Thumpers are neg args – FTC loses now but plan makes it easier which is all the 1AC Khan/Hovenkamp cards.

#### Deadlock prevents antitrust enforcement

Doesn’t interfere with privacy enforcement because there’s consensus. The plan changes this by FIAT

Eleanor Tyler 10/7/21. Legal Analyst on the Litigation team, with a focus on antitrust, at Bloomberg Law. “ANALYSIS: FTC May Be Headed Into Deadlock, Delaying Big Deals.” https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-ftc-may-be-headed-into-deadlock-delaying-big-deals

The Federal Trade Commission may be about to pause, unable to act on antitrust enforcement and policy until President Biden’s nominee can be confirmed and seated.

On Oct. 8, Federal Trade Commissioner Rohit Chopra is stepping down to take up his new position as head of the Consumer Financial Protection Bureau. Because it takes a majority among the Commissioners present to conduct business, and because the remaining commissioners will be split 2-2 between Democrat and Republican appointees, the Commission may find itself sitting on its hands until an equally divided Senate can approve privacy expert Alvaro Bedoya, whom Biden nominated Sept. 20 for Chopra’s seat.

In the past, the Commission has typically managed to continue making decisions and bringing cases while short a member (or several). These aren’t normal times, however. Many actions could be easily conducted on a bipartisan basis, but decisions about antitrust policy—and, potentially, antitrust enforcement—have proven contentious. That poses a potential obstacle for deals currently under investigation at the FTC, which tend to be large deals and those with market overlap between the parties.

#### They’re giving everything else a pass.

Zephyr Teachout 10/29/21. Associate professor of law at Fordham Law School. “Why Judges Let Monopolists Off the Hook.” https://www.theatlantic.com/ideas/archive/2021/10/antitrust-facebook-congress-sherman-act/620539/

Americans have gotten far too used to the idea that corporate behemoths are free to acquire any company they want, engage in predatory behavior, and bully, squeeze out, or demand kickbacks from smaller rivals. Indeed, the U.S. government’s decision to let Facebook buy an obvious rival, Instagram, looks so wrong in hindsight—especially now that leaked documents have revealed Facebook’s seeming indifference to the many problems that its products cause or exacerbate—that Americans should utterly disavow the complex legal framework that allowed the Federal Trade Commission to rationalize that decision. Over the past several decades, establishing that a company has violated antitrust law has become an extraordinarily difficult process. And when violations of the law are hard to punish, authorities will usually give them a pass—as the FTC did with Facebook’s acquisition of Instagram. (Yesterday, Facebook rebranded itself as Meta.)

#### Other enforcement is all talk

JED GRAHAM 9/16/21. Writes about economic policy for Investor's Business Daily.

Khan is clearly using her bully pulpit to the utmost, trying to dissuade merger talks from reaching fruition.

But right now it's all talk. She has turned a few heads, but the S&P 500 and Big Tech leaders have kept cruising. Facebook stock is up 11% since Khan took the FTC's helm on June 15, while Apple has climbed 15% and Google stock 18%. That's despite reports that the Justice Department is preparing to file a second Google antitrust suit over its ad dominance.

The new antitrust enforcement regime may not change all that much "until they show that they can sue and win," Kovacic said.

#### No major new cases

Brent Kendall 10/9/21. Legal affairs reporter in the Washington bureau of The Wall Street Journal. “Justice Department Makes Quiet Push on Antitrust Enforcement.” https://www.wsj.com/articles/justice-department-makes-quiet-push-on-antitrust-enforcement-11633800598

The five-member FTC voted 3-2 along partisan lines last month to formally withdraw those guidelines. The commission’s new chairwoman, Lina Khan, is a leading progressive advocate for overhauling antitrust enforcement. She has been laying the groundwork for changes at the commission as she settles into the job, but hasn’t yet spearheaded any major new cases.

#### Privacy now –

#### FIRST – prefer issue-specific uniqueness – FTC resources being low proves that they are making tradeoffs to prioritize privacy

McKinnon 9/29 – John D. McKinnon, reporter for the Wall Street Journal covering high tech policy, “FTC Weighs New Online Privacy Rules,” 9/29/21, https://www.wsj.com/articles/ftc-weighs-new-online-privacy-rules-11632913200

WASHINGTON—The Federal Trade Commission is considering strengthening online privacy protections, including for children, in an effort to bypass legislative logjams in Congress.

The rules under consideration could impose significant new obligations on businesses across the economy related to how they handle consumer data, people familiar with the matter said. The early talks are the latest indication of the five-member commission’s more aggressive posture under its new chairwoman, Lina Khan, a Democrat who has been a vocal critic of big business, particularly large technology companies.

Congressional efforts to assist the FTC in tackling perceived online privacy problems was the focus of a Senate Commerce Committee hearing Wednesday. If the agency chooses to move forward with an initiative, any broad new rule would likely take years to implement.

In writing new privacy rules, the FTC could follow several paths, the people said: It could look to declare certain business practices unfair or deceptive, using its authority to police such conduct. It could also tap a less-used legal authority that empowers the agency to go after what it considers unfair methods of competition, perhaps by viewing certain businesses’ data-collection practices as exclusionary.

The agency could also address privacy protections for children by updating its rules under the 1998 Children’s Online Privacy Protection Act. And it could use its enforcement powers to target individual companies, as some privacy advocates urge.

The FTC might choose not to move forward with any major privacy initiative. And action could be delayed as agency Democrats wait for confirmation of President Biden’s newest nominee to the commission, privacy advocate Alvaro Bedoya.

But since taking office June 15, Ms. Khan has made a number of moves to lay the groundwork for potential rule making, including by voting with the FTC’s two other Democrats to change internal procedures to expand her control over the rule-writing process. Mr. Biden has ordered the FTC to look at writing competition rules in a number of areas, including “unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy.”

#### SECOND – the FTC is streamlining their enforcement process to make privacy regulation efficient and effective

Conley 9/23 – Stephen Conley, associate at Wiley Rein LLP, regulatory counsel on a wide array of issues related to privacy, telecommunications, and technology, “Latest Changes at FTC Will Drive Federal Action on Privacy, Data Security, and AI,” 9/23/21, https://www.jdsupra.com/legalnews/latest-changes-at-ftc-will-drive-7883938/

Last week’s Federal Trade Commission (FTC) Open Commission Meeting (Open Meeting) featured a number of agency developments that will drive its approach to privacy, data security, and AI/algorithmic decision-making during Chair Lina Khan’s tenure. These include an enhanced rulemaking petition process and guidance on health breach notification for health apps and connected devices, on top of a streamlined process for data and algorithmic bias investigations announced the day before the Open Meeting. These developments follow the adoption in July of streamlined rulemaking processes that can be used by the agency for implementing privacy or other data-related rules.

All these changes lay the foundation for much greater activity on both the enforcement and rulemaking side when it comes to privacy, security, algorithms, and data governance.

At the FTC’s September 15 Open Meeting, the agency approved several changes that will directly impact privacy, data security, and AI. Additionally, the FTC withdrew the 2020 Vertical Merger Guidelines, which will have a significant impact on how the agency reviews market competition and mergers.

The FTC approved a health app policy statement, stating that it will apply its existing Health Breach Notification Rule to health apps in the marketplace that are not covered by the Health Insurance Portability and Accountability Act (HIPAA). The Rule requires notification to consumers and the FTC upon unauthorized disclosures of covered health data – which the FTC will now interpret to include both data breaches and discovery of certain privacy violations. We summarize the Rule and its potential impact in more detail here. The vote was 3-2.

The FTC established a process for considering external rulemaking petitions by a 4-1 vote. Under the new process, formal petitions for rulemaking will be published in the Federal Register and placed on a 30-day public comment period, after which the FTC will publicly announce whether it will go forward with a rulemaking. While external petitions can inform the FTC’s work, there has been no formal process for resolving them in the past, and no way for other stakeholders to effectively engage. The procedural change could be significant – it will likely incentivize greater use of rulemaking petitions, since an official response is now guaranteed. In the past, external groups have pushed for rulemaking in areas like AI, and these kinds of petitions will now get much more attention. Industry stakeholders should expect increased regulatory activity in the areas of privacy, security, algorithms, and data governance more generally.

These developments come just days after the FTC announced the adoption of streamlined investigation and enforcement procedures under new investigation resolutions in certain areas. These include:

Algorithmic and Biometric Bias: One new resolution allows staff to investigate allegations of bias in algorithms and biometrics. As we have previously discussed, algorithmic bias has been a key area of focus for the FTC, and enforcement activity has been previewed.

Children under 18: Another resolution allows the staff to address harmful conduct directed at children under 18. This resolution is notable because the primary children’s privacy law – the Children’s Online Privacy Protection Act (COPPA) applies to children under the age of 13. Some lawmakers have pushed for the expansion of COPPA to older minors, and it remains to be seen whether the FTC will investigate privacy issues with older minors as well.

Deceptive and Manipulative Conduct on the Internet. This resolution expands the scope of previous resolutions to include the “manipulation of user interfaces,” including but not limited to “dark patterns,” which were recently the subject of an FTC workshop. Although critics have complained that these “dark patterns” are used to obtain consumer data without consent, the FTC has not defined which user interface designs are sufficiently “manipulative,” and it is not clear what would fall within the scope of deceptive conduct under the FTC Act.

All of these developments follow the FTC’s vote to streamline its rulemaking processes in July. As we previously explained, in July the FTC approved procedural changes to streamline its FTC Act Section 18 rulemaking process related to unfair or deceptive practices – often known as “Magnuson-Moss” rulemaking. The changes mean that this rulemaking process will proceed more quickly, though it still will be more cumbersome than traditional Administrative Procedure Act (APA) rulemaking. The passage and debate is another signal that the current Commission intends to be aggressive on rulemaking, including potentially on privacy and algorithms.

#### THIRD – the nomination of Bedoya to the FTC proves they’re increasing resources, expertise, and effort on privacy

Wyrich 9/22 – Andrew Wyrich, deputy tech editor at the Daily Dot, “‘Privacy rights are civil rights’: Why Biden’s pick for FTC signals a new effort to protect user data,” 9/22/21, https://www.dailydot.com/debug/alvaro-bedoya-ftc-privacy-data-abuses/

President Joe Biden’s nomination of Alvaro Bedoya, the founding director of Georgetown Law’s Center on Privacy and Technology, was immediately hailed by public interest groups. Bedoya has a background in a number of issues that could become a focus for the agency if he’s confirmed to the FTC by the Senate.

Bedoya’s experience in privacy matters and facial recognition is extensive. He co-authored a report in 2016 that found “most American adults are enrolled in a police face recognition network” and served as a chief counsel for the U.S. Senate Judiciary Committee on Privacy, Technology, and Law. In that role, according to his bio on Georgetown’s website, he conducted oversight on “location privacy and biometrics.”

At Georgetown, Bedoya also put together the “Color of Surveillance” conference, which for years looked at the impact of surveillance on communities of color. He’s also written numerous articles about the privacy and civil rights concerns raised by the technology.

All of that experience has public interest groups excited about what he could accomplish on the commission.

“He’s an expert in the privacy realm and how privacy rights are civil rights,” Carmen Scurato, a senior policy counsel at Free Press, told the Daily Dot. “He’s been, throughout the years, expressing the concern and need for the government to address the abuses of data and the impacts on privacy.”

That background in tackling privacy issues, according to a person who worked with him that spoke with the Daily Dot, will bring an expertise to the FTC that they “do not really have with the folks they have sitting there now.”

Lina Khan, who was named the chair of the commission by Biden earlier this year, has been critical of big tech companies and is an expert in antitrust issues. Naturally, that has been the focus of the commission so far.

The person added that they expect Bedoya to “push the envelope” on how the FTC goes after companies that commit abuses by focusing on the “unfair” aspect of the law, not just the “deceptive.”

The FTC Act allows for the commission to initiate enforcement action if it has “reason to believe” that the law has been violated. It notes that “unfair or deceptive acts or practices in or affecting commerce” are unlawful.

Most of the enforcements in the tech and privacy space have focused on the deceptive part of the law. In 2019, the FTC imposed a $5 billion fine on Facebook for “deceiving users” about how much control they had over the privacy of their personal information. The penalty was the largest imposed on a company for violating a consumer’s privacy.

Similarly, earlier this year the FTC settled with Everalbum over allegations that it “deceived consumers” about its use of facial recognition. The commission alleged that the company offered an app called “Ever” that allowed users to upload videos and stored them on its cloud-based storage.

Then Everalbum launched a new feature—that was enabled by default—that used facial recognition to group users’ photos by the faces of people and tag them by name. It had said previously, the commission noted, that it wouldn’t enable the use of the technology by default.

The commission has also used “unfair” in its settlements against tech companies. In November 2020, the FTC announced a settlement with Zoom, the popular videoconferencing company. That settlement, which focused on Zoom saying it offered “end-to-end encryption” but really didn’t, also noted that Zoom “secretly installed” software called ZoomOpener on Macs.

ZoomOpener allowed for the software to automatically launch and bypass a safeguard in Safari that guarded against malware, the FTC said. The FTC’s complaint alleged that the company didn’t give adequate notice to users about ZoomOpener—or get their consent—and deemed that “unfair” and a violation of the FTC Act.

A ‘clear signal’ for the FTC

While the agency has tackled data abuses, observers say they believe Bedoya’s nomination shows that the FTC might focus more on the issue in the future.

Sara Collins, a policy counsel at Public Knowledge, said there seems to be a “clear signal” that the administration and FTC sees that “privacy is important” and that they want to be “intersectional in how we approach these types of issues.” Collins, and others, noted Bedoya’s experience working on issues related to privacy and surveillance of communities of color.

“That’s what [Bedoya] really brings to the table: a deep understanding of privacy, technology, and civil rights,” Collins said. “I think this shows a commitment by the administration that they want the FTC to be a fulsome agency. They want it to be exerting its competition powers—I think the nomination of Khan is a clear indication of that, and so are her statements and the work she has been doing—but I do think that this is a signal to the broader community, or even the broader tech portfolio, that we’re not just doing competition. We’re going to be doing privacy, we are going to be digging into more design, algorithm, AI. We want to be serious about regulating this space and having a regulator on the beat who wants to regulate this space.”

Collins said once Bedoya is confirmed, she expected that the FTC would work on broader rulemaking around privacy while also working on cases that “flesh out” the agency’s understanding and scope of its powers in highlighting “especially egregious cases of data abuses.”

The commission has both rulemaking authority, the ability to issue industry-wide regulations, and enforcement powers to lead investigations into companies that violate laws.

It’s not just the people at the commission that are signaling a push toward privacy issues at the agency. House Democrats proposed setting aside $1 billion for the commission to set up a bureau that would focus on “unfair or deceptive acts or practices related to privacy, data security, identity theft, data abuses, and related matters.” The proposal is part of a massive budget reconciliation effort.

Just this week, a group of Democratic senators sent a letter to the FTC urging the commission to use its rulemaking authority to “to protect consumer privacy, promote civil rights, and set clear safeguards on the collection and use of personal data in the digital economy.”

Meanwhile, in July, more than 50 civil rights, privacy rights, and internet rights groups called on the FTC to step in and curb the data collection practices of big tech companies. The groups specifically asked the agency to use its rulemaking authority to ban corporate use of facial recognition, surveillance in public, and “industry-wide data abuse.”

Even the commission itself has hinted at their focus on data abuses and artificial intelligence. Earlier this summer, Commissioner Rebecca Kelly Slaughter spoke at the agency’s “PrivacyCon” in July. In her prepared remarks, Slaughter noted the FTC needed to look into “a wide variety of data abuses, including questions of racial bias, civil rights, and economic exclusion.”

Slaughter added: “Words matter, and ‘data abuses’ reflects the fact that rampant corporate data collection, sharing, and exploitation harms consumers, workers, and competition in ways that go well beyond more traditional or libertarian privacy concerns.”

The commission itself published a blog post in April about artificial intelligence, noting that the technology can lead to “troubling outcomes.”

In 2014, Bedoya spoke about a “problem in privacy” for both the government and the industry. He said the value of that data had caused both sides to “collect as much information as possible and to retain it as long as possible.”

“Both in the intelligence committee and in industry, there’s effectively an effort to redefine privacy,” Bedoya said at the time. “Privacy used to be about collecting only what you needed to collect. Under the new model, you collect as much information as possible and you protect privacy through after-the-fact, post-collection use restrictions.”

While some tech companies have been offering opt-outs or other mechanisms for users, it’s clear there is momentum in Washington toward creating some kind of privacy standard for users. The FTC, if Bedoya is confirmed, could initiate rulemaking that covers these issues while Congress continues to work on a federal privacy law. There’s a growing consensus for the FTC to act in this space, and experts say Bedoya’s nomination is another indication of that.

“There is clearly both an appetite within the FTC and outside the FTC for this work to happen,” Collins said, adding: “I think it’s likely we that get more facial recognition cases. I think it’s likely that we get more AI or algorithmic bias cases. Maybe even some data security cases. We just had, at the open meeting, Chopra and Khan talking about health apps and privacy. That’s my guess, but obviously, it’s up to the commissioners on how to move forward.”

#### FOURTH – even if they’re not fully effective, successful privacy rulemaking causes Congressional action which solves our impact

Kelly 9/29 – Makena Kelly, policy reporter for The Verge covering net neutrality, data, and privacy, “As privacy issues worsen, Congress looks to the FTC,” 9/29/21, https://www.theverge.com/2021/9/29/22699202/data-privacy-facebook-google-congress-senate-reconciliation-infrastructure

“The FTC is not very well-funded to do this kind of work. It has limited resources and limited capabilities to engage in privacy work, plus all of the other work it has to do,” Sara Collins, privacy policy counsel at Public Knowledge, said Tuesday. “It’s a competition authority. It’s a general consumer protection authority. They have to have more resources to do this work.”

Still, experts like Collins are optimistic that any new FTC rulemaking could force Congress’ hand on legislative reform. Several states, including California and Colorado, have already enacted their own state bills as well. This patchwork of regulation could build more momentum for lawmakers to tackle a federal law once and for all.

#### FIFTH – the reconciliation bill will increase FTC funding for privacy enforcement – that solves any residual uniqueness arguments

Ikeda 9/16 – Scott Ikeda, longtime tech reporter and senior correspondent at CPO magazine, “FTC Sets Its Sights on Big Tech: $1 Billion Proposed to Create Digital Privacy & Cybersecurity Division,” 9/16/21, https://www.cpomagazine.com/data-privacy/ftc-sets-its-sights-on-big-tech-1-billion-proposed-to-create-digital-privacy-cybersecurity-division/

The creation of a federal-level digital privacy bill continues to be a problem for the United States government, but the House Democrats are looking to put reins on Big Tech through other legislative means. A proposed $1 billion addition to the $3.5 trillion economic package would go to the Federal Trade Commission (FTC) for the purposes of establishing a digital division that focuses on privacy issues, cybersecurity incidents and other matters that center on online services and platforms.

The full scope of the bill includes “unfair or deceptive acts or practices relating to privacy, data security, identity theft, data abuses, and related matters.”

$1 Billion Boost Could Spark Stronger Regulation of Big Tech

The proposal was developed by a panel of Democrats in the House of Representatives and has yet to go up for a vote, but has a favorable path to adoption given the party’s control of Congress and the Executive. The issue is also one that has bipartisan support, though the Republican interest in regulating Big Tech has tended to be more along antitrust lines rather than privacy issues. Out of fear of a filibuster in the Senate, the Democrats will likely add this measure to the overall spending bill and attempt to pass the entire thing via the reconciliation process (which comes down to a simple majority vote).

Should the measure pass, it would increase the FTC’s budget by nearly 30% over the coming decade. The agency has struggled with regulation of Big Tech at times due to a simple lack of resources. The tech giants have much more money at their disposal than any regulatory body, and put it to use hiring away former members of these agencies as strategic resources and exhausting every possible stall tactic and challenge in courtrooms.

Cillian Kieran, CEO of Ethyca, sees empowerment of the FTC as a realistic first step to restoring balance as a federal privacy bill continues to take a long time in coalescing: “Creating the new FTC division focused on protecting Americans from privacy violations and other data abuses is an exciting, necessary, and promising first step … I think of privacy infrastructure as our other kinds of infrastructure, like bridges. Everybody crossing a bridge or using the internet deserves a safe experience, and we must ensure that the supervisors of that infrastructure—the FTC, in the case of privacy—have the tools they need to protect the public … Following Chair Lina Khan’s appointment earlier this year to lead the FTC, the proposal signals that Washington’s sentiments about privacy—Congress has introduced more than 20 privacy bills this session, yet none have passed—are finally translating into action.”

The proposal is scheduled to be finalized on September 15 and go before the House Energy and Commerce Committee next week. As it stands, it does not call for granting the FTC any new powers; the burst of funding would instead go toward enforcing existing laws with a focus on Big Tech’s transgressions. The Democrats will have to refrain from attempting to add new powers to the FTC’s arsenal if the intention is to pass the bill via reconciliation. The proposal is also part of a package that includes items unrelated to cybersecurity or regulation of Big Tech: $30 billion to remove and replace lead pipes used in water and sewage systems, $10 billion for supply chain resilience projects and $13.5 billion for the development of zero emissions vehicle infrastructure.

The FTC has its hands full with both privacy and monopoly power issues that involve Big Tech firms, and some cases leave one wondering if there might have been a better outcome if the agency was better equipped and funded. A monopoly lawsuit it brought against Facebook in late 2020 was dismissed in June, with the judge ruling that the FTC had not displayed adequate metrics or methods to hold up its assertion that Facebook owns more than 60% of the social media market. And the agency settled with upstart Zoom over its exaggerated security claims last year as well, not fining the company and only requiring it to make certain security improvements.

### AT no tradeoff – 1nr

#### Assertion with no cards – both 1NC cards say antitrust requires army of lawyers, tons of money, and length litigation time and says the FTC’s biggest constraint is that they have to pick and choose and there is a direct tradeoff.

#### Antitrust focus trades off with attention to privacy.

Caitlin Chin, Research Analyst, Center for Technology Innovation - The Brookings Institution, and Marla Odell, Research Intern - Center for Technology Innovation, ’19, “Highlights: Commissioners discuss the future of the FTC’s role in privacy” https://www.brookings.edu/blog/techtank/2019/11/05/highlights-commissioners-discuss-the-future-of-the-ftcs-role-in-privacy/

Against a backdrop of high-profile data breaches and abuses, the Federal Trade Commission (FTC) has taken center stage. On October 28, FTC Commissioners Rebecca Kelly Slaughter and Christine Wilson joined Brookings Distinguished Fellow Cameron Kerry for a fireside chat to discuss the agency’s mandate to protect consumer privacy in an increasingly data-driven world—and how federal privacy legislation could help the agency carry out its mission.

Over the past few months, the FTC has announced several settlements in major cases. These include a $575 million settlement with Equifax following a wide-reaching data breach, a $170 million settlement with YouTube due to alleged COPPA violations, and a $5 billion settlement with Facebook—the largest privacy fine recorded to date—stemming from alleged deceptive data sharing practices with third-parties, including Cambridge Analytica. To supporters of these settlements, these record-breaking fines and new oversight requirements bring immediate corporate change and consumer remedies. To critics, however, the settlements do not sufficiently deter future violations and instead reflect the FTC’s constant internal trade-off to settle privacy cases, rather than litigate or push for tougher penalties, in the face of limited agency resources and capacity.

#### Lengthy litigation creates crushing resource tradeoffs.

FFHSJ, Fried Frank Harris Shriver & Jacobson Llp [Law firm], 1-5-2021, "Managing Antitrust Risk in the Biden Administration," Lexology, https://webcache.googleusercontent.com/search?q=cache:QV1NrcUaRWIJ:https://www.lexology.com/library/detail.aspx%3Fg%3D8f2eaf8e-db8e-47d5-80c5-c912e3042591+&cd=23&hl=en&ct=clnk&gl=us

Federal Courts and Budget Constraints Will Be Limiting Factors

Challenging transactions based on novel antitrust theories, without the benefit of precedent, means the agencies have the uphill battle of persuading a court that the transaction violates antitrust laws. The DOJ's unsuccessful challenges of the AT&T/Time Warner and Sabre/Farelogix mergers showed how difficult it can be to win a merger challenge that goes beyond the comfort of precedent and presumptions. Notably, in Sabre/Farelogix, the court found in favor of the parties based almost entirely on the precedent set in the Supreme Court's decision in Ohio v. American Express. Similarly, the FTC's Ninth Circuit loss in its lawsuit against Qualcomm will make it more difficult to bring an antitrust challenge to licensing practices for standard-essential patents. With the Trump Administration appointing almost a quarter of active federal judges and three Supreme Court justices, winning cases that push the boundaries of antitrust law will not be easy.

Further, despite a record number of litigated cases, the budget at the antitrust agencies is insufficient to match the rhetoric of more enforcement. The DOJ had 25% fewer full-time employees in 2019 than it had 10 years earlier9 and the FTC recently imposed a hiring freeze. With limited resources, the agencies are forced to make important tradeoffs in deciding what matters to challenge, settle, or walk away from. Indeed, Commissioner Wilson reportedly voted against bringing a lawsuit to block CoStar's acquisition of RentPath, in part, because of limited FTC resources.10 Although the agencies will receive a modest budget increase for the current fiscal year,11 it is far short of what some think is needed.12 As antitrust enforcement has become a bipartisan issue, a significant increase in the antitrust agencies' budgets in the future is likely.

#### Antitrust adjudication trades off with privacy enforcement

McGinnis & Sun ’21 [John; George C. Dix Professor @ Northwestern University, JD @ Harvard Law School; and Linda; Associate @ Wilmer Pickering Hale & Dorr LLP, JD @ Northwestern Pritzker School of Law; “Unifying Antitrust Enforcement for the Digital Age,” *Washington and Lee Law Review* 78(1), p. 305-378; AS]

The FTC needs more resources to adequately address the nation's growing privacy concerns. 3 17 Currently, the FTC oversees both consumer protection-encompassing privacy-and antitrust, 318 making the FTC the chief federal agency on privacy policy and enforcement 319 and the nation's de facto privacy agency. 320 The agency has long-standing experience in enforcing privacy statutes 321 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy. 322 The FTC, however, has failed to keep pace with the massive growth of privacy concerns-a phenomenon also driven by modern technology. 323 Very few Americans feel confident in the privacy of their information in the digital age. 324 According to a 2019 study, over 80 percent of Americans feel that they have little to no control over the data collected on them by companies and the government. 325 To adequately address privacy concerns, the FTC needs more resources. 32 The agency has been explicit that it needs more manpower to police tech companies. 32 7 In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases. 328 A former director of the FTC's Bureau of Consumer Protection, which houses the privacy unit, has called the FTC "woefully understaffed." 329

As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the U.K. and Ireland, respectively. 330 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether. 331 Currently, the FTC's resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency's antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. 332 Further, it would free up the scarce time of the commissioners to oversee this essential effort. 333

This reallocation of resources is especially timely because the FTC's privacy responsibilities are expected to grow in the future. The FTC is already on its way to becoming a consumer protection agency primarily focused on privacy. 334 In its 2019 budget request to Congress, over half of the agency's budget was allocated to privacy. 335 In addition, lawmakers on both sides of the political spectrum have proposed federal privacy legislation. 336 Such legislation would expand the FTC's jurisdiction, empower it to bring more privacy actions, and increase the demands on its privacy resources. 337 Right now, the U.S. is one of the only Western countries that does not have a comprehensive federal privacy law.338 Public pressure is great from both industry and scholars to change that, which would lead to increased privacy action at the federal level. 339 Moving the FTC's antitrust duties to the DOJ would cleanly complete a readjusting of priorities that is already happening organically.

### AT: fiat – 1nr

#### Have to spec in 1AC – this is basically intrinsicness, 2AC “normal means” clarifications jack all neg DAs and prevent educational and core-of-topic debates about resource tradeoffs.

#### Aff not Congress – overturns a Court ruling – Bannan examples are about creating wholly new bureaus and delegating an entirely new authority to the FTC – that’s not the aff, the aff just restores FTC jurisdiction over competition – that was CX.

#### The *length of litigation* forces the FTC to settle cases instead of trying

Makena Kelly, Policy Reporter for the Verge, ‘19, "Why wasn’t the FTC harder on Facebook?," Verge, https://www.theverge.com/2019/7/25/8930630/facebook-ftc-settlement-privacy-cambridge-analytica-congress

On Thursday, the Federal Trade Commission finalized a landmark settlement with Facebook over the company’s alleged privacy malpractices accrued over the past year.

Whether it was Cambridge Analytica or falsely promising user control over its use of facial recognition, Facebook messed up — big time. But after months of negotiations with the FTC, Mark Zuckerberg’s leadership was left virtually untouched, and investors applauded the settlement in the company’s earnings call yesterday evening.

“Good news on the FTC settlement,” one investor said.

That agreement included a $5 billion fine, a penalty that’s small in comparison to the company’s total profits. Mark Zuckerberg (or any future executive) will need to personally sign off on new products and privacy provisions, and Facebook will need to set up an independent privacy committee at the board level that would diffuse Zuckerberg’s power over privacy decisions.

But for anyone hoping the settlement might change Facebook’s behavior, the settlement was frustrating, if not outright maddening. As soon as news of the settlement broke, Democrats put out scathing statements, calling the deal anything from a “joke” to a “slap on the wrist” for such overwhelming allegations of abuse. For reformers, it raises a difficult and urgent question: what more could the FTC have done?

Officials at the Commission argued Wednesday that they did the best they could under current law and with the resources available. At yesterday’s press conference, FTC Chairman Joseph Simons repeatedly said that the Commission had two options: One, settle on “excellent terms” (what was agreed to in yesterday’s announcement); or two, litigate for years and receive “far less relief” than what’s included in the final settlement.

“The question was in negotiations, if there was something we could get for something, then we determined what was best for the public,” Jim Kohm, the FTC’s director of enforcement, said in response to a question on deposing Zuckerberg. “In this case, we got a lot of relief that we couldn’t otherwise have obtained and that is in some small part due to not going further.”

Most of what critics want — higher fines, personal liability, hard limits on data sharing — couldn’t be obtained through a settlement. Facebook simply wouldn’t agree to it. The only way to get it was by going to trial, which the FTC wasn’t ready to do. The courts are unpredictable, the majority said, and the Commission perhaps wouldn’t have received the amount of relief that was agreed to in the settlement.

### AT: illogical – 1nr

#### Doesn’t assume fiat – aff forces FTC to bring more cases even tho they have other agenda priorities rn. AND, our evidence says there is a direct tradeoff.

#### If this is true it means DS the aff cuz FTC would not bring cases – would enforce privacy instead.

### AT: link turn – 1nr

#### Not a link turn vis a vis status quo – aff is no cases against one side now, aff enables those cases EVEN IF the change in BoP makes them slightly more efficient. Can’t bring cases now, aff enables and forces them to.

#### RoR bad cards on case disprove.

#### Expanding the rule of reason unduly burdens federal agencies – high costs, delays, and complex litigation sap resources.

Chopra & Khan ’20 [Rohit; Commissioner @ Federal Trade Commission; and Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The Case for “Unfair Methods of Competition” Rulemaking,” *The University of Chicago Law Review* *87*(2), p. 357-380; AS]

The current approach to antitrust also makes enforcement highly costly and protracted. In 2012, the American Bar Association (ABA) published the report of a task force that sought to “study ways to control the costs of antitrust litigation and enforcement.”9 The task force, the authors explained, was “a response to concerns” about both “the costs imposed on businesses by the American system of antitrust enforcement” and “the length of time required to resolve antitrust issues both in litigation and in enforcement proceedings.”10 Out-of-control costs undermine effective antitrust enforcement by agencies and private litigants, but may advantage actors who profit from anticompetitive practices and can treat litigation as a routine cost of business. Professor Michael Baye and Former Commissioner Joshua Wright have noted that generalist judges may be ill-equipped to independently analyze and assess evidence presented by economic experts.11 Because determining the legality of most conduct now involves complex economic analysis, courts have effectively “delegate[d] both factfinding and rulemaking to courtroom economists,” making courtroom economics “not just inevitable but often dispositive.”12 In fact, paid expert testimony now is often “the ‘whole game’ in an antitrust dispute.”13

Paid experts are a major expense. Some experts charge over $1,300 an hour, earning more than senior partners at major law firms.14 Over the last decade, expenditures on expert costs by public enforcers have ballooned.15 In a system that incentivizes firms to spend top dollar on economists who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.16 Another component of the burden is that antitrust trials are extremely slow and prolonged.17 The Supreme Court has criticized antitrust cases for involving “interminable litigation”18 and the “inevitably costly and protracted discovery phase,”19 yielding an antitrust system that is “hopelessly beyond effective judicial supervision.”20 That it can easily take a decade to bring an antitrust case to full judgment means that by the time a judge orders a remedy, market circumstances are likely to have outpaced it.21 The same 2012 ABA report suggested that lengthy, costly litigation may be contributing to reduced government-enforcement efforts over time relative to the expansion of the US economy.22

#### Case by case adjudication costly.

Foer & Durst ’18 [Albert; Senior Fellow @ American Antitrust Institute; and Arthur; Assistant Attorney General @ Office of the Attorney General for the District of Columbia; “The Multiple Goals of Antitrust,” *The Antitrust Bulletin* 63(4), p. 494-508; AS]

Note some implications. These are highly theoretical constructs, and the calculations that they require must be based on empirical information about consumer behavior and predictions about future behavior—in other words must be premised on probabilities that are a matter of opinion rather than mathematical, scientific certainties. By shifting the antitrust case from structural assumptions about how the political economy works to proof about what the effects of particular transactions or practices have been or will be, they impose large expenses for economic data gathering, modeling, and analysis, often ending up in conflicting testimony of economic consultants, presented to judges who are not trained to evaluate this type of argumentation. As Tim Wu has aptly put it, “Economics does not yield answers, but arguments.”17