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#### Anticompetitive business practices are behaviors

Charlotte Wezi Mesikano-Malonda 16. Executive director. "Global Competition Review". No Publication. 7-22-2016. https://globalcompetitionreview.com/review/the-european-middle-eastern-and-african-antitrust-review/the-european-middle-eastern-and-african-antitrust-review-2017/article/malawi-competition-and-fair-trading-commission

Anticompetitive business practices are generally defined as the category of agreements, decisions and concerted practices that result in the prevention, restriction or distortion of either actual or potential competition. Abuse of dominance and market power is an example of anticompetitive business practices and hence falls within the purview of the CFTA.3 Anticompetitive business practices are either illegal per se or illegal by rule of reason. A conduct is illegal per se if, regardless of its objective and effect or any justifications of the conduct, there is a presumption of harm on competition.

#### Prohibitions are any proscribed conduct in antitrust.

Margaret V. Sachs 01. Robert Cotten Alston Professor of Law, University of Georgia School of Law. A.B. 1973, Harvard University; J.D. 1977, Harvard Law School. “Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of The Securities Exchange Act Of 1934”. https://www.illinoislawreview.org/wp-content/uploads/2001/06/Sachs.pdf

Many federal regulatory statutes are hybrid statutes—their prohibitions1 are enforceable in criminal actions as well as in private or govern- mental civil actions (or both).2 Leading examples include the Sherman Antitrust Act,3 the Clean Water Act,4 the Truth in Lending Act,5 the False Claims Act,6 the Racketeer Influenced Corrupt Organizations Act,7 the Federal Food, Drug and Cosmetic Act,8 and the Securities Exchange Act of 1934.9 Hybrid statutes present an important question that has divided courts but received virtually no attention from legal scholars—can the same prohibition mean different things in different enforcement contexts?10

---FOOTNOTE 1 STARTS---

1. For purposes of this article, the term “prohibition” refers to the part of the statute that identifies proscribed conduct. The plaintiff must prove that the defendant engaged in this conduct in order to establish a prima facie case.

---FOOTNOTE 1 ENDS---

#### Lowering the burden for evaluation doesn’t change if conduct is prohibited---coding proves.

Anu Bradford and Adam S. Chilton 18. Anu Bradford Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton. Assistant Professor of Law and Walter Mander Research Scholar.

Before discussing our data and the coding of the CLI, it is important to recognize that there are limitations to any index that attempts to quantify competition regulation. This is because it is difficult to produce a single metric that tells the comprehensive story of country’s competition regime. For example, if a specific type of conduct is prohibited, is it prohibited always (per se) or sometimes (rule of reason)? This seems like a relevant distinction to code, but it turns out to be difficult to capture systematically in many jurisdictions. For instance, Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) seems to regulate anticompetitive agreements under the rule of reason standard in the European Union, but, in practice, cartels are per se prohibited. This highlights the challenge of coding even just the law in books, let alone accounting for all the nuances of a country’s competition policies.20

#### Vote neg on predictable limits and ground---infinite adjudication standards without differences in outcome moot topic disads and create unpredictable process advantages.

### 1NC---K

#### Competitive markets produce monopolization---antitrust replicates the problem.

Richard Wolff 19 Professor Emeritus of Economics at University of Massachusetts, Amherst. Transcript from YouTube video: “Economic Update: Competition and Monopoly in Capitalism.” Democracy @ Work. December 9th, 2019. https://www.democracyatwork.info/eu\_competition\_monopoly\_in\_capitalism.

Today I'm going to devote the program to something many of you have asked me to present, to talk about, to analyze, and that is the question of monopoly. It has to do with the assertions we hear often these days that somehow our capitalist system, here in the United States and beyond, is being negatively affected because monopolies have replaced or displaced competition. The idea here is if only we can get competition back, recreate a competitive capitalism, why then the problems we face will go away. Today's program is a design to show you how and why that is not the case, to think about these things in a different way from this nice story that capitalism is basically fine; it's just the monopoly form we have to get rid of so we get back to the competition which we're all supposed to believe is wonderful and presents us with no problems to solve. So let's go, and let's do it in a systematic way.

First, it is of course easier, faced with a declining capitalism, a capitalism that's all around us with its extreme inequalities, with its instabilities – here we are, trying to cope with the effects of the Great Crash of 2008, even while we anticipate the next downturn coming down the road soon – an economic system that has shown (that is, capitalism) that it is not respectful of the natural environment; it is not, as the words now go, sustainable in a reasonable way. Yeah, we're surrounded by problems of capitalism. So it's comforting in that situation to get the idea from somewhere that this really isn't a problem of capitalism as a system but rather the problem brought in somehow from the outside – monopoly – a situation in which competition among many companies gives way in some way we're not quite sure about to a domination by one or a small handful of companies. And so the argument goes, we don't have to be critical of capitalism; we don't have to think about an alternative system. No, no, we just have to deal with this little detail, the monopoly problem. And if we can deal with that, well, we'll get back to a competition, to a competitive capitalism that is good.

There are three big mistakes involved in this way of thinking, which is nonetheless very widespread and very popular, more so now than in quite some years. First mistake: Capitalism has been wrestling with the problem of monopoly from day one. We have had repeated periods of monopoly. They have eventually led to movements, often of many people, to destroy or remove monopoly. We used to call that in America trust-busting, or antitrust. We even have a department within the Department of Justice in Washington devoted to antitrust activities. Yeah, we've been waging battles against monopoly over and over again, and you know why? Because we keep having monopolies over and over again. Google is a monopoly. Amazon is a monopoly. They're all around us: companies that have effectively no real competition. This is a problem that capitalism has always displayed. And that ought to lead you to wonder whether thinking about it as something we can do away with isn't maybe the best possible example of wishful thinking.

The second big mistake is to imagine that competition is some unmixed blessing. It never was, and it isn't today. A competitive market is a human institution. Like every other human institution, it has strengths, and flaws, and weaknesses. To think of competition as some magical perfection is a silly abnegation of your own rational capability to evaluate something. It's sort of advertising thinking. By that, I mean the advertiser tells you what's good about the product they've been told to advertise; they don't tell you what's bad about it. If you want to evaluate it, you don't talk to an advertiser because they only give you one side. The people who promote competition use advertising logic. We're not going to do that here. Competition is no unmixed blessing.

And finally, I'm going to show you that competition is itself the major cause of monopoly. So that even if we ever got back to a competitive capitalism, all that would mean is we're back in the process that produces monopoly – as it always has.

All right, so let's begin. I'm going to start with explaining how competition has all kinds of consequences that most of you, like me, don't like, don't want. It's a discussion, if you like, of competition's other side: you know, the part that the advertiser doesn't tell you about. The used-car salesman who wants you to buy that junk doesn't tell you about what happened last week in the car crash that that was part of, etc., etc.

All right, let's begin. One of the major reasons that American corporations shut down their operations in the United States and moved them to China, among other places, is because of – you guessed it – competition. They wanted to make more money than they had been before. They were afraid of other companies beating them in the competitive game, so they said wow, let's go to China, because there you can pay workers a lot less. There you don't have the same rules to obey. There they don't care that much about pollution as they do here. So we can save on all kinds of costs, and that will allow us to undercut our competitors. Yeah, one of the consequences of competition was the exodus of American companies to other parts of the world, and the enormous unemployment that resulted from it. Yeah, that was a result, among other things, of competition.

Here's another one: Capitalists, employers, seeking to compete with one another, often engage in what we call automation. They bring in machines that are cheaper to use than human laborers, and that gets them a step ahead of their competitors. Okay, if we replace people with machines, we throw those people out of work. That has an impact on them, their self-esteem, their relationship to their spouse, their relationship to their children, their relationship to alcohol – should I continue? What are the social costs of automation? They're huge. They've been documented over and over again. Competition provokes and produces automation.

Let me give you another example: Companies are competing, say, in the food business – you know, trying to get a customer like you or me to buy this kind of cereal rather than another. So they get their labs to go to work, and they discover we can replace wheat, which we used to put in our little flakes, with – Lord help us – some chemical that is cheaper than wheat. We're not going to worry about what that chemical does to your chemistry in your body because we can now lower the price of our cereal, because we're saving on wheat, and undercut the competitor. The human beings who eat this stuff will suffer, now and in the future, but competition left our producer of cereal no choice.

And in case you think I'm making some up, let me give you some concrete ones. The Boeing Corporation, the major producer of airplanes in this country, is in a crisis as a corporation. You know why? Because the 737 Max crashed a couple of times, killing hundreds of people. And you know why? It turns out they economized on safety measures, and training measures. And you know why they did that? Because they're in a very tight competition with European and other airplane manufacturers, and that leads them – as it usually does – to look to cut corners: that race for, quote, "efficiency." Yeah, it was competition that contributed to those deaths and to that problem. That's competition too. You can't whitewash this story; they're real. One of the ways Amazon beats its competition is it speeds up the work process. It has figured out ways to make people work much more intensely, using up their brains, their muscles, their nerves, in ways that cause real long-term physical damage to working people. That, too, is a result of the competitive effort.

And you know, it wasn't so long ago that children were part of the labor force. That's right, kids as young as five and six years of age. We were told they have little fingers, you see. They can be more productive than people who are adults with big fat fingers, you know – that doesn't work. And by the way, you should be grateful because poor kids are the ones we hire, and that gives their poor families more income than they would otherwise have. We heard those arguments. Competition, the companies said, required them to use the more productive, and the lower-wage, children rather than adults. So child labor was also a result of competition. It was so ugly and so troubling to so many people that finally there were movements in the United States and many other countries simply to outlaw child labor. So it became a crime for any employer to use a worker who was under 16 or 18 years of age. That was a way in which people said we are not going to allow competition among capitalists to destroy our children. They were recognizing that competition has an awful effect in what it does to children.

Well, it has many awful effects. So let's be clear: In the history of capitalism, the monopoly problem (which we're going to get to in the second half of today's program) is no worse, it's just different, from the competition problems. Capitalism goes through phases of competition and monopoly, going from one to the other, as I will explain. But we shouldn't bemoan the one in favor of the other, any more than vice-versa. These are neither of them solutions; they are both phases of the problem. And the problem is capitalism, which does its number on us both in the period when it's competitive and in the period when it's monopoly. People who want us to engage one more time in an anti-monopoly crusade are doing something that in the end evades the problem, which is the system – capitalism – not this or that form of that system, such as competition and monopoly.

We've come to the end of the first half of today's Economic Update. This gives me an opportunity to remind you, please, to sign up if you haven't already, to subscribe to our YouTube channel. It's a way easily for you to support us, doesn't cost any money, and it is a big help to us in terms of our reputation and what we can accomplish. Likewise, please make use of our websites. They are there for your communication with us. They are there for you to be able to, with a click of a mouse, to follow us on Facebook, Twitter, and Instagram. And finally, a special thanks goes, as always, to our Patreon community for their ongoing enthusiastic support. It means the world to us. My final, very final for this first half, is about a new book that we have just produced and released. It's a follow-up to an earlier volume I have spoken to you about that was called Understanding Marxism. For the same reason, we have now produced a brand-new book, just out, called Understanding Socialism. It is a response, as this program is, to issues, questions, comments you have sent to us in large numbers. It's an attempt to give an overview of the different interpretations of what socialism means, of what happened in countries like Russia and China that tried to create this – the strengths, the weaknesses, the lessons to be learned, what to do, and what not to do. Please, if you're interested and want to follow up, check us out, check the book out: lulu.com is how you find both books. And I will be right back; stay with us.

Welcome back, friends, to the second half of today's Economic Update. This program, as I explained, is devoted to the analysis of competition and monopoly as two interactive, sequential phases of capitalism as a system. The first part of the program was devoted mostly to competition, so let's turn now to monopoly. What is the basic definition and criticism of monopoly? Strictly speaking, monopoly is defined simply as a situation in which the producers of a particular commodity – shoes, software programs, haircuts, it doesn't matter – have been reduced to only one. Literally one seller – a monopolist. But in general language, it includes also situations where many producers who once competed with one another have been reduced to only a handful. The strict term for only a handful is "oligopoly," but we don't have to split hairs about this. "Monopoly" will be the word we use for either one or a very small number.

For example, there were once dozens of automobile companies, but very quickly their competition reduced them to basically three for much of the post-World War II period, and you know their names: Ford, General Motors, and Chrysler. And likewise there were once many cigarette producers, there were once many television-set producers, and they became very few, whose names, therefore, we all know.

What's the criticism of a monopoly or oligopoly situation? Again, very simple: The idea is, if there's only one seller of something, that seller can jack up the price way above what he might have otherwise because he doesn't have any competitor. If he had a competitor, if he raised the price, the competitor would get all the business because we'd all go to the competitor who hadn't raised the price rather than buy it at a higher price from the monopolist. So we don't like monopolies, because they can jack up their prices and their profits because they don't have a competitor. And if it's a few, a handful, well then we talk about things like cartels: arrangements when a few get together over dinner, or out on the golf course, and tell us what the price is. If you ever wondered why the prices of different cars, different cigarettes, and so on, are so close to one another – mm-hmm – that's because there are few sellers, and somehow they worked it all out. But the basic criticism is that a monopoly is a situation in which the seller of something jacks the price up way beyond what they could otherwise get because there are no more competitors.

So let's talk about this monopoly problem and where the monopolies come from. Well, the first and most important lesson is this: Competition produces monopoly. It's not something external, imposed on competition. It has nothing to do with human greed or anything else. Are people greedy? You betcha – some more, some less – but that's really a separate matter. It's competition that produces monopoly, and let me show you how that works. In competition, we have, by definition, a whole bunch of producers. They all produce the same thing. They compete with one another, hoping we, the consumer, will buy from one rather than the other. They compete in the quality of what they produce and in the price of what they produce. And we are supposed, as consumers, to go look for the best quality at the lowest price, and to patronize that one who offers that to us better than the others that we could buy from but choose not to.

Okay, that's a fair definition. Now let's follow the logic. Company A produces – however it manages it – a better quality and/or a lower price than Company B. So we all go to Company A. Company B can't find any buyers because it's not competitive. Or to say the same thing in other words, Company A outcompetes Company B. Here's what happens: Company B collapses. Because it can't sell its goods, we're all going to Company A. So Company B sooner or later declares bankruptcy. It can't continue. It lays off its employees, it stops buying inputs, because it can't compete. Good. Now what happens in Company A? Company A says hey, there's a whole bunch of workers that have just lost their job at Company B; they're trained in producing what we produce; let's go hire some of them. And likewise, Company A says, they're not using their computers, or their trucks, or their other inputs. They're going to have to sell them on the secondhand market. We can get some important inputs we need at a lower price than we would have to pay if we bought them new. So what begins to happen is, where before there were two companies, A and B, there's now one larger A, and B has disappeared. Or to say the same thing in simple English, A – the winner in the competitive struggle – eats, absorbs into itself, what's left of Company B.

And this process is repeated over and over, until 30, or 300, companies have become one, or two, or three. That's the result of competition. That's how competition is supposed to work. That's how competition does work. It's important to understand: Monopoly is where competition leads. And as if that weren't enough, let me make sure you understand this from the business point of view: It is the great dream of every entrepreneur to become the last one standing in the competition, to win the competition, not just because it makes you feel good you outmaneuvered your competitors, but because if you're the last one standing, you're the monopolist. The reward for having outcompeted the others is that you're now in a position to jack up the profits, and the prices, way beyond what you could have done before.

So we have a system that produces monopoly, and all the incentives for every entrepreneur in competition to work as hard as possible to become the monopolist. So why is anyone surprised that monopolies keep happening, because they're the whole point and purpose of capitalist competition. If you ever were – and we never have, but if you ever were – able to get rid of all the monopolies and re-establish competition, all you would be doing is setting this same process in motion again for the umpteenth historical time. In other words, fighting against monopoly is pointless as long as you have capitalism, because it is the endless reproducer of this problem – as it always has been.

Now, how do monopolies maintain themselves? If you're the only one standing, you're a monopolist. Or you're an oligopoly, you're a few, and you get together and jack up your prices together. The question becomes look, a monopolist makes very high profits – much higher than a competitor can achieve – and isn't that an enormous incentive for other capitalists to get in on that business? Because look at the profits they're earning, because they're the only one. Apple, Amazon, Google – the profits are staggering. Everybody wants to get in. So the way a monopolist has to think is, I've got to create obstacles that block other people from coming in to get a piece of the enormous profits my monopoly allows me to get. We call that in economics "barriers to entry." Monopolists need to create barriers. Let me give you a couple of examples.

The major soft drink makers in the United States – basically Coca-Cola and Pepsi Cola – they produce a drink that has sugar and coloring in it, and lots and lots of water. Let me assure you, there is nothing difficult or complicated about producing a mixture of sugar, color, and water. It doesn't take a genius; it never did. Pepsi and Coca-Cola make a fortune off of their product, as we know, and they have for decades. They have a virtual monopoly. Now, lots of other people could produce water, sugar, and color close to, if not identical with, whatever they produce, but they can't break through. They can't really get to that status. And you know why? Because Coca-Cola and Pepsi erected a barrier to entry. And the way they did that was with advertising. Every billboard, every magazine cover, every doorway of every institution you've ever been to has a picture of smiling, happy people drinking one or the other. You've learned: that's the drink, that's the drink. Another company might make a perfect substitute, but they can't afford the enormous cost of advertising. The advertising costs more than the water, and the sugar, and the color. What you pay for when you buy Pepsi and Coke is the advertising that got you to buy it. You're paying for being hustled. But it works, because it means other companies know that they can't get in there by cheaply producing an alternative, because you have to produce the advertising that goes with it, or else you can't do it. And so their monopoly is maintained.

Here's another way to maintain a monopoly: Get the government to step in. Here the famous example is the milk producers. Some years ago, there was a crisis with milk. There was contamination; people were getting sick. So the clever milk monopolies came in and said, we're going to support the enormously expensive, special equipment to guarantee pasteurization, and so on, of milk. Why did they support it? Because your small farmer, your small dairy producer, can't afford it, so they go out of business. Only the big, rich few that are left can afford the enormous equipment. They used governmental rules to create a barrier to entry.

Here's another way: corrupt public officials. President Trump denounces Huawei corporation because it compromises our national security. It denounces European car producers because somehow their shipping cars here compromises our security. Who cares? As long as the president blocks other companies from getting into the business that might compete with an American, a barrier to entry exists. Monopolists have been very creative in coming up with ways to preserve their monopolies.

I don't want to lose the basic point. The basic point is: Capitalism oscillates, back and forth between competition and monopoly – first this industry, then that one. For a while, Ford, General Motors, and Chrysler were the monopolies – or the oligopoly, if you like – in automobiles. But eventually, Toyota, and Nissan, and Peugeot, and Fiat broke the monopoly. In that case, it was foreigners who did it. And then we had some competition, and that, then, is now shrinking. The French – the last two producers in France – have just agreed to merge. You get the picture. Industry by industry, first this one, then that one, go through one phase or another.

The important point is: The phases are not our problem. They merge into, and incentivize, each other. Each provokes movement in the other direction. The point to understand is that the problems of a capitalist system are not about this oscillation of phases. We're not going to solve the problem of monopoly by getting rid of them and re-establishing competition. We've been there; we've done that; it reproduces monopoly; and it doesn't change the basic inequality, unsustainability, instability of capitalism. We need to get beyond that stale, old debate – competition versus monopoly – and face the underlying reality: Capitalism is the problem, and getting beyond it is the solution.

#### Antitrust against Big Tech’s “anti-competitive” business practices builds legitimacy for capitalism “for the people”---it’s circumvented via offshoring, unsustainable, and ensures extinction through eco crisis. Alt is an eco-socialist digital tech new deal---the perm’s “regulated” capital is a myth reinforcing “private” property and “competition.”

Michael Kwet 20 Visiting Fellow of the Information Society Project at Yale Law School. “A Digital Tech New Deal to break up Big Tech.” Al Jazeera. 10-26-20. https://www.aljazeera.com/opinions/2020/10/26/a-digital-tech-new-deal-to-break-up-big-tech

In July, the CEOs of Google, Apple, Facebook and Amazon appeared before Congress in an “historic” antitrust hearing. The event was met with great fanfare from the press. In early October, the United States House Judiciary Committee published a 450-page report criticising the anti-competitive business practices of the four giants and recommending new measures to “restore competition” to the market.

Mainstream “tech critics” across the political spectrum of the so-called “techlash” are celebrating this antitrust agenda led by the US Congress and the intellectuals informing the hearings. They see nothing wrong with the American legal system reshaping corporations that dominate markets outside US borders. After all, they accept the notion that the US “owns” the world and see capitalism as the only system imaginable.

For them, the reformist goal to “restore” a “capitalism for the people” is seen as the proper way to fix Big Tech. The Americans are joined by European power elites, who are seeking to curb the dominance of Big Tech as part of an effort to increase market share for European companies.

Yet the solution to American Big Tech corporations dominating markets across the world cannot come from the American or European pro-capital legal systems. Rather, it has to be a collective effort by the international community, focused on bottom-first redistribution for the Global South, as part of a global transformation towards a sustainable green economy.

The new progressives and neo-Brandeisian antitrust

To understand Big Tech antitrust in the US, we need to understand its origins. The movement was spearheaded by a group of US legal scholars, sometimes called the neo-Brandeisians, named after Supreme Court Justice Louis Brandeis (1856-1941).

As a young lawyer and legal scholar, Brandeis focused on social justice issues and financial power. As corporations restricted competition through “trusts”, he became concerned with how monopoly power could undermine democracy and harm society. His work inspired “antitrust” legislation banning unfair business practices in the US.

Decades later, in the 1970s, a conservative group of legal scholars sought to restrict the scope of antitrust in the US. These neoliberals of the Chicago School, led by legal scholar Robert Bork, argued that antitrust should be narrowly concerned with economic efficiency, largely measured by lower prices for consumers. Inspired by the likes of Bork, US courts began ruling that “consumer welfare”, rather than broad concerns about democracy and power, should be the focus of antitrust.

Over the past few years, neo-Brandeisian scholars dug into legal history and argued, correctly, that the neoliberal antitrust framework does not work for Big Tech. Its business model cannot always be measured by the price that consumers pay for a firm’s product (eg Facebook, Twitter, and YouTube are “free”), and broader concerns around democracy and equality should inform antitrust. In order to fix Big Tech, they insist, we need to think broadly about antitrust and antimonopoly, much like Louis Brandeis did a century ago.

While this all sounds great, a closer look at what neo-Brandesians offer reveals two significant problems with it: one, they want the US to legislate for a problem that concerns the whole world; two, they still insist on a capitalist solution which is incompatible with notions of global social justice and environmental protection.

Big Tech is global

Neo-Brandeisian scholars intend to restructure Big Tech within a framework of US law, spearheaded by US thinkers. However, the firms they want to regulate have a global reach that harms people outside of the US as well.

In fact, the central business model of Big Tech is digital colonialism. Google, Amazon, Facebook, Apple, Microsoft (GAFAM) are worth more than $5 trillion in total and much of it is profit coming from abroad.

For example, less than half of Facebook’s revenues come from the US and Canada, while nine of its top 10 user bases are from Global South countries, totalling 957 million users. The US, by comparison, has 190 million users.

Most revenue for Apple and Google comes from outside the US as well, and almost half of Microsoft’s revenue comes from abroad. A large majority of Amazon’s total revenue comes from its US operations, but it is expanding globally, and its Amazon Web Services dominate the global cloud market.

If we zoom in on individual countries, the scale of the problem becomes even clearer. A small country may provide a tiny fraction of GAFAM’s revenue, but the giants still capture a large share of various markets in that country. For example, in South Africa, Google controls 70 percent of local online advertising, and social media – led by Facebook – another 12 percent. South Africa’s largest media groups take just 8 percent of the pie.

Some 84 percent of smartphones in South Africa use Google Android operating systems, while 15 percent – Apple; 72 percent of desktop computers have Microsoft Windows, while 17 percent – Apple. Other products and services, such as e-hailing, streaming entertainment, search, cloud and office suites are also dominated by American firms. This dynamic repeats throughout the world.

US tech reformers have little to say about the global nature of US tech transnationals, or about why laws regulated by the US government should reshape the core structure of global behemoths. Most of them also no longer discuss how the partnership between the National Security Agency and Big Tech promotes American military imperial interests outside of the US.

The best neo-Brandeisian scholars can argue is that their proposals would weaken the stranglehold of the Silicon Valley beyond US borders. But this is not enough to resolve the problem and does nothing to address the looming environmental catastrophe we are facing.

‘Kinder capitalism’ does not work

US tech reformers assume that market competition – supplemented by new privacy laws, public utility regulation, and some publicly subsidised, non-profit alternatives – is the solution to the power of monopoly. However, they do not address the problem of how private property in a capitalist marketplace creates inequality in the first place. Would “competitive markets” really benefit the Global South?

Competition means beating other people out, and poorer people and nations are naturally disadvantaged in such a competition.

After “restoring competition” to the tech economy, those who will dominate as “new market entrants” on the “open” internet will still be companies from richer countries: the US, European powers, China, etc, not low-income countries like Zimbabwe, Bolivia or Cambodia. And within low-income countries, the well-resourced classes will capture any new market opportunities that an antitrust push in the US may open.

Indeed, reformers assume we can restore “competitive capitalism” while we are staring at the abyss of permanent environmental destruction. Proponents of capitalism maintain that we can grow our way to poverty alleviation and innovate to stop climate change and environmental degradation. But estimates show that under the growth model of the past few decades, the global economy would require a 175-fold increase in global consumption and production just to bring billions of poor people up to a meagre $5 per day. And in the process, we would most definitely destroy the environment.

Degrowth researchers have demonstrated that capitalism is fatally flawed. A capitalist economy focuses on profit and growth, which increases greenhouse gas emissions overheating the planet and leads to over-extraction of material resources, which results in ecological collapses.

The richest nations are dependent on material extraction from the poorest. High-income countries have the worst material footprint, with a consumption level of about 26 tonnes per person per year, when the sustainable level is about eight tonnes per person globally. Low-income countries consume about two tonnes per person per year.

The Big Tech industry contributes to environmental destruction in several ways. E-waste now accounts for five percent of all global waste, and it is growing, in large part because gadgets are built with short lifespans. Instead of designing products that can last a long time, Big Tech has lobbied to kill “right to repair” laws, which would allow consumers to get their devices repaired or buy spare parts from third parties.

What is more, Big Tech directly contributes to inequality by extracting wealth from the poor and concentrating in the hands of a few US-based executives, shareholders and highly paid professionals. At the same time, it exploits workers and often denies them safe and dignified working conditions.

Digital capitalists also encourage consumerism through ads and monetise surveillance, which is destroying privacy, with grave consequences for civil rights and liberties.

Private ownership of the means of computation – software code, infrastructure and the internet – is required to extract money for content, force ads on audiences and spy on users. If the people own and control the digital environment, they would opt to share knowledge freely, reject ads and protect their privacy.

Solutions: Tech for Extinction Rebellion

It goes without saying that any solution for the digital economy must be part and parcel of a sustainable green economy. This, in turn, requires rapid wealth and income redistribution and degrowth. It is a monumental task.

Fortunately, there are some reasonable ways forward.

First, we can phase out copyright paywalls and patents. Such a move would enjoy the support of activists in the Global South and Global North, and would make the world’s scientific and cultural knowledge available to all people, irrespective of their ability to pay. Of course, equitable information sharing and generation also requires resources to bridge the digital divide and make use of scientific knowledge.

Second, software can be placed under strong free and open-source licences, online services can be decentralised, interoperable and owned by communities, while internet infrastructure can be fully socialised as communal property. The global Free Software Movement and activist scholars have already built a preliminary foundation and framework for moving in this direction.

Third, an eco-socialist Digital Tech New Deal has to be implemented to reorient the tech economy away from profit and towards satisfying the needs of the people. This requires socialising financial, intellectual and physical property. As first steps, we could impose heavy taxes on the rich to fund a global digital commons, produce plans to phase out private ownership of information and the means of computation, support workers and mandate economic redistribution to the global poor, and build a privacy-by-design tech ecosystem. All of this must be done within the confines of a sustainable economy.

These solutions need to be part of the global movement for wealth redistribution, reparations, and democratisation. In South Africa, we are building a People’s Tech for People’s Power movement to drive this agenda forward, through popular education and the formation of solidarity networks to launch actions against Big Tech and digital capitalism.

There already is a good historical precedent for global action against Big Tech. During South Africa’s apartheid era, people around the world initiated boycotts, divestment and sanctions (BDS) against corporations like IBM and Hewlett-Packard, which aided and abetted the apartheid state and businesses.

US corporations, in response, pushed a reformist agenda called the Sullivan Principles said to improve racial equality for workers. But anti-apartheid activists rejected the move as corporate propaganda designed to manufacture consent while US corporations continued to profit from apartheid misery.

Today, the US resembles the South African apartheid state, but on a global scale. Its high-tech military projects power across the world, its diplomats impose strong intellectual property protections at the World Trade Organization, its imperialist anti-immigrant policies control the movement of people and capital, and its tech corporations dominate nearly every industry vertical outside of mainland China, all while creating a global police state.

We do not need 21st century Sullivan Principles to save digital capitalism. We need digital socialism, reparations and democratisation of tech for a global green economy. This is a matter of survival for the whole human race.

If the Americans cannot get on board with this, the rest of the world may have to unite behind targeted BDS actions centred on Silicon Valley and its supporters in the US.

### 1NC---CP

#### The United States federal government should determine that harm to a single side of the market in platform markets are sufficient ground for a case on unfair, deceptive, or abusive acts or practices.

#### PICs out of antitrust and anticompetitive---solves the case and avoids the FTC tradeoff disad.

Natasha Sarin 20. Assistant Professor of Law, the University of Pennsylvania Carey Law School; Assistant Professor of Finance, the Wharton School of the University of Pennsylvania. “What’s in Your Wallet (and What Should the Law Do About It?)”. The University of Chicago Law Review. https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/Sarin\_Wallet\_87UCLR553.pdf

The AmEx decision makes a version of this argument, stating that “[e]vidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power.”15 Many antitrust experts believe this is flawed reasoning that represents a stark departure from precedent,16 which historically defines markets for antitrust analysis narrowly by focusing on the service “directly affected by a challenged restraint.”17 These critiques have merit. But unless reversed, the AmEx decision will make it difficult to challenge the pricing practices of many two-sided platforms on antitrust grounds. This is also true for two-sided markets beyond payment networks: just as a card network’s restraint on merchants can be offset by benefits to consumers on the other side of the market, so too can restraints on Uber drivers be offset by low-cost rides.

This Essay proposes a way forward for reining in two-sided markets. Specifically, I advocate that consumer protection authority can play the role historically performed by antitrust, at least with respect to the payment industry. The Dodd-Frank Act18 provides the Consumer Financial Protection Bureau (CFPB) with the authority to prohibit unfair, deceptive, or abusive acts or practices (UDAAP) that cause injury that cannot be “reasonably avoid[ed].”19 The anti-steering clauses at the heart of the AmEx decision are unfair to consumers and thus can be restricted using the CFPB’s UDAAP authority. This is true generally for prohibitions on merchants’ ability to surcharge retail customers who use rewards cards to transact that are expensive for merchants to process.

Antitrust critics of the AmEx decision focus on the harm suffered by consumers in credit card markets. As Professor Erik Hovenkamp explains:

The Supreme Court overlooked the parties’ capacity to balance fees against rewards through bilateral contracting. Intuitively, when a buyer and seller are permitted to bargain over alternative payment platforms, their common objective is the same as that of all contracting parties: to maximize their joint-welfare and split the surplus in a way that leaves them both better off than the status quo.20

This is true, and so the antisteering rules are UDAAPs from the perspective of the credit card consumer, who is losing out on the ability to bargain for a piece of this surplus. She can’t reasonably avoid the harm of losing some of this surplus.21 But what the antitrust view misses in its focus on a well-defined market is that the choice of a payment instrument has important consequences for consumers outside of the credit card market as well. Because of antisteering rules, merchants set uniform retail prices. To process certain rewards cards, they pay more than 3 percent of total transaction value in interchange fees.22 This fee is significantly higher than the cost of processing debit cards (capped at $0.22 plus 0.05 percent of the transaction amount) or cash (no transaction fees).23 In low-margin businesses—for example, average general retail profits are 2 percent24—merchants pass large interchange costs through to consumers. Some consumers receive a kickback on their retail purchases in the form of credit card rewards. However, cash users bear high retail prices to cover the costs of other people transacting with credit cards. Cash users are disproportionately lower-income and less financially sophisticated consumers.25 This means that the payments system engenders regressive cross subsidization of the wealthy by the poor.

This cross subsidization is unfair to non-rewards-card users and cannot be avoided by them, especially given that many who transact with cash or low-interchange debit cards do not have access to credit. This means the CFPB has the authority to prohibit card networks’ antisteering provisions and restraints on merchant surcharging more broadly. This approach is not a panacea—as I discuss, many state laws restrict heterogeneous pricing. Further, even if merchants have the right to vary consumer price depending on the payment instrument used, they may choose not to do so for fear of alienating their customers. Preliminary survey evidence suggests that surcharges are unlikely to be popular in practice.

### 1NC---CP

#### Text: The 50 states, DC, and all relevant territories should uniformly increase prohibitions on anticompetitive business practices which cause net-harm on one side of platforms.

### 1NC---CP

#### The United States should only allow the continuation of anticompetitive business practices which cause net-harm on one side of platforms under antitrust law when the president determines it is necessary to prevent condition which may pose a direct threat to the national defense or its preparedness programs.

#### It competes---the counterplan is a regulation not prohibition.

James Broaddus 50. February 6; Judge on the Kansas City Court of Appeals, Missouri; Westlaw, “City of Meadville v. Caselman,” 240 Mo. App. 1220. https://casetext.com/case/city-of-meadville-v-caselman-1

"Under power conferred on cities of the fourth class `to regulate and license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a state, with a general policy of conducting licensed saloons, authority to prohibit is excluded. The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity. The latter implies its entire destruction or cessation.'" (Citing text writers and cases.)

#### The counterplan maintains DPA authority---the plan eliminates it.

Michael H. Cecire and Heidi M. Peters 20. Michael H. Cecire, Analyst in Intergovernmental Relations and Economic Development Policy. Heidi M. Peters, Analyst in U.S. Defense Acquisition Policy. “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress” Updated March 2, 2020. https://www.everycrsreport.com/reports/R43767.html

Authorities Under Title VII of the DPA

Title VII of the DPA contains various provisions that clarify how DPA authorities should and can be used, as well as additional presidential authorities. Some significant provisions of Title VII are summarized below.

Special Preference for Small Businesses

Two provisions in the DPA direct the President to accord special preference to small businesses when issuing contracts under DPA authorities. Section 701 reiterates89 and expands upon a requirement in Section 108 of Title I directing the President to "accord a strong preference for small business concerns which are subcontractors or suppliers, and, to the maximum extent practicable, to such small business concerns located in areas of high unemployment or areas that have demonstrated a continuing pattern of economic decline, as identified by the Secretary of Labor."90

Definitions of Key Terms in the DPA

The DPA statute historically has included a section of definitions.91 Though national defense is perhaps the most important term, there are additional definitions provided both in current law and in E.O. 13603.92 Over time, the list of definitions provided in both the law and implementing executive orders has been added to and edited, most recently in 2009, when Congress added a definition for homeland security93 to place it within the context of national defense.94

Industrial Base Assessments

To appropriately use numerous authorities of the DPA, especially Title III authorities, the President may require a detailed understanding of current domestic industrial capabilities and therefore need to obtain extensive information from private industries. Under Section 705 of the DPA, the President may "by regulation, subpoena, or otherwise obtain such information from ... any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act [the DPA]."95 This authority is delegated to the Secretary of Commerce in E.O. 13603.96 Though this authority has many potential implications and uses, it is most commonly associated with what the DOC's Bureau of Industry and Security calls "industrial base assessments."97 These assessments are often conducted in coordination with other federal agencies and the private sector to "monitor trends, benchmark industry performance, and raise awareness of diminishing manufacturing capabilities."98 The statute requires the President to issue regulations to insure that the authority is used only after "the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency."99 This regulation has been issued by DOC.100

Voluntary Agreements

Normally, voluntary agreements or plans of action between competing private industry interests could be subject to legal sanction under anti-trust statutes or contract law. Title VII of the DPA authorizes the President to "consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense."101 The President must determine that a "condition exists which may pose a direct threat to the national defense or its preparedness programs"102 prior to engaging in the consultation process. Following the consultation process, the President or presidential delegate may approve and implement the agreement or plan of action.103 Parties entering into such voluntary agreements are afforded a special legal defense if their actions within that agreement would otherwise violate antitrust or contract laws.104 Historically, the National Infrastructure Advisory Council noted that the voluntary agreement authority has been used to "enable companies to cooperate in weapons manufacture, solving production problems and standardizing designs, specifications and processes," among other examples.105 It could also be used, for example, to develop a plan of action with private industry for the repair and reconstruction of major critical infrastructure systems following a domestic disaster.

The authority to establish a voluntary agreement has been delegated to the head of any federal department or agency otherwise delegated authority under any other part of E.O. 13603.106 Thus, the authority could be potentially used by a large group of federal departments and agencies. Use of these voluntary agreements is tracked by the Secretary of Homeland Security,107 who is tasked under E.O. 13603 with issuing regulations that are required by law on the "standards and procedures by which voluntary agreements and plans of action may be developed and carried out."108 The Federal Emergency Management Agency (FEMA), which at the time was an independent agency and tasked with these responsibilities under the DPA, issued regulations in 1981 to fulfill this requirement.109 FEMA is now a part of DHS, and those regulations remain in effect.

The Maritime Administration (MARAD) of the U.S. Department of Transportation manages the only currently established voluntary agreements in the federal government, the Voluntary Intermodal Sealift Agreement (commonly referred to as "VISA") and the Voluntary Tanker Agreement. These programs are maintained in partnership with the U.S. Transportation Command of DOD, and have been established to ensure that the maritime industry can respond to the rapid mobilization, deployment, and transportation requirements of DOD. Voluntary participants from the maritime industry are solicited to join the agreements annually.110

Nucleus Executive Reserve

Title VII of the DPA authorizes the President to establish a volunteer body of industry executives, the "Nucleus Executive Reserve," or more frequently called the National Defense Executive Reserve (NDER).111 The NDER would be a pool of individuals with recognized expertise from various segments of the private sector and from government (except full-time federal employees). These individuals would be brought together for training in executive positions within the federal government in the event of an emergency that requires their employment. The historic concept of the NDER has been used as a means of improving the war mobilization and productivity of industries.112

The head of any governmental department or agency may establish a unit of the NDER and train its members.113 No NDER unit is currently active, though the statute and E.O. 13603 still provide for this possibility. Units may be activated only when the Secretary of Homeland Security declares in writing that "an emergency affecting the national defense exists and that the activation of the unit is necessary to carry out the emergency program functions of the agency."114

Authorization of Appropriations, as amended by P.L. 113-72

Appropriations for the purpose of the DPA are authorized by Section 711 of Title VII.115 Prior to the P.L. 113-172, "such sums as necessary" were authorized to be appropriated. This has been replaced by a specific authorization for an appropriation of $133 million per fiscal year and each fiscal year thereafter, starting in FY2015, to carry out the provisions and purposes of the Defense Production Act.116

Table 1 shows that the annual average appropriation to the DPA Fund between FY2010 and FY2019 was $109.1 million,117 with a high of $223.5 million in FY2013 and a low of $34.3 million in FY2011. Monies in the DPA Fund are available until expended, so annual appropriations may carry over from year to year if not expended. Recently, the only regular annual appropriation for the purposes of the DPA has been made in the DOD appropriations bill, though appropriations could be made in other bills directly to the DPA Fund (or transferred from other appropriations).

Committee on Foreign Investment in the United States118

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign investment in the economy. It reviews foreign investment transactions to determine if (1) they threaten to impair U.S. national security; (2) the foreign investor is controlled by a foreign government; or (3) the transaction could affect homeland security or would result in control of any critical infrastructure that could impair the national security. The President has the authority to block proposed or pending foreign investment transactions that threaten to impair the national security.

CFIUS initially was created and operated through a series of Executive Orders.119 In 1988, Congress passed the "Exon-Florio" amendment to the DPA, granting the President authority to review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such actions.120 This amendment codified the CFIUS review process due in large part to concerns over acquisitions of U.S. defense-related firms by Japanese investors. In 2007, amid growing concerns over the proposed foreign purchase of commercial operations of six U.S. ports, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49) to create CFIUS in statute.

On August 13, 2018, President Trump signed into law new rules governing national security reviews of foreign investment, known as the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-235).121 FIRRMA amends several aspects of the CFIUS review process under Section 721 of the DPA.122 Notably, it expands the scope of transactions that fall under CFIUS' jurisdiction. It maintains core components of the current CFIUS process for evaluating proposed or pending investments in U.S. firms, but increases the allowable time for reviews and investigations. Upon receiving written notification of a proposed acquisition, merger, or takeover of a U.S. firm by a foreign investor, the CFIUS process can proceed potentially through three steps: (1) a 45-day national security review; (2) a 45-day maximum national security investigation (with an option for a 15-day extension for "extraordinary circumstances"); and (3) a 15-day maximum Presidential determination. The President can exercise his authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he finds that (1) "credible evidence" exists that the foreign investor might take action that threatens to impair the national security; and (2) no other laws provide adequate and appropriate authority for the President to protect national security. FIRRMA shifts the filing requirement for foreign investors from voluntary to mandatory in certain cases, and provides a two-track method for reviewing certain investment transactions. Other changes mandated by FIRRMA would provide more resources for CFIUS, add new reporting requirements, and reform export controls.

Termination of the Act

Title VII of the DPA also includes a "sunset" clause for the majority of the DPA authorities. All DPA authorities in Titles I, III, and VII have a termination date, with the exception of four sections.123 As explained in Section 717 of the DPA, the sections that are exempt from termination are

* 50 U.S.C. §4514, Section 104 of the DPA that prohibits both the imposition of wage or price controls without prior congressional authorization and the mandatory compliance of any private person to assist in the production of chemical or biological warfare capabilities;
* 50 U.S.C. §4557, Section 707 of the DPA that grants persons limited immunity from liability for complying with DPA-authorized regulations;
* 50 U.S.C. §4558, Section 708 of the DPA that provides for the establishment of voluntary agreements; and
* 50 U.S.C. §4565, Section 721 of the DPA, the so-called Exon-Florio Amendment, that gives the President and CFIUS review authority over certain corporate acquisition activities.

P.L. 115-232 extended the termination date of Section 717 from September 30, 2019, to September 30, 2025. In addition, Section 717(c) provides that any termination of sections of the DPA "shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act" prior to its termination. This means, for instance, that prioritized contracts or Section 303 projects created with DPA authorities prior to September 30, 2025, would still be executed until completion even if the DPA is not reauthorized. Similarly, the statute specifies that the authority to investigate, subpoena, and otherwise collect information necessary to administer the provisions of the act, as provided by Section 705 of the DPA, will not expire until two years after the termination of the DPA.124 For a chronology of all laws reauthorizing the DPA since inception, see Table A-4.

Defense Production Act Committee

The Defense Production Act Committee (DPAC) is an interagency body originally established by the 2009 reauthorization of the DPA.125 Originally, the DPAC was created to advise the President on the effective use of the full scope of authorities of the DPA. Now, the law requires DPAC to be centrally focused on the priorities and allocations authorities of Title I of the DPA.

The statute assigns membership in the DPAC to the head of each federal agency delegated DPA authorities, as well as the Chairperson of the Council of Economic Advisors. A full list of the members of the DPAC is included in E.O. 13603.126 As stipulated in law, the Chairperson of the DPAC is to be the "head of the agency to which the President has delegated primary responsibility for government-wide coordination of the authorities in this Act."127 As currently established in E.O. 13603 delegations, the Secretary of Homeland Security is the chair-designate, but the language of the law could allow the President to appoint another Secretary with revision to the E.O.128 The Chairperson of the DPAC is also required to appoint one full-time employee of the federal government to coordinate all the activities of the DPAC. Congress has exempted the DPAC from the requirements of the Federal Advisory Committee Act.129

The DPAC has annual reporting requirements relating to the Title I priority and allocation authority, and is also required to include updated copies of Title I-related rules in its report. The annual report also contains, among other items, a "description of the contingency planning ... for events that might require the use of the priorities and allocations authorities" and "recommendations for legislative actions, as appropriate, to support the effective use" of the Title I authorities.130 The DPAC report is provided to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services.

Impact of Offsets Report

Offsets are industrial compensation practices that foreign governments or companies require of U.S. firms as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act (22 U.S.C. §2751, et seq.) and the International Traffic in Arms Regulations (22 C.F.R. §§120-130). In the defense trade, such industrial compensation can include mandatory co-production, licensed production, subcontractor production, technology transfer, and foreign investment.

The Secretary of Commerce is required by law to prepare and to transmit to the appropriate congressional committees an annual report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade. Specifically, the report discusses "offsets" in the government or commercial sales of defense materials.131

Considerations for Congress

Enhance Oversight

Expand Reporting or Notification Requirements

Congress may consider whether to add more extensive notification and reporting requirements on the use of all or specific authorities in the DPA. These reporting or notification requirements could be added to the existing law, or could be included in conference or committee reports accompanying germane legislation, such as appropriations bills or the National Defense Authorization Act. Additional reporting or notification requirements could involve formal notification of Congress prior to or after the use of certain authorities under specific circumstances. For example, Congress may consider whether to require the President to notify Congress (or the oversight committees) when the priorities and allocations authority is used on a contract valued above a threshold dollar amount.132 Congress might also consider expanding the existing reporting requirements of the DPAC, to include semi-annual updates on the recent use of authorities or explanations about controversial determinations made by the President. Existing requirements could also be expanded from notifying/reporting to the committees of jurisdiction to the Congress as a whole, or to include other interested committees, such as the House and Senate Armed Services Committees.

Enforce and Revise Rulemaking Requirements

Congress may consider reviewing the agencies' compliance with existing rulemaking requirements. A rulemaking requirement exists for the voluntary agreement authority in Title VII that has been completed by DHS, but it has not been updated since 1981 and may be in need of an update given changes to the authority and government reorganizations since that date.133 One of the agencies responsible for issuing a rulemaking on the use of Title I authorities has yet to do so. Congress may also consider potentially expanding regulatory requirements for other authorities included in the DPA. For example, Congress may consider whether the President should promulgate rules establishing standards and procedures for the use of all or certain Title III authorities. In addition to formalizing the executive branch's policies and procedures for using DPA authorities, these regulations could also serve an important function by offering an opportunity for private citizens and industry to comment on and understand the impact of DPA authorities on their personal interests.

Broaden Committee Oversight Jurisdiction

Since its enactment, the House Committee on Financial Services, the Senate Committee on Banking, Housing, and Urban Affairs, and their predecessors have exercised legislative oversight of the Defense Production Act. The statutory authorities granted in the various titles have been vested in the President, who has delegated some of these authorities to various agency officials through E.O. 13603. As an example of the scope of delegations, the membership of the Defense Production Act Committee (DPAC), created in 2009 and amended in 2014, includes the Secretaries of Agriculture, Commerce, Defense, Energy, Labor, Health and Human Services, Homeland Security, the Interior, Transportation, the Treasury, and State; the Attorney General; the Administrators of the National Aeronautics and Space Administration and of General Services, the Chair of the Council of Economic Advisers; and the Directors of the Central Intelligence Agency and National Intelligence.

In order to complement existing oversight, given the number of agencies that currently use or could potentially use the array of DPA authorities to support national defense missions, Congress may consider reestablishing a select committee with a purpose similar to the former Joint Committee on Defense Production.134 As an alternative to the creation of a new committee, Congress may consider formally broadening DPA oversight responsibilities to include all relevant standing committees when developing its committee oversight plan.

Should DPA oversight be broadened, Congress might consider ways to enhance inter-committee communication and coordination of its related activities. This coordination could include periodic meetings to prepare for oversight hearings or ensuring that DPA-related communications from agencies are shared appropriately. Finally, because the DPA was enacted at a time when the organization and rules of both chambers were markedly different to current practice, Congress may consider the joint referral of proposed DPA-related legislation to the appropriate oversight committees.

Amending the Defense Production Act of 1950

While the act in its current form may remain in force until September 30, 2025, the legislature could amend the DPA at any time to extend, expand, restrict, or otherwise clarify the powers it grants to the President. For example, Congress could eliminate certain authorities altogether. Likewise, Congress could expand the DPA to include new authorities to address novel threats to the national defense. For example, Congress may consider creating new authorities to address specific concerns relating to production and security of emerging technologies necessary for the national defense.

#### Key to pandemic response.

J. Mark Gidley et al. 20. J. Mark Gidley chairs the White & Case Global Antitrust/Competition practice. Martin M. Toto and Sean Sigillito. “A Novel Antitrust Defense for COVID-19 Agreements: Section 708 of the Defense Production Act” <https://www.whitecase.com/sites/default/files/2020-04/novel-antitrust-defense-covid-19-agreements-section-708-defense-production-act.pdf>

There is a dire need for the assistance of private industry in developing vaccines and treatments for the SARS-CoV-2 virus, and for the manufacture and distribution of medical and other supplies to aid in the United States’ response to the COVID-19 health emergency. The Government’s recent actions indicate a desire to allow private sector companies to work together to do so quickly.

While many of the needs arising from the ongoing emergency focus specifically on medical supplies, the President’s delegation of Section 708 authority to the DHS as well as HHS potentially opens the door to voluntary agreements within broader sectors of the US economy. Under the right circumstances, and if the business combination could garner the governmental sponsor needed for the voluntary agreement, invoking the Defense Production Act’s antitrust relief provision through the enactment of voluntary agreements could allow for a more robust response to the COVID-19 pandemic.

#### Extinction.

Dennis Pamlin & Stuart Armstrong 15. \*Executive Project Manager Global Risks, Global Challenges Foundation. \*\*James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford. February 2015, “Global Challenges: 12 Risks that threaten human civilization: The case for a new risk category,” Global Challenges Foundation, p.30-93. https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf

A pandemic (from Greek πᾶν, pan, “all”, and δῆμος demos, “people”) is an epidemic of infectious disease that has spread through human populations across a large region; for instance several continents, or even worldwide. Here only worldwide events are included. A widespread endemic disease that is stable in terms of how many people become sick from it is not a pandemic. 260 84 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 3.1 Current risks 3.1.4.1 Expected impact disaggregation 3.1.4.2 Probability Influenza subtypes266 Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261 These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic. Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267 There are other grounds for suspecting that such a highimpact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme. Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275 Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade). Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics). Five important factors in estimating the probabilities and impacts of the challenge: 1. What the true probability distribution for pandemics is, especially at the tail. 2. The capacity of modern international health systems to deal with an extreme pandemic. 3. How fast medical research can proceed in an emergency. 4. How mobility of goods and people, as well as population density, will affect pandemic transmission. 5. Whether humans can develop novel and effective anti-pandemic solutions.

### 1NC---DA

#### 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.

#### Antitrust enforcement saps up FTC resources and personnel, which are finite.

Tara L. Reinhart, et al. 21. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “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.

#### That trades off with the necessary resources for privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. 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.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 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 UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’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. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### 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.”

## Advantage 1---Platforms

### 1NC---Turn (Innovation)

#### Expanding antitrust is uniquely prone to erroneous enforcement that chills innovation and investment across all economic sectors.

Geoffrey A. Manne 20**.** president and founder of the International Center for Law and Economics, “Error Costs in Digital Markets,” November 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3733662

Legal decision-making and enforcement under uncertainty are always difficult and always potentially costly. The risk of error is always present given the limits of knowledge, but it is magnified by the precedential nature of judicial decisions: an erroneous outcome affects not only the parties to a particular case, but also all subsequent economic actors operating in “the shadow of the law.”2 The inherent uncertainty in judicial decision-making is further exacerbated in the antitrust context where liability turns on the difficult-to-discern economic effects of challenged conduct. And this difficulty is still further magnified when antitrust decisions are made in innovative, fastmoving, poorly-understood, or novel market settings—attributes that aptly describe today’s digital economy.

Rational decision-makers will undertake enforcement and adjudication decisions with an eye toward maximizing social welfare (or, at the very least, ensuring that nominal benefits outweigh costs).3 But “[i]n many contexts, we simply do not know what the consequences of our choices will be. Smart people can make guesses based on the best science, data, and models, but they cannot eliminate the uncertainty.”4 Because uncertainty is pervasive, we have developed certain heuristics to help mitigate both the direct and indirect costs of decision-making under uncertainty, in order to increase the likelihood of reaching enforcement and judicial decisions that are on net beneficial for society. One of these is the error-cost framework.

In simple terms, the objective of the error-cost framework is to ensure that regulatory rules, enforcement decisions, and judicial outcomes minimize the expected cost of (1) erroneous condemnation and deterrence of beneficial conduct (“false positives,” or “Type I errors”); (2) erroneous allowance and under-deterrence of harmful conduct (“false negatives,” or “Type II errors”); and (3) the costs of administering the system (including the cost of making and enforcing rules and judicial decisions, the costs of obtaining and evaluating information and evidence relevant to decision-making, and the costs of compliance).

In the antitrust context, a further premise of the error-cost approach is commonly (although not uncontroversially5 ) identified: the assumption that, all else equal, Type I errors are relatively more costly than Type II errors. “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”6 Thus the error-cost approach in antitrust typically takes on a more normative objective: a heightened concern with avoiding the over-deterrence of procompetitive activity through the erroneous condemnation of beneficial conduct in precedent-setting judicial decisions. Various aspects of antitrust doctrine—ranging from antitrust pleading standards to the market definition exercise to the assignment of evidentiary burdens—have evolved in significant part to constrain the discretion of judges (and thus to limit the incentives of antitrust enforcers) to condemn uncertain, unfamiliar, or nonstandard conduct, lest “uncertain” be erroneously identified as “anticompetitive.”

The concern with avoiding Type I errors is even more significant in the enforcement of antitrust in the digital economy because the “twin problems of likelihood and costs of erroneous antitrust enforcement are magnified in the face of innovation.”7 Because erroneous interventions against innovation and the business models used to deploy it threaten to deter subsequent innovation and the deployment of innovation in novel settings, both the likelihood and social cost of false positives are increased in digital and other innovative markets. Thus the avoidance of error costs in these markets also raises the related question of the proper implementation of dynamic analysis in antitrust.8

### 1NC---AT: Business Dynamism

#### The pandemic unleashed a massive amount of business dynamism, only in the U.S.---it’ll be durable

-- U.S. dynamism is up because of policy support given to small business that wasn’t present in other G7 economies

Simeon Djankov 21, Policy Director, Financial Markets Group, London School of Economics; and Eva (Yiwen) Zhang, Researcher, Peterson Institute for International Economics, 3/3/21, “US business dynamism rises,” <https://voxeu.org/article/us-business-dynamism-rises>

In 2020, the creation of US startups shot up by 24% relative to the previous year. This is the largest annual increase since business statistics started being collected in the US. Some of this boom in entrepreneurial activity is accounted for by the migration of businesses to online activity.

This business dynamism is unexpected. Vox columns written in early 2020 (e.g. Baker et al. 2020, Coibion et al. 2020, Sedláček and Sterk 2020, Calvino et al. 2020) recorded steep falls in entrepreneurial activity across G7 economies. In a recent paper (Djankov and Zhang 2021), we show that such falls were indeed the norm across advanced economies at the end of 2020. The US is an exception, fuelled by the government assistance provided to small businesses.

The focus on new entry is warranted, as research in the US shows that young firms tend to grow faster than incumbents (Haltiwanger et al. 2013). Haltiwanger et al. (2017) document that startups account for about 40% of aggregate growth in total factor productivity, 50% of aggregate output growth, and 60% of aggregate employment growth. Another important benefit of entrepreneurship is the ability of new firms to increase competition, thus reducing mark-ups (Djankov et al. 2002).

Still, the positive impact of these entrants on long-term economic growth should be taken with a grain of salt, as research shows that firms born during recessions not only start smaller but also tend to stay smaller in future years, even when the economy recovers (Sedláček and Sterk 2017). Also, the crisis has reshaped the outlook for many sectors, more so than previous crises have. Firms and workers have invested in years’ worth of digital transformation in just a few months (Baldwin 2020). This transformation is likely to result in significant further churning among businesses in the months and years to come.

### 1NC---AT: I/L---Platform Abuse/Innovation

#### Platforms won’t abuse dominance because it drives away parties on both sides

Friso Bostoen 19, Ph.D. researcher, Institute for Consumer, Competition & Market, KU Leuven (University of Leuven); Fellow of the Research Foundation – Flanders, 2019, “REGULATING ONLINE PLATFORMS: LESSONS FROM 100 YEARS OF TELECOMMUNICATIONS REGULATION,” https://www.ptc.org/PTC20/Proceedings/Paper\_YS\_1\_21\_Bostoen\_Friso.pdf

The (news) stories about how a platform enters a downstream market that its platform serves and subsequently uses its digital infrastructure to push out competitors are numerous enough to cause legitimate concern.[[1]](#footnote-1) The empirical literature on this issue is, however, limited and ambiguous (see supra, section 3.2.). The reason for this may, once more, be found in the incentives. An online marketplace—such as Amazon’s—cannot discriminate against too many of its sellers, as this could negatively affect the health of its ecosystem: a platform with a reputation for exclusion may not attract or retain enough participants to give it the necessary volume and diversity.198 It is difficult to say which incentives will dominate: those to capture more of the value in the ecosystem through vertical exclusion, or those to preserve the overall health of the ecosystem. The on-going investigations into the potentially exclusionary conduct by Amazon199 and Apple may bring us closer to the answer. Until then, the focus should be on speeding up these investigations, which can already be done through the broader use of interim measures while anticipating more fundamental institutional changes. However, the balance of the evidence does not currently favor structural separation, and it is difficult to see how this would change in the future given the various procompetitive efficiencies of vertical integration. While such efficiencies exist, however, there is no guarantee whatsoever that they in every case outweigh the anticompetitive effects, which are particularly pronounced in platform markets. Therefore, there appears to be room for a behavioral measure that preserves those efficiencies while also providing a basis for intervention whenever the anticompetitive effects take the upper hand. However, a number of antitrust precedents (e.g. potential decisions on Amazon and Apple, in addition to the Google Search decision) could—through increased deterrence—have the same effect as a behavioral ex ante rule. Moreover, as anticompetitive effects are difficult to assess in discrimination scenarios (given that they involve innovation, quality and choice rather than price), mitigating the burden of proof on the complainant is advised. Again, however, this can be done through an evolving interpretation of ex post antitrust law as well as the adoption of an ex ante behavioral rule.

### 1NC---FinTech---Squo Solves

#### Large firms and big banks are driving FinTech innovation now that sustains economic coercion---paragraph after their card

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Developments in financial technology also have the potential to affect the availability and strength of coercive economic measures over the longer term. The movement to develop blockchain-based, decentralized payments platforms and new digital currencies or tokenized assets that feature anonymity can undermine the strength of coercive economic measures. However, financial technology developments, such as the development of artificial intelligence/machine learning (AI/ML) compliance technologies, also present potential means to better detect and stop evaders and avoiders of U.S. economic coercion throughout global chains of financial interconnectivity.

Financial technologies are not themselves the drivers of potential future changes to the sources of coercive economic leverage. However, they may enable foreign governments to develop better tools to insulate transactions from U.S. jurisdiction. And, regardless of the actions of foreign governments as they spread commercially, they may help evaders duck U.S. coercive economic power in limited but meaningful ways. Conversely, new AI/ML or other technologies may help U.S. policymakers implementing economic coercion to better do their job.

Financial technology can be a facilitator of rapid transformation in the financial services sector. Importantly, financial technology developments will not happen just in the United States; a number of other countries, from China to Singapore to Switzerland, are promoting themselves as financial technology leaders. There is no guarantee that financial technology innovators and investors will be centered in the United States in the future—which represents a vulnerability to U.S. economic prominence.

Maintaining U.S. Leverage

The extent to which the United States will maintain coercive economic leverage in a world where financial technology disrupts aspects of the traditional financial architecture will depend to a significant degree on the extent to which U.S. firms, and large global firms, continue to play a dominant role in the development of the technology. To put it bluntly, a blockchain-based clearing mechanism that enables trade between foreign countries without financial transactions touching the dollar would likely undermine U.S. leverage if the technology were developed and operated by a foreign company that had no need to adhere to U.S. law. The United States would maintain at least some leverage if the technology were developed or operated by a U.S. company obliged to adhere to U.S. sanctions, technology-export restrictions, and other relevant laws, or a foreign company with significant U.S. exposure.

**\*\*\*GEORGETOWN ENDS\*\*\***

There are some signs that large U.S. and global firms will play a larger role in financial technology developments over the next several years as such technology moves even more mainstream. This is good news for U.S. economic prominence and the strength of U.S. coercive economic measures. The biggest conventional banks, exchanges, and investment houses, as well as central banks, have all begun making major commitments to this new class of technology. The Depository Trust & Clearing Corporation, a U.S. company that operates one of the main entities for clearing and settlement of securities transactions, is testing a new platform for credit derivatives based on distributed ledger technology.94 Large financial institutions are also getting involved with digital currencies. Goldman Sachs decided in May 2018 to open a trading desk for Bitcoin and has already been clearing Bitcoin futures on the Chicago Mercantile Exchange for clients.95 But other trends may bode less well for the future of U.S. coercive economic leverage. Central banks in Sweden, Canada, and China are all studying the possibility of issuing central-bank-backed digital currency, and Uruguay’s central bank started a pilot program for digital currency. The People’s Bank of China is particularly interested in developing its digital currency with “controllable anonymity.”96

The approach that U.S. regulators take toward fostering financial technology developments will be an important determinative to the issue of U.S. dominance of financial technology. In interviews, many financial technology company executives and investors cited a lack of clarity and understanding from U.S. regulators as a substantial barrier to innovation and adoption of financial technology. A particular sticking point in interviews was the unwillingness of the Securities and Exchange Commission (SEC) to provide greater clarity and more rapid decisions on whether it considers new digital currencies to be securities. However, U.S. regulators are trying to lay out new approaches to incentivize development of financial technology, with the Treasury Department releasing a report in July 2018 spelling out a variety of ways the United States could improve its regulatory environment for financial technology.97

### 1NC---Turn (FinTech)

#### Tech sector concentration allows BigTech to disrupt financial institutions---the plan prevents it

Giuseppe Colangelo 20, Fellow in the Transatlantic Technology Law Forum at Stanford, Jean Monnet Professor of European Innovation Policy at University of Basilicata, 2020, “Evaluating the Case for Regulation of Digital Platforms,” https://gaidigitalreport.com/2020/10/04/evaluating-the-case-for-ex-ante-regulation-of-digital-platforms/

The entry of large digital platforms into the financial sector magnifies both the benefits provided and the concerns raised by FinTech companies. Focusing just on antitrust implications, on the one hand, drawing on their leadership in big data analytics as well as on digital services and infrastructure, BigTechs may further increase competitive pressure on the incumbent side. In turn, this will likely stimulate responses from the incumbent side, ultimately improving consumer welfare and financial inclusion. On the other hand, the disruption evidenced by other industries because of BigTechs entry might raises antitrust concerns. Digital platforms can make full use of data access mechanisms in order to strengthen their business potential even further by leveraging their data advantage in downstream or conglomerate markets, thereby attaining significant portfolio effects.[153] Therefore, nothing prevents them from engaging in self-preferencing, bundling new products with traditional services, or discriminating traditional incumbents when accessing to their platforms.

For these reasons, proposals have been specifically targeted to the role of BigTechs in finance. Banks run the risk of being enveloped by BigTech platforms, which may harness the network effects that previously protected the incumbent by assembling much of the information the customer’s bank or asset manager possesses, and supplementing it with their detailed knowledge of many other aspects of the customer’s choices and preferences.[154]

In particular, a bill has been introduced before the U.S. House of Representatives which would prohibit technology companies that have an annual global revenue of over twenty-five billion dollars from either acting as a financial institution or being affiliated with a financial institution.[155] The bill would ban BigTechs from establishing, maintaining, or operating a digital asset that is intended to be widely used as medium of exchange, unit of account, store of value, or any other similar function, thus effectively banning virtual currencies.

Furthermore, the European Expert Group on Regulatory Obstacles to Financial Innovation has recommended the introduction of ex ante rules to prevent large, vertically integrated platforms from discriminating against products and services offered by third parties.[156] Notably, the Expert Group list three main scenarios: a) large technology companies with access to significant social media, search history, and other data, leveraging their preferential data access to enter the market for financial services and benefiting from access to payment account information; b) providers of smartphone operating systems not providing access to the relevant devices’ interface for competing payment applications; and c) providers giving access to devices or software under conditions that can create inefficiencies, such as prohibiting the use of other consumer interfaces or demoting rivals’ financial products and services in search engine results.

Finally, incumbents and commentators have proposed to complement the data sharing rule with a reciprocity obligation between BigTechs and banks:[157] if the beneficiary is a large digital company, the access to account rule should be integrated with a corresponding right for banks to access BigTech data that may be used to enhance digital payment services.

With data portability provisions in place to address concerns about the data power of incumbent banks over FinTechs, attention has shifted toward BigTechs’ data power over incumbent banks. The regulatory pendulum swings back and forth as more asymmetric regulation is introduced.

However, it is worth remembering that, in the banking sector, gatekeepers are represented by financial institutions, rather than BigTechs. Therefore, by adopting ex ante prohibitions against digital players, policy makers run the risk of missing the forest for the trees.

Because regulation significantly affects innovation, competition, and consumer welfare, policymakers ought to be aware of the trade-offs embedded in different approaches. Specifically, policymakers should carefully consider whether it is premature to implement new regulations to protect big banks from BigTechs.[158] As matters stand, it is not yet possible to predict if and how BigTechs are going to approach or disrupt retail banking markets. At present, we are still witnessing individual and cautious attempts by technology companies to provide specific services to their platform users. At the same time, it is becoming evident that FinTech start-ups are set to cooperate, rather than compete, with incumbent banking players. Whether this complementarity ends up in cooperation or full-fledged integration between large incumbent banks and FinTech start-ups, we are still halfway to achieving the pro-competitive goal underlying data access regulatory regimes. In fact, regulatory interventions such as the PSD2, the Open Banking remedy, and the Consumer Data Right, were designed to serve the purpose of creating a more competitive retail banking environment to deliver lower prices and better quality to consumers.

If new asymmetric regulations were introduced as a containment measure specifically aimed at shielding traditional banks from BigTechs’ competitive pressure, a twofold problem would arise. First, innovations and efficiencies that potentially could have emerged from platforms would be jeopardized, thereby preventing the creation of new products and services beneficial to consumers. Such a form of regulation would asymmetrically target specific entities, thereby subjecting them to a non-neutral regulatory burden based on a bigness biased assumption that they would behave unfairly once engaged in retail financial markets. Second, large incumbent banks would be in a privileged position because they would be protected from BigTechs’ potential competition but still free to harness FinTech-enabled solutions to drive out of the market small local banks unable to bear the cost of the Open Banking transition. Further, FinTech firms and established financial institutions may join forces to counter the entry of BigTechs.[159] Hence, somewhat paradoxically, early regulatory measures specifically imposed on BigTechs could end up frustrating the pro-competitive aim of data portability regimes previously introduced. Finally, it should be borne in mind that the ordinary legal framework would still apply. Hence, antitrust enforcement would still be required to oversee and fight any anti-competitive conduct as it may arise.

### \*1NC---FinTech---AT: IL

#### The practice at issue in the AmEx case was American Express preventing merchants from promoting other credit cards. That tactic is useless against FinTech startups!

Rory Van Loo 18, Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project, 2018, “Making Innovation More Competitive: The Case of Fintech,” UCLA Law Review, 65 UCLA L. REV. 232

Some legacy firms can also limit market access through their dominant market positions. Over 99 percent of all credit card transactions run through the Visa, American Express, Mastercard, and Discover networks.62 Many commentators have documented credit card companies' ability to engage in exclusionary conduct, such as vertical restraint clauses that prevent merchants from using other payment methods.63 Although credit card companies may not be able to use those same tactics against payment fintechs, their strong market positions could enable them to deploy other tactics. They have, for instance, instituted "Honor All Cards" rules requiring merchants to accept their contactless payments as a condition of accepting plastic cards. These rules arguably "foreclose entry to those digital wallets that.., do not use the credit card networks for payments. 64

### AT: Sanctions

#### Noko nuclearization disproves effectiveness of sanctions, OR

#### US sanctions are strong now

Kathy Gilsinan 19, a contributing writer at The Atlantic "A Boom Time for U.S. Sanctions," Atlantic, 5-3-2019, https://www.theatlantic.com/politics/archive/2019/05/why-united-states-uses-sanctions-so-much/588625/; HS

The Treasury Department’s position is that, even as the number of sanctions have increased, their success is measured not by volume but by their impact in achieving specific policy goals.

On that score, sanctions have notched some successes. They may have helped drive the North Koreans to negotiate with Trump over their nuclear program, though so far no deal has resulted. Sanctions also helped push Iran to the table over its own nuclear program during the Obama administration; the Trump administration says that the current sanctions are part of an effort to push it back for a better deal.

The goals spelled out in Secretary of State Mike Pompeo’s 12 demands on Iran—including renouncing nuclear weapons, ceasing support for proxies like Hezbollah that the U.S. considers terrorist organizations, and releasing U.S. citizens imprisoned in the country—would amount to a wholesale overhaul of the country’s current foreign policy. Iranian leaders have in the past indicated that they’re not interested in negotiating over those points, though Foreign Minister Javad Zarif recently floated the idea of a prisoner exchange in a possible sign of softening. The demands have been criticized as unreachable, but Pompeo has said they amount to nothing more than a request for normal behavior of the kind the U.S. should expect from any other country.

In the meantime, though, Iran’s economy is tanking, and the country is struggling to trade on its economic lifeblood, which is oil. Whatever the long-term policy goals, and whatever the risks of pursuing them so aggressively, in the short term the administration is satisfied with the results so far.

### AT: US-Iran War---1NC

#### No Iran impact---domestic pressures check.

Michael C. Horowitz and Elizabeth N. Saunders 20. \*\*Professor of political science and the interim director of Perry World House at the University of Pennsylvania. \*\*Associate professor in the School of Foreign Service at Georgetown University, and a nonresident senior fellow at the Brookings Institution. 1-7-2020. “War with Iran is still less likely than you think.” Washington Post. <https://www.washingtonpost.com/politics/2020/01/07/war-with-iran-is-still-less-likely-than-you-think/>. accessed 1-8-2020//JDi

In the wake of the U.S. attack that killed Maj. Gen. Qasem Soleimani, head of Iran’s Quds Force, many are concerned yet again about the potential for escalation between the United States and Iran to a general war.

In June, after tensions spiked following attacks on two oil tankers in the Gulf of Oman that the United States blamed on Iran, we laid out the case for why the two countries were unlikely to fight a general war. We drew on similar arguments in 2018, when we explained why war between the United States and North Korea was unlikely despite the fears of many analysts at the time.

The killing of Soleimani was different

The U.S. killing of Soleimani, an attack on a high-ranking government official, is different from previous moments of international tension during the Trump administration. Soleimani was an important military officer in a sovereign state, rather than the leader of a stateless terrorist organization, like Islamic State leader Abu Bakr al-Baghdadi. In last summer’s oil tanker and drone-downing episodes, the stakes were lower, and there were elements of deniability or ambiguity that were not feasible in the case of killing Soleimani.

The direct strike on one of Iran’s top military leaders has led many to conclude that Iran will strike back, possibly against U.S. targets in the Middle East. Such retaliation would be potentially costly, even if it does not lead to a general war.

But as other analysts have noted, fears of World War III are overblown. Even after this escalatory move, many factors that made war between the United States and Iran unlikely in June remain unchanged. There will no doubt be consequences — but general war remains unlikely.

But could the United States and Iran stumble into war?

Although the killing of Soleimani was a deliberate act by the United States, much fear about escalation between the United States and Iran surrounds the potential for a conflict spiral through miscalculation.

Fortunately, this type of escalation is rare. As Dan Reiter explained here at The Monkey Cage during a spike in tensions with North Korea two years ago, “powder kegs” rarely explode into war by accident.

Those worried about accidental war may also point to reports that the Trump administration developed the plan to kill Soleimani in haste, suggesting there was insufficient effort to think about how Iran might respond.

But if and when it does respond, Iran’s action is likely to be highly considered. This may be worrisome — but it’s not war by accident or miscalculation. If Iran’s leaders take an action in response that triggers a general war, it will probably be because they decided it was a risk worth taking.

Retaliation by Iran is not the same as war

It’s important not to move the goal posts for how we define war. At the same time, it’s also key to distinguish tit for tat between the United States and Iran from a general war involving ground troops.

This is not to deny the risk of a damaging retaliatory move from Iran that may result in American casualties and lead to long-term complications for the United States in the region.

But even retaliation may not come right away. Suzanne Maloney of the Brookings Institution argues that Iran is likely to “bide its time” despite anti-American protests in Iran during the widespread mourning for Soleimani.

Domestic politics still act as a brake — in both the United States and Iran

As TMC editor Michael Tesler wrote over the weekend, war with Iran is unpopular in the United States and is unlikely to help Trump win reelection. And Trump has long said he doesn’t want a Middle East war.

Similarly, despite short-term domestic pressures to retaliate, Iran’s leaders want to stay in power and do not want to risk their regime in a costly war — and war between the United States and Iran would probably be very costly.

Back in June, we wrote about one risk that could increase the odds of war: “if Trump’s hawkish advisers present an option that seems like it could be kept limited, but actually carries a strong likelihood of escalation.” According to news reports, Trump chose the option to kill Soleimani on short notice, surprising even some of his advisers and setting off a planning scramble.

But we also noted that Trump has backed away from tough stances before. If the past is any guide, having now looked tough, Trump may seek an off-ramp. And as Sarah Croco, Jared McDonald and Candace Turitto have pointed out here at TMC, Trump is unlikely to be punished if he flip-flops and backs down.

And even if Iran strikes back — as it says it will — it is also likely to try to avoid escalating the conflict significantly. Finding such a finely calibrated option is, of course, a difficult problem, but neither miscalculation nor domestic politics are the most likely drivers of further escalation in this case.

What might prevent the two sides from finding the offramps? One factor is if the administration, with Mike Pompeo at the understaffed State Department leading the hawkish charge, does not fully consider diplomatic options or engage in a robust set of invisible, back-channel consultations that would produce such options.

The stakes are high

Another concern is that this crisis has higher stakes for Iran than last summer’s tanker or drone encounters. We know that war can occur even if both sides don’t want it when one side doesn’t believe the other’s commitment not to attack in the future. If Iran doesn’t believe the United States will really leave its regime alone, it might frame the stakes of the Soleimani killing in the strongest possible terms, planning for significant escalation.

But that seems unlikely, given that the United States is far more powerful than Iran and a general war would probably mean the end of Iran’s regime. And Iran’s leaders might alternatively believe Trump does not want a war, especially given his publicly stated interest in reducing the U.S. military’s footprint in the Middle East. Indeed, a challenge for Iran’s leaders is that they may agree with commentators who have noted that Trump has not made clear what he wants.

Blowback may be coming, and the U.S. strike against Soleimani may increase the risk of bad outcomes short of an all-out war. Those are reasons for concern. But it’s critical to distinguish such consequences from a general war.

#### Middle East war is more unlikely than ever

Mara Karlin 19, International Studies Professor at John Hopkins University, Nonresident Senior Fellow at the Brookings Institution, and U.S. Deputy Assistant Secretary of Defense for Strategy and Force Development 2015-2016, & Tamara Cofman Wittes, a Senior Fellow in Foreign Policy at the Brookings Institution and U.S. Deputy Assistant Secretary of State for Near Eastern Affairs from 2009-2012. [America’s Middle East Purgatory: The Case for Doing Less, Foreign Affairs, January/February 2019, 98(1)]//BPS

LESS RELEVANT REGION In response to the Iraq war, the United States has aimed to reduce its role in the Middle East. Three factors have made that course both more alluring and more possible. First, interstate conflicts that directly threatened U.S. interests in the past have largely been replaced by substate security threats. Second, other rising regions, especially Asia, have taken on more importance to U.S. global strategy. And third, the diversification of global energy markets has weakened oil as a driver of U.S. policy. During the Cold War, traditional state-based threats pushed the United States to play a major role in the Middle East. That role involved not only ensuring the stable supply of energy to Western markets but also working to prevent the spread of communist influence and tamping down the Arab-Israeli conflict so as to help stabilize friendly states. These efforts were largely successful. Beginning in the 1970s, the United States nudged Egypt out of the pro-Soviet camp, oversaw the first Arab-Israeli peace treaty, and solidified its hegemony in the region. Despite challenges from Iran after its 1979 revolution and from Saddam Hussein’s Iraq throughout the 1990s, U.S. dominance was never seriously in question. The United States contained the Arab-Israeli conflict, countered Saddam’s bid to gain territory through force in the 1990–91 Gulf War, and built a seemingly permanent military presence in the Gulf that deterred Iran and muffled disputes among the Gulf Arab states. Thanks to all these efforts, the chances of deliberate interstate war in the Middle East are perhaps lower now than at any time in the past 50 years.

### \*AT: Saudi

#### No Saudi prolif.

Ian **Stewart &** Dominic **Williams 15**. Senior Research Fellows in the Department of War Studies at King’s College London. 05-23-15. “Is Saudi Arabia trying to get nuclear weapons?” Telegraph. http://www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/11617339/Is-Saudi-Arabia-trying-to-get-nuclear-weapons.html

Perhaps the main strategic driver relates to the P5+1’s nuclear negotiations with Iran. Saudi Arabia is one of Iran’s main regional competitors and there have long been concerns that if Iran acquired nuclear weapons other countries in the region would follow. Iran is not on the brink of acquiring nuclear weapons, however, and the negotiations currently taking place with a deadline of mid-summer could leave Iran even further from nuclear weapons than it has been for the last several years. In this context, it is important to note that the Saudi leadership has generally expressed approval for a nuclear deal with Iran. If the negotiations with Iran have triggered a renewed interest in nuclear weapons in Saudi Arabia, it is perhaps more likely that the Saudi royals are seeking to use their apparent interest in acquiring them in order to influence the negotiations rather than seeking nuclear weapons for their own use. It is also possible that Saudi’s calculus regarding nuclear weapons has changed for other reasons. One possible reason for this could be changes in the country’s leadership. King Salman’s enthronement has brought changes to the country’s approach to foreign policy and the appointment of the his son as defence minister has resulted in the country taking unusually bold action against Iran-backed forces in Yemen. It cannot be ruled out that the new leadership, unafraid of bold policy choices in pursuit of the country’s international security goals, could also decide to acquire nuclear weapons. Even if Saudi was to decide to do so, however, it is far from clear that the country is capable of acquiring nuclear weapons. After all, the country’s own nuclear infrastructure is nascent and orientated towards civil purposes. More plausibly, following a deal between the P5+1 and Iran, Saudi Arabia could seek to exercise the same right to enrich uranium that Iran claims for its own program as part of a nuclear hedging strategy. Supplier restraint in relation to transfers of enrichment technology mean that it is unlikely that Saudi could buy such a capability outright. The country does have some of the prerequisite industry to embark on an indigenous effort, however, which would be a longer term proposition (likely lasting some decades). The second possibility would be for Saudi to acquire weapons ‘off the shelf’ from Pakistan. The likelihood of this scenario is difficult to quantify: certainly, Pakistan and Saudi Arabia have a unique relationship. However, would Pakistan be willing to proliferate? Pakistan is still struggling to overcome the damaged international reputation it suffered as a result of the actions of AQ Khan, who passed on the country’s uranium enrichment and possibly nuclear weapons designs to at least three countries include Libya, Iran and North Korea. Pakistan has enacted a systematic export controls to prevent such a recurrence (although there is some question about how well this system functions as it is understood that no licences for authorised transfers of any nuclear technology have been granted). It is also likely that Chinese pressure would restrain Pakistan from transferring nuclear weapons to Saudi Arabia: China is currently subject to intense diplomatic pressure over its decision to sell nuclear reactors to Pakistan. Should an egregious nuclear transfer take place from Pakistan, the prospects of such civil nuclear cooperation, which is important to Pakistan’s own development, would be bleak. Finally, there are also practical hurdles over transferring nuclear weapons from Pakistan to Saudi Arabia (perhaps the least of which is the US 5th fleet).

#### Even if prolif occurs, no impact.

John **Mueller 18**. Adjunct Professor of Political Science and Woody Hayes Senior Research Scientist at Ohio State University and a Senior Fellow at the Cato Institute Nov/Dec 2018 https://www.foreignaffairs.com/articles/2018-10-15/nuclear-weapons-dont-matter

HOW ABOUT PROLIFERATION AND TERRORISM? Great powers are one thing, some might say, but rogue states or terrorist groups are another. If they go nuclear, it’s game over—which is why any further proliferation must be prevented by all possible measures, up to and including war. That logic might seem plausible at first, but it breaks down on close examination. Not only has the world already survived the acquisition of nuclear weapons by some of the ~~craziest~~ [most reckless] mass murderers in history (Stalin and Mao), but proliferation has slowed down rather than sped up over time. Dozens of technologically sophisticated countries have considered obtaining nuclear arsenals, but very few have done so. This is because nuclear weapons turn out to be difficult and expensive to acquire and strategically provocative to possess. They have not even proved to enhance status much, as many expected they would. Pakistan and Russia may garner more attention today than they would without nukes, but would Japan’s prestige be increased if it became nuclear? Did China’s status improve when it went nuclear—or when its economy grew? And would anybody really care (or even notice) if the current British or French nuclear arsenal was doubled or halved? Alarmists have misjudged not only the pace of proliferation but also its effects. Proliferation is incredibly dangerous and necessary to prevent, we are told, because going nuclear would supposedly empower rogue states and lead them to dominate their region. The details of how this domination would happen are rarely discussed, but the general idea seems to be that once a country has nuclear weapons, it can use them to threaten others and get its way, with nonnuclear countries deferring or paying ransom to the local bully out of fear. Except, of course, that in three-quarters of a century, the United States has never been able to get anything close to that obedience from anybody, even when it had a nuclear monopoly. So why should it be true for, say, Iran or North Korea? It is far more likely that a nuclear rogue’s threats would cause its rivals to join together against the provocateur—just as countries around the Persian Gulf responded to Saddam’s invasion of Kuwait by closing ranks to oppose, rather than acquiescing in, his effort at domination.

## Advantage 2---Conduct

### \*1NC---Monopoly Inevitable

#### Monopolization’s inevitable due to network effects and market structure

Sukhayl Niyazov 20, independent writer, bylines in The National Interest, City Journal, Foundation for Economic Education, Law & Liberty, and other publications, 2/27/20, “Don’t Break Up Big Tech,” https://medium.com/swlh/dont-break-up-big-tech-fb17590f30f1

The main problem with tech giants is that they represent natural monopolies. A natural monopoly is a monopoly that results from high barriers to entry to the market.

Put simply, because the costs of production are high, only large companies can be profitable, when a large number of customers bring enough profits to cover the costs of production.

There is a point where companies can reap the benefits of “economies of scale” and they are even ready to make initial losses to maximize later gains (as Amazon did for its first seven years of operation, when it accumulated $2 billion in debt, and also FedEx, ESPN, Tesla, Spotify, Uber, and many others).

That is why the majority of digital platforms are natural monopolies. They can be profitable only in the economies of scale — and thus they often take the majority of the market. Therefore, breaking them up would eliminate their most fundamental advantage and hamper their ability to bring benefits to consumers and the economy in general.

In the data-driven economy, the process of monopolization is inevitable. This is because of AI algorithms’ dependency on data. The more data available, the better the algorithms are. If a particular company gains an early upper hand, it will, in most cases, dominate the market. First, even a slightly better product will attract more customers. In turn, more users will supply more data. Then, more data will amplify AI algorithms. Finally, improved algorithms will make the user experience even better and even more, customers will choose this company — which will create even more activity, ad infinitum. Monopolization is thus an inherent characteristic of the AI industry.

As The Economist has put it,

… a full-scale break-up would ~~cripple~~[constrain] the platforms’ economies of scale, worsening the service they offer consumers. And even then, in all likelihood one of the Googlettes or Facebabies would eventually sweep all before it as the inexorable logic of network effects reasserted itself.

Apart from economic reasons, there are geopolitical incentives not to break up Big Tech. In China, top AI companies (Baidu, Huawei, Alibaba, Tencent) have very strong ties with the central government. They enjoy unrivaled and unchallenged positions thanks to Beijing’s full support and are allowed to harvest personal data without any constraints, regardless of privacy concerns. If Washington breaks up its tech companies, its efficiency will be severely harmed and it will be very difficult for the US to compete with Chinese tech behemoths in the global market.

If the US wants to reinforce its global technological dominance, we must assist Big Tech, not undermine it.

Big Tech is not a threat; it is inevitable aftermath of technological evolution. Trying to break it up will not only restrict innovation and growth but will also entail severe geopolitical risks. It is critical to adopt a more balanced and pragmatic approach to dealing with Big Tech.

### \*1NC---AT: Kill Zones/Killer Acquisitions

#### No kill zone or killer acquisitions, and the CWS can adequately protect innovation

Joe Kennedy 20, senior fellow at the Information Technology and Innovation Foundation, 11/9/20, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?,” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones

Large Internet platforms such as Amazon, Apple, Facebook, and Google have attracted increased regulatory attention over the past several years. Most recently, the Democratic majority in the Subcommittee on Antitrust, Regulatory, and Administrative Law of the U.S. House of Representatives Committee on the Judiciary culminated a 16-month investigation of competition in digital markets by issuing a report calling for significantly greater regulation of these companies.

One argument made against large technology companies is that they limit innovation, either by acquiring start-ups in order to terminate the development of innovations that threaten their continued dominance (“killer acquisitions”) or by creating areas of the market in which they exert dominance to the extent others won’t invest in these areas (“kill zones”). Either way, large tech companies supposedly limit prospective challengers from being able to take root and grow, thereby limiting not only competition but overall U.S. innovation.

In fact, acquisitions may be beneficial, at least to innovation, if they allow the larger firm to benefit from economies of scale or network effects, and enable the smaller firm to reach many more customers much more quickly with a higher quality product. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest. Making it more difficult for them to sell might make it harder for promising firms to find funding.

And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler, guiding entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate usually mature products offered by large firms that benefit from economies of scale or network effects? It is better for society if new companies concentrate instead on other markets they can break into. Indeed, that seems to be occurring as venture capital investment, especially in early-stage deals, has grown significantly over the last decade, indicating that there is no shortage of innovation opportunities. Although the areas of investment have shifted in response to market developments, this reflects the natural evolution of Internet platforms, rather than a pernicious attempt to stifle competition or innovation.

In either case, regulators already have sufficient powers to protect competition. The current focus on consumer welfare adequately incorporates concerns about innovation. While antitrust authorities going forward probably should broaden their review of acquisitions by dominant companies, there is no need to significantly change antitrust statutes or embrace structural remedies such as structural separation or breakups, as these would likely slow innovation and harm consumers.

#### Any firm that acquired competitors to kill innovations would stagnate and lose out

Joe Kennedy 20, senior fellow at the Information Technology and Innovation Foundation, 11/9/20, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?,” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones

As in much of the anti-monopoly movement’s criticism of technology industries, the critique of killer acquisitions does not reflect the unique nature of technology industries, wherein continued innovation is key and product platforms are complex and require many different components, often ones that companies simply do not have capabilities in. As Edward Roberts and Wenyun Kathy Liu wrote in 2001:

The most dramatic change in global technological innovation—the movement toward externally oriented collaborative strategies that complement internal research-and-development investments—began more than a decade ago. Today companies use alliances, joint ventures, licensing, equity investments, mergers and acquisitions to accomplish their technological and market goals over a technology’s life cycle.20

Unlike most other industries, the large Internet companies have plenty of cash to invest in new research. Their markets also experience rapid technological innovation that threatens to displace them if they do not continue to offer a better service than their rivals. The high capacity for internal investment reduces the need for venture capital. But the dynamic nature of the markets ensures continuous innovation, even without entrants. A market leader that merely buys up companies to protect itself from having to innovate will soon be eclipsed by the next new thing. This is part of the reason these companies spend significantly more on research as a portion of their revenue than virtually any other public companies in the world.21

This is why, despite expressing many concerns about the competitive threat posed by large Internet firms, a recent report for the European Commission urges caution in toughening merger policy for digital companies:

In the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them.22

Likewise, economist Luis Cabral argued that several features of digital platforms make acquisitions a more attractive form of technology transfer.23 First, the evolution of business models is much harder to predict. Partly for this reason, preemptive actions are difficult to judge given the poor definition of markets and the uncertainty in identifying future rivals. Second, intellectual property is more difficult to protect than in markets such as pharmaceuticals. As a result, companies cannot be sure of what they are licensing. Nor can they be confident that a rival will not simply copy their technology for free. Cabral noted that, out of hundreds of mergers completed by these companies over the last decade, only a handful typically attract any criticism. As an anecdote, he mentioned Alta Vista’s refusal of an offer to purchase Google for $1 million. He pointed out that Google’s substitutability and superiority was not apparent at the time. In fact, two years later, Alta Vista still had more than double Google’s market share

### 1NC---AT: Cyber-Attacks

#### 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 retaliate

on. 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.

#### No cyber impact---non state actors lack capability, Russia and China don’t have an incentive.

Lewis 20 – (James A., PhD, a senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies (CSIS), Before joining CSIS, Lewis worked at the Departments of State and Commerce as a foreign service officer and as a member of the Senior Executive Service, a political advisor to the U.S. Southern Command for Operation Just Cause, the U.S. Central Command for Operation Desert Shield, and the Central American Task Force. Lewis served on the U.S. delegations to the Cambodian peace process and the Permanent Five talks on arms transfers and nonproliferation, and he negotiated bilateral agreements on transfers of military technology to Asia and the Middle East. He led the U.S. delegation to the Wassenaar Arrangement Experts Group on advanced civilian and military technologies. Lewis led a long-running Track 2 dialogue on cybersecurity with the China Institutes of Contemporary International Relations. He has served as a member of the Commerce Spectrum Management Advisory Committee, the Advisory Committee on International Communications and Information Policy, and the Advisory Committee on Commercial Remote Sensing and as an advisor to government agencies on the security and intelligence implications of foreign investment in the United States, 2020, “Dismissing Cyber Catastrophe,” [accessed 8/30/20], <https://www.csis.org/analysis/dismissing-cyber-catastrophe>, see)

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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. 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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.

## Adv 3

### 1NC---Turn (Gradualism)

#### Gradualism is key---plan causes massive false positives.

David E. Wheeler et al. 17. Verizon Communications Inc. Thomas R. McCarthy, Counsel of Record and Bryan K. Weir, Consovoy McCarthy Park PLLC. “Brief Amicus Curiae of Verizon Communications Inc. In Support of Neither Party”. https://www.supremecourt.gov/DocketPDF/16/16-1454/23911/20171214135834771\_16-1454%20Ohio%20et%20al.%20v.%20American%20Express%20Company%20et%20al..pdf

The costs of erroneous judicial decisions are substantial: “False positives and false negatives are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review: False positives and false negatives may chill beneficial conduct by other economic actors (potentially in other industries) that must comply with the rule; these errors may also fail to deter harmful conduct by other economic actors to which the same rule would apply.” Baker, supra, at 5-6.

Because erroneous decisions “can deter conduct that may be desirable, or prevent challenges to undesirable conduct,” Popofsky, supra, at 449, when enforcing the Sherman Act, the Court should rule on the basis of the facts in a given case rather than make broad pronouncements on novel issues of antitrust law that may proscribe (or endorse) categories of activity for all time. The Court’s gradual move away from per se liability with regard to vertical restraints reflects just such a cautionary approach. See Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 901 (2007) (“In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints.”); see also State Oil Co. v. Khan, 522 U.S. 3 (1997); Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988); Cont’l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

In order to avoid harming the consumer public, the Court should follow a policy of “nonintervention” when it is unclear whether particular market activity is pro- or anti-competitive. Robert H. Bork, The Antitrust Paradox 133 (1978). This is especially true in the context of novel markets and business arrangements where courts “are forced to formulate doctrine in the dark.” Devlin & Jacobs, supra, at 83.

#### The thesis of their advantage is wrong.

Alden Abbott 21. Senior research fellow at the Mercatus Center, focusing on antitrust issues. He previously served as the Federal Trade Commission’s General Counsel from 2018 to early 2021. 3/31/21. “Four Reasons to Reject Neo-Brandeisian Critiques of the Consumer Welfare Approach to Antitrust.”

First, the underlying assumptions of rising concentration and declining competition on which the neo-Brandeisian critique is largely based (and which are reflected in the introductory legislative findings of the Competition and Antitrust Law Enforcement Reform Act [of 2021, introduced by Senator Klobuchar on February 4, lack merit]. Chapter 6 of the 2020 Economic Report of the President, dealing with competition policy, summarizes research debunking those assumptions. To begin with, it shows that studies complaining that competition is in decline are fatally flawed. Studies such as one in 2016 by the Council of Economic Advisers rely on overbroad market definitions that say nothing about competition in specific markets, let alone across the entire economy. Indeed, in 2018, professor Carl Shapiro, chief DOJ antitrust economist in the Obama administration, admitted that a key summary chart in the 2016 study “is not informative regarding overall trends in concentration in well-defined relevant markets that are used by antitrust economists to assess market power, much less trends in concentration in the U.S. economy.” Furthermore, as the 2020 report points out, other literature claiming that competition is in decline rests on a problematic assumption that increases in concentration (even assuming such increases exist) beget softer competition. Problems with this assumption have been understood since at least the 1970s. The most fundamental problem is that there are alternative explanations (such as exploitation of scale economies) for why a market might demonstrate both high concentration and high markups—explanations that are still consistent with procompetitive behavior by firms. (In a related vein, research by other prominent economists has exposed flaws in studies that purport to show a weakening of merger enforcement standards in recent years.) Finally, the 2020 report notes that the real solution to perceived economic problems may be less government, not more: “As historic regulatory reform across American industries has shown, cutting government-imposed barriers to innovation leads to increased competition, strong economic growth, and a revitalized private sector.”

### \*1NC---Turn

#### The plan sends a protectionist shockwave that ends the last semblance of global free trade

Allison Murray 19, JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Former Corporate Paralegal at Boeing, Degree in Economics and Management from the University of Oxford, “Given Today's New Wave of Protectionism, Is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?”, Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Winter 2019, p. 117-119

INTRODUCTION

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents. 1They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The "our country first, world trade after" mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized. 2

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. [\*118] Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders' best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law. 3So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States ("U.S."), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally. 4To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes. 5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions [\*119] that could counteract that progress. 6Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization ("WTO"), "once formal trade barriers come down, other issues become more important." 7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

### AT: Econ Impact---1NC

#### No economy impact

**Walt 20** -- Stephen Walt, International Relations Professor at Harvard University. [Will a Global Depression Trigger Another World War? 5-13-20, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/]

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

# 2NC---Round 5---Harvard

## 2NC---Regulations CP

### 2NC---O/V

### 2NC---AT: Perm Do Both

#### 2---“Do both” is antitrust duplication---the disputes collapse resources, effectiveness, and signaling

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Disputes over clearance can have tangible adverse effects on enforcement. First, some have commented that delays caused by clearance disputes can narrow the efficacy of remedial options, particularly with mergers. As Sen. Richard Blumenthal has commented, “The Big Tech companies are not waiting for the agencies to finish their cases. They are structuring their companies so that you can’t unscramble the egg.” Structural remedies are favored by Delrahim, who has commented that alternative, behavioral remedies should be used sparingly: “The division has a strong preference for structural remedies over behavioral ones. … The Antitrust Division is a law enforcer and, even where regulation is appropriate, it is not equipped to be the ongoing regulator.”

Second, disputes over clearance and, more so, duplicative investigations waste agency resources, threaten to blunt their effectiveness, and can lead to inconsistent and confusing governmental positions. In the Sept. 17 oversight hearing, Simons and Delrahim were both criticized for requesting an increase in funding: “As you both acknowledged, both of you could use, and desperately need, more resources. That being the case, it makes no sense to me that we should have duplication of effort, when that has a tendency inevitably to undermine the effectiveness of what you’re doing.” Duplicative investigations dilute the specialization that is a principal goal of the agencies’ clearance agreement and raise the risk that one agency will take legal positions that undercut the other. No doubt the DOJ’s amicus brief in the Qualcomm case influenced the U.S. Court of Appeals for the Ninth Circuit’s decision to issue a stay pending appeal.

So how will the FTC and DOJ resolve their latest turf war? Perhaps they will revisit their clearance agreement and decide to split their authority by company or the business practice being investigated, based on prior agency experience, rather than by industry as Appendix A currently does. Or maybe Congress will decide to consolidate civil antitrust enforcement jurisdiction under one agency. That seems like a long shot considering the political implications. However, during the Senate’s antitrust oversight hearing, Sen. Josh Hawley proposed “cleaning up the overlap in jurisdiction by removing it from one agency” and “clearly designating enforcement authority to one agency.” One thing is sure—the agencies should not be duplicating civil antitrust investigations. Stay tuned.

### 2NC---AT: CP Text is Wrong

### 2NC---AT: Antitrust Key---2AC Shelanski

#### At worst, Links back to the Aff---Shelanski says that both types are bad—Emory is yellow.

2AC Shelanski, JD, PhD, Professor @ the Georgetown University Law Center, Partner, Davis Polk & Wardell, former ORIA Administrator, former FCC Chief Economist, former Director of the FTC Bureau of Economics, ‘13

(Howard, “Information, Innovation, and Competition Policy For The Internet,” University of Pennsylvania Law Review, May 2013, Vol. 161, No. 6)

Competition enforcers could adopt a number of approaches to these mixed results depending on whether the changes are on balance more beneficial than harmful, or depending on whether the harms are intentional or not. Both inquiries, however, run the risk of calling into question company's best judgment about how to engineer its own products. Finding that an innovation—say a new proprietary interface or product integration is anticompetitive because the value of the innovation to consumers deemed ex post to be outweighed by the costs of competitive exclusion cause firms to hesitate to make beneficial product changes. Knowing the firm could be punished for the effects the innovation has on rivals if the innovation does not turn out well (or perhaps turns out too well for compet itors' tastes), the firm will raise the required ex ante probability of success and undertake fewer R&D efforts. Similarly, punishing a firm that has or mixed motives for undertaking innovation might harm consumers deterring product changes that benefit consumers despite the firm's partly anticompetitive motives.

Absent compelling evidence, then, caution and modesty in enforcement are warranted in this area. This prescription comes not from a glib hope that competition or innovation will somehow eradicate any harm, but from risk that intervention is as likely to make things worse as to make things better. Some have advocated for a government regulatory body to evaluate search algorithms and other intermediary behavior on the Internet.112 There are compelling reasons to be very skeptical of interposing such a government review process into the ongoing and demanding process of private innovation. Algorithms change quickly and must adapt to gaming manipulation by those seeking to profit from online search.113 Regulators are certain to know less about a new technology than those who invent work with it daily. Moreover, regulatory processes and related litigation will inevitably become part of rivals' competitive strategy, distracting resources from competition and innovation in the marketplace. A much better course is for government to give a wide berth to innovation, even where the firm's intentions may not seem benevolent and where the conduct may appear harm competition at the same time that it benefits consumers. And where there is a compelling case for harm, ex post intervention on a case-by-case basis through antitrust law is preferable to general regulation in this context.

This wide berth does not, however, mean we should abandon enforcement or place all purportedly innovative conduct beyond the reach of antitrust law. Microsoft 7/114 gave significant deference to product innovation and integration, but clearly left open the door to a finding that such activity was a ruse or pretext for anticompetitive exclusion. It allowed for antitrust liability where a product innovation was not in some way different and better than what a consumer could do for himself, thereby preserving anticompetitive tying as a possible claim against a software platform.115

Generalizing from the Microsoft II decision, where innovation was clearly a pretext for harming rivals or for deterring rival innovation, competition enforcement should be available. Two kinds of conduct which digital platforms have been accused of undertaking would appear to harm innovation without constituting legitimate innovation: raising rivals' costs and forced free riding.

### 2NC---AT: Platform Conduct/Innovation---2AC Hovenkamp

#### Solves best and doesn’t harm innovation---its not antitrust law.

Natasha Sarin 20. Assistant Professor of Law, the University of Pennsylvania Carey Law School; Assistant Professor of Finance, the Wharton School of the University of Pennsylvania. “What’s in Your Wallet (and What Should the Law Do About It?)”. The University of Chicago Law Review. https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/Sarin\_Wallet\_87UCLR553.pdf

IV. A SOLUTION: CONSUMER FINANCIAL PROTECTION AS AUTHORITY

A. Broadening the Conception of Consumer Harm

Despite legitimate critiques, the AmEx decision is law and has implications at the very least for all platforms that facilitate “single, simultaneous transaction[s].”127 Future antitrust litigation will have to consider both sides of the market in determining whether a platform’s pricing is anticompetitive.

It is worth remembering that consideration of both sides of the market—although disfavored by some antitrust scholars—fits with economists’ view of platforms. As discussed above, what distinguishes two-sided markets from one-sided markets is that the intermediary chooses not only a price but also a price structure. Thus, two-sided platforms often use one side of the market as a loss leader and the other as a profit center. The mere observation that price levels are high and rising on one side of the market does not indicate a failure of competition. An increase in price on one side of the market could be to collect monopoly rents (as the plaintiffs in AmEx suggest) or it could be in response to changes in elasticities on the consumer side of the market that require AmEx to give even more generous rewards to maintain its customer base. Therefore, it is difficult in this context to think of price increases as direct proof of harm as plaintiffs and the District Court assert.128

Regardless of the merits, it is clear that as long as the AmEx precedent governs, it will be more challenging for two-sided platforms to use antitrust to rein in card networks. In the first stage of the rule-of-reason inquiry, a plaintiff alleging a vertical restraint will have to show that the harm on one side of the market (for networks like Discover that cannot compete because of antisteering provisions) is not outweighed by benefit on the complementary side of the market (that is, AmEx customers get attractive rewards). To take a series of relevant examples: it will be hard to bring an antitrust case against ride-sharing platforms for under-paying drivers without showing that this harm is not offset by consumer benefit, and Amazon “can continue to squeeze the suppliers and retailers reliant on its platform with little worry about being charged with the abuse of monopsony power.”129

Beyond the legal difficulties with using antitrust to rein in two-sided platforms going forward, there are conceptual issues as well. It is not clear that competition policy is the right tool to address concerns about platform pricing. There are myriad issues with merchants not being able to steer/surcharge consumers for using more expensive forms of payment. One issue, which the AmEx discussion focuses on, is that these restraints can impede competition and restrict credit consumers from bargaining with merchants for surplus if costs are lower when steering is permitted.

That is true, but it misses another kind of consumer harm— to a consumer who is not in this credit card market at all. Imagine two consumers buy $100 worth of groceries. One pays with a debit card (with low processing fees) and one with an AmEx. The inability to steer or surcharge the AmEx consumer leads to uniform pricing in this retail market—despite the fact that merchants pay only $0.22 to process the debit transaction and $2.00 to process the credit card transaction. In a perfectly competitive market with no restraints on merchant pricing, price will be the marginal cost of providing groceries to each consumer—meaning the price for the card user will be adjusted to capture the extra $1.78 in processing fees. Antisteering provisions prohibit such price adjustment.

The antisteering restraints at issue in AmEx mean that, practically, merchants that accept credit cards must decide from a set of second-best alternatives: They can price as they would have if transaction costs were zero and pay transacting fees out of their revenue; they can lower prices and hope sales volume, and thus profits, will rise enough to cover their transacting costs; or they can raise prices for all consumers, regardless of the payment instrument used. They could also refuse to accept cards issued by high-cost networks, but merchants argue that this is a false choice because they risk losing their consumer base if they do not accept rewards cards. It is especially difficult to reject AmEx cards because AmEx’s business model is premised on providing valuable rewards to wealthy consumers who transact frequently. This is an especially important customer segment for merchants. Importantly, the option unavailable to merchants is price differentiation depending on the kind of card consumers use.

Profit margins in the retail industry average around 2 percent.130 Credit interchange rates for grocers are also in the range of 1–1.5 percent for basic cards, and even higher for rewards cards.131 This means that interchange is a very large portion of retail margins—in many cases, their second-highest cost of operating after labor132—so simply paying transaction fees out of profits is not a viable option for retailers.133 Instead, as merchants themselves point out, these high costs of interchange are “reflected” in the high retail prices that consumers pay.134

The inability to adjust prices to reflect the costs of interchange harms consumers in two ways. First, within the credit card transaction, card users are “deprived of the right, as economic actors, to decide for themselves whether the benefit of rewards is worth increased prices.”135 Practically, this leads to an overuse of credit cards because consumers do not internalize the actual cost of credit when making the transacting decision. Professor Adam Levitin makes this point: “[C]onsumers never internalize the costs of their choice of payment system. Merchant restraints thus encourage more credit card transactions at higher price than would occur in a perfectly efficient market.”136

Second, restraints on merchant price discrimination harm consumers because they lead to cross subsidization by those who transact with cheaper payment instruments (cash, check, debit) of those who transact with credit, who tend to be richer and more financially sophisticated.137

The cross subsidization of credit users by their non-credit counterparts has devastating consequences. It is regressive: in the extreme, “a lower-income shopper who pays for his or her groceries with cash or through [food stamps] . . . is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base.”138 The magnitude of this cross subsidy is significant; every year, households who earn more than $150,000 annually receive an estimated subsidy of $756 from households earning less than $20,000 through credit card rewards.139 But the harm to these consumers from contractual and legal barriers to differentiated retail pricing cannot be captured by antitrust analysis because they are outside of the credit card market, however broadly it is defined.140

The cross subsidization by cash and check consumers of their credit counterparts means that, absent any antitrust considerations, the merchant restraints at the heart of the AmEx decision can be reined in on consumer protection grounds.141

B. UDAAP Authority

Section 1031 of the Dodd-Frank Act provides the CFPB with the authority to intervene to prohibit “unfair, deceptive, or abusive acts or practices” (UDAAPs).142 Practices can be unfair, deceptive, and abusive, but each is governed by a different standard. If the CFPB observes a UDAAP, it can proceed by commencing litigation in a federal court or before an administrative law judge under the Administrative Procedure Act.143

#### Solves best.

Natasha Sarin 20. Assistant Professor of Law, the University of Pennsylvania Carey Law School; Assistant Professor of Finance, the Wharton School of the University of Pennsylvania. “What’s in Your Wallet (and What Should the Law Do About It?)”. The University of Chicago Law Review. https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/Sarin\_Wallet\_87UCLR553.pdf

Economists and antitrust scholars have long debated how best to assess competition in two-sided markets, which are distinct from traditional markets because platforms must choose both a price and a price structure. Practically, in two-sided markets, high or rising prices on one side of the market are not necessarily indicative of an anticompetitive market failure. Instead, consideration of total revenue and total cost on both sides of the market is necessary, lest we mistakenly apply one-sided logic to two-sided markets.

The Supreme Court’s decision in AmEx embraced this broader market definition, shifting the antitrust paradigm for platform cases. Despite resounding criticism by eminent antitrust scholars, AmEx is law and makes it unlikely that antitrust is the most promising tool to rein in two-sided platforms going forward.

This Essay advocates that, at least in the payments market, consumer protection authority is best equipped to tame this twosided market. Dodd-Frank provided the CFPB with broad authority to restrict “unfair, abusive, or deceptive” acts and practices. The antisteering provisions at the heart of AmEx are unfair both to consumers in the credit card market—who lose out on potential retail savings from using lower-interchange cards—and consumers outside of the credit card market, who subsidize the rewards that credit users receive. This regressive cross subsidization is an important consequence of card networks’ pricing practices, but one that antitrust necessarily ignores in its focus on narrowly defined product markets. Of course, the payments market is but one example of a twosided platform implicated by the Court’s recent decision in AmEx.

It will be harder to bring antitrust cases against Uber, eBay, and Amazon as well, or against essentially any two-sided market where there is a “simultaneous transaction” that links both sides. The CFPB’s authority is not a panacea because its power is limited to providers of consumer financial services. That said, the general push of this Essay—to broaden our conception of a two-sided market—applies to platforms beyond payment networks. Just as it is a mistake to consider one-side of a two-sided market in isolation, it is a mistake to think of one set of consumers in isolation. Determining whether a market is well or poorly functioning requires engaging with externalities—both positive and negative—on consumers outside of the market. Consumer protection, rather than competition policy, is well suited to this far-reaching analysis.

#### No solvency for platform misuse: their card concludes antitrust isn’t sufficient.

1AC Stucke 18 is a co-founder of The Konkurrenz Group and a law professor at the University of Tennessee (Maurice, “Here Are All the Reasons It’s a Bad Idea to Let a Few Tech Companies Monopolize Our Data,” <https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data>)

Limiting the Power of Data-opolies

Upon closer examination, data-opolies can actually be more dangerous than traditional monopolies. They can affect not only our wallets but our privacy, autonomy, democracy, and well-being.

Markets dominated by these data-opolies will not necessarily self-correct. Network effects, high switching costs for consumers (given the lack of data portability and user rights over their data), and weak privacy protection help data-opolies maintain their dominance.

Luckily, global antitrust enforcement can help. The Reagan administration, in espousing the then-popular Chicago School of economics beliefs, discounted concerns over monopolies. The Supreme Court, relying on faulty economic reasoning, surmised that charging monopoly prices was “an important element of the free market system.” With the rise of a progressive, anti-monopoly New Brandeis School, the pendulum is swinging the other way. Given the emergence of data-opolies, this is a welcomed change.

Nonetheless, global antitrust enforcement, while a necessary tool to deter these harms, is not sufficient. Antitrust enforcers must coordinate with privacy and consumer protection officials to ensure that the conditions for effective privacy competition and an inclusive economy are in place.

#### They don’t solve

Maurice E. 1AC Stucke 18, 1AC Author [“Should We Be Concerned About Dataopolies?” Georgetown Law Technology Review, Vol. 2, p. 275, 2018, https://georgetownlawtechreview.org/wp-content/uploads/2018/07/2.2-Stucke-pp-275-324.pdf]

With the divergence in antitrust enforcement, some claim bias and protectionism.19 Others argue that it is impossible to find any way in which consumers are being harmed when the services are free and constantly evolving.20 Given the European and U.S. divergence over dataopolies, Part I explores one possible factor: data-opolies, under antitrust’s consumer welfare standard, are seemingly benign. Data-opolies might have power upstream. Google and Facebook, for example, could conceivably dominate certain online advertising markets; Amazon could exert significant buyer power (for books and other products).21 But Amazon, while striking fear in many retail sectors and among suppliers, is generally viewed as offering consumers an array of low-cost products and services. Most of Google’s and Facebook’s services for consumers are ostensibly “free.” 22 Consequently, Robert Bork argued that there “is no coherent case for monopolization because a search engine, like Google, is free to consumers and they can switch to an alternative search engine with a click.”23

Data-opolies, unlike earlier monopolies, have not exercised their power by charging consumers higher prices. But this does not mean dataopolies are harmless. Digging deeper, Part II provides a taxonomy of potential harms by data-opolies. Among these potential harms are less privacy protection; less innovation and dynamic disruption in markets in which they dominate; and political, moral, and social concerns. Part III discusses why data-opolies may be more durable than some earlier monopolies.

The goal is not to vilify data-opolies. Not every dominant tech platform will have the incentive and ability to cause harm. Instead, one must understand the scope of harm data-opolies present, absent vigilant antitrust enforcement. This is critical because the DOJ has only brought one monopolization case under section 2 of the Sherman Act from 2000 onward.24 In contrast, between 1970 and 1972, the DOJ brought thirty-nine civil and three criminal cases against monopolies and oligopolies.25 This abdication is not justifiable going forward, given the risks that dataopolies pose not only to our wallets but also to our privacy, autonomy, democracy, and well-being.

### 2NC---AT: Harms Innovation---2AC Hovenkamp

#### Antitrust fails---only consumer protection solves.

Natasha Sarin 20. Assistant Professor of Law, the University of Pennsylvania Carey Law School; Assistant Professor of Finance, the Wharton School of the University of Pennsylvania. “What’s in Your Wallet (and What Should the Law Do About It?)”. The University of Chicago Law Review. https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/Sarin\_Wallet\_87UCLR553.pdf

In addition to practical difficulties deploying antitrust going forward, there are conceptual challenges as well. Despite our historical reliance on antitrust to rein in card networks, antitrust appears confused with respect to two-sided markets in a way that consumer protection authority does not, making the latter a more theoretically defensible means of taming two-sided platforms. In important ways, the traditional antitrust conception of the relevant market for scrutiny in platform pricing cases seems too narrow. Professor Jean Tirole, a Nobel Laureate who studies two-sided platforms, has argued that consideration of the pricing practices on only one side of a two-sided market is indefensible and can lead to distortionary regulation.26 And yet historically—until AmEx— this narrow inquiry was the antitrust paradigm. And with its focus on precise market definition, antitrust fails to consider the consequences for consumers outside of the narrowly defined market, who may well be (and in the case of payment cards, are) suffering harm that feels importantly relevant to our consideration of how functional this market is. Consumer protection authority allows us to defend intervention—not by misapplying “one-sided logic” to “two-sided markets,” as economists caution against27— but instead by embracing a broader definition of the market that appreciates that platform users create unavoidable externalities for all consumers, and these externalities (when sufficiently harmful) must be addressed.

## 2NC---Search Advantage

### 2NC---Gradualism Turn

### 2NC---OV

#### Encourages litigation---overwhelming false positives.

Neal Kumar Katyal et al. 18. Counsel of Record. Jessica L. Ellsworth and Eugene A. Sokoloff. Hogan Lovells US LLP. “Brief of Amicus Curiae the Computer & Communications Industry Association in Support of Respondents”. https://www.supremecourt.gov/DocketPDF/16/16-1454/28925/20180123144113794\_16-1454\_bsac%20CCIA%20FINAL.pdf

III. IGNORING THE EFFECTS OF MULTISIDEDNESS THREATENS INNOVATION

Without careful attention to the range of dynamics that multi-sided firms face in their operations, a decision in this case could inadvertently discourage innovation. Multi-sided firms have proliferated over the last two decades, bringing market participants together in ways that were never possible before and providing tremendous benefits to consumers and small businesses alike.

A rule that fails to account for dynamics of multisided firms and the interplay among the different sides of those markets would jeopardize these developments. Instead of a balanced assessment of their conduct in light of competitive realities, petitioners and the United States would subject multi-sided firms to a skewed analysis that may ignore some of the most significant competitive constraints they face.

This Court has warned that “[t]he cost of false positives” is an important consideration in crafting antitrust rules. Trinko, 540 U.S. at 414. A rule that deferred any consideration of multi-sidedness until after the plaintiff’s prima facie case would dramatically increase the risk of false positives, encourage meritless litigation, penalize healthy competition, and deter the development of valuable new products and services.

If, for example, a court could find market power based on the simple fact a multi-sided firm charges one set of customers a price that exceeds marginal cost, while providing services to another set of customers for free, it may prevent a video-streaming service (or traditional television network, for that matter) from attracting enough viewers to attract the highest quality content providers—even though the prices charged to both sides of the firm were reasonably related to the firm’s total variable costs. And if a court defined the relevant market for a travel-planning firm based only on the number of free users it attracted—ignoring the firm’s need to retain airlines as paying sellers—it could condemn as a monopoly a company that could not profitably adopt even a trivial increase in price.

Multi-sided firms such as some of CCIA’s members exemplify these phenomena: some base pricing and output decisions on the complex interrelationships between the various sides of the markets they serve. And they compete vigorously with each other and with single-sided businesses that serve the same customers. This Court’s precedents have consistently emphasized that the Sherman Act requires a focus on “actual market realities.” Kodak, 504 U.S. at 466. That maxim should guide the Court here.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

### 2NC---AT: No Link

#### 1---Precedents Turn---Precedents are bad

David E. Wheeler et al. 17. Verizon Communications Inc. Thomas R. McCarthy, Counsel of Record and Bryan K. Weir, Consovoy McCarthy Park PLLC. “Brief Amicus Curiae of Verizon Communications Inc. In Support of Neither Party”. https://www.supremecourt.gov/DocketPDF/16/16-1454/23911/20171214135834771\_16-1454%20Ohio%20et%20al.%20v.%20American%20Express%20Company%20et%20al..pdf

In the absence of guidance and practical experience in dealing with two-sided markets, the risk of error—false positives or false negatives—is great. And the cost of such errors is substantial; they “are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review.” Jonathan B. Baker, Taking the Error Out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right, 80 Antitrust L.J. 1, 5 (2015). Moreover, multi-sided markets vary wildly in their structures and in how their interdependent markets relate to each other. They thus are not susceptible to one-size-fits-all economic analysis. Accordingly, the Court should proceed cautiously here, deciding only the case before it on the facts presented, so as to minimize the possibility of error and avoid impairing the development of multi-sided markets.

#### SCOTUS ruling guarantees false positives---its bad

David E. Wheeler et al. 17. Verizon Communications Inc. Thomas R. McCarthy, Counsel of Record and Bryan K. Weir, Consovoy McCarthy Park PLLC. “Brief Amicus Curiae of Verizon Communications Inc. In Support of Neither Party”. https://www.supremecourt.gov/DocketPDF/16/16-1454/23911/20171214135834771\_16-1454%20Ohio%20et%20al.%20v.%20American%20Express%20Company%20et%20al..pdf

Judicial evaluation of market behavior to determine whether it is pro- or anti-competitive is a complex and difficult enterprise. There thus is a substantial risk of error in this arena. And the costs of such errors can be great. See Baker, supra, at 5-6; Mark S. Popofsky, Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules, 73 Antitrust L.J. 435, 449 (2006).

The stakes are particularly high in this Court, as any ruling

that extends past the conduct and parties in this case will endorse or restrain economic behavior across the country and preclude helpful percolation on those issues in the lower courts. See Popofsky, supra, at 449 (“Error costs can cause deviations from optimal deterrence because ‘a decision by a court will not only bind the litigating parties, but will also serve as precedent by which future conduct will be judged.’”) (quoting C. Frederick Beckner III & Steven C. Salop, Decision Theory and Antitrust Rules, 67 Antitrust L.J. 41, 51 (1999)). Accordingly, the Court should proceed with caution. Amicus respectfully requests that the Court refrain from issuing any broad pronouncements on novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

#### Flips precedent

Benjamin J. Horwich et al. 17 Benjamin J. Horwich and Justin P. Raphael. Munger, Tolles & Olson LLP. EVAN R. Chesler, Counsel of Record. Peter T. Barbur, Kevin J. Orsini, and Rory A. Leraris. Cravath, Swaine & Moore LLP. “Brief for American Express in Opposition” https://www.scotusblog.com/wp-content/uploads/2017/08/16-1454-amex-BIO.pdf

The court of appeals also followed settled precedent in holding that a relevant market must reflect the “commercial realities” facing consumers. See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482 (1992). Applying this rule, the court of appeals correctly held that the market here must “encompass the entire multi-sided platform”, including the cardholders whom the district court had excluded. Pet. App. 39a. This holding was premised on the very nature of the service that Amex and its competitors offer—as Petitioners themselves put it, “bring[ing] cardholder customers together with merchant customers for ordinary transactions”. Pet. i. The Government’s own expert economist similarly testified that “[i]t is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market.” Tr. 4037:15-20.

The district court’s decision to define the market in terms of merchants alone failed to account for the nature of the service that Amex competes to provide, and was therefore inconsistent with the purpose of market definition—“to identify the market participants and competitive pressures that restrain an individual firm’s ability to raise prices or restrict output”. Pet. App. 32a (quoting Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004)). And the argument that the NDPs have “thwarted” price competition fails for the same reason: it ignores the vigorous competition on the cardholder side of the market driven by cardholder benefits and services that are funded by merchant fee revenue. Given this uncontested interdependence between the two halves of the single product at issue, it is impossible to account for the nature of competition by looking at only half of the equation.

Contrary to Petitioners’ claims, the Second Circuit’s conclusion that the defined market in this case must include both sides is fully consistent with this Court’s precedent.

#### 2---False Positives Turn---Plan shreds settled law---creates undue false positives that increase costs for everyone.

Benjamin J. Horwich et al. 17 Benjamin J. Horwich and Justin P. Raphael. Munger, Tolles & Olson LLP. EVAN R. Chesler, Counsel of Record. Peter T. Barbur, Kevin J. Orsini, and Rory A. Leraris. Cravath, Swaine & Moore LLP. “Brief for American Express in Opposition” https://www.scotusblog.com/wp-content/uploads/2017/08/16-1454-amex-BIO.pdf

C. Anticompetitive Effects

The Second Circuit also applied well-settled rules for analyzing anticompetitive effects, holding that the Government “bore the initial burden to show that Amex’s NDPs have ‘an actual adverse effect on competition as a whole in the relevant market.’” Pet. App. 49a-50a (quoting K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995)).

The court of appeals explained that the Government could have met its initial burden under the rule of reason by showing “that cardholders engaged in fewer credit‐card transactions (i.e., reduced output), that card services were worse than they might otherwise have been (i.e., decreased quality), or that Amex’s pricing was set above competitive levels within the credit‐card industry (i.e., supracompetitive pricing).” Pet. App. 52a. Petitioners cited this same menu—reduced output, reduced quality and supracompetitive pricing—long offered by the courts of appeals. See, e.g., Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001) (“[W]hether an actual adverse effect has occurred is determined by examining factors like reduced output, increased prices and decreased quality.”) (cited at Gov’t C.A. Br. 65); Gordon v. Lewistown Hosp., 423 F.3d 184, 210 (3d Cir. 2005) (anticompetitive effects include “reduced output, raised prices or reduced quality”) (cited at Gov’t C.A. Br. 65), cert. denied, 547 U.S. 1092 (2006).

Applying this standard to the undisputed record, the Second Circuit correctly held that the Government had not met its burden of proving adverse effects. That record showed that “industry-wide transaction volume”—the undisputed measure of output in this market—“has substantially increased and card services have significantly improved in quality” with the NDPs in place. Pet. App. 52a. On that record, the Second Circuit correctly concluded the Government had not carried its burden. See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 237 (1993) (“Where, as here, output is expanding at the same time prices are increasing … a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.”).

Moreover, both courts below agreed that the record could not support a finding that Amex’s prices were supracompetitive, when accounting for both sides. See Pet. App. 209a (district court’s finding that the record did not provide “a reliable measure of [Amex’s] two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders”, or of Amex’s margins); Pet. App. 53a (similar conclusion from court of appeals).

Petitioners suggest that the court of appeals contradicted precedent by “shift[ing] to the Government the burden of disproving any procompetitive benefits”. Pet. 24. The supposed conflict is illusory. Under the rule of reason, a plaintiff always bears the burden to demonstrate competitive harm in “the product market as a whole”. Cont’l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 45 (1977) (citation omit- ted). The service that Amex competes to provide is completing payment transactions between a cardholder and a merchant—a service for which neither has any use unless the other does. Thus, Petitioners’ argument that a court need not account for cardholders is an invitation to misdefine the competition at issue.6 Petitioners rely on United States v. Topco Associates, 405 U.S. 596 (1972), for the proposition that restraining competition in “one sector of the economy” cannot be justified by “promot[ing] greater competition in a more important sector”. Pet. 25 (quoting 405 U.S. at 610). But cardholders do not exist in a separate “sector” of the economy from merchants for purposes of transacting through card networks, whose purpose is to bring them together. Supra at 2- 3.

Indeed, under this Court’s precedent, the interdependence of merchant and cardholder demand requires assigning burdens as the court of appeals did. As the Government’s expert testified: “[A]n assessment of market definition, market power and competitive effects should account for the two-sided nature of the market”. Tr. 4018:13-19. Evidence about the NDPs’ effect on merchant fees does not support a confident inference of harm to competition overall, because such effects necessarily will effect cardholders. Thus, the evidence on which Petitioners would stake their case is at least as consistent with healthy competition as anticompetitive effects. See Tr. 4037:15-20 (Government expert testifying: “It is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market.”); cf. Brooke Group, 509 U.S. at 237 (refusing to recognize anticompetitive effects where “rising prices are equally consistent with growing product demand”).

Condemning a restraint on such an ambiguous showing creates an unacceptable risk of false positives that “increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage”. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 894- 95 (2007); see also Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (“The cost of false positives counsels against an undue expansion of [antitrust] liability.”). The Second Circuit correctly refused the Government’s invitation.7

#### 3---Competition Turn---Key to prevent antitrust against actions that significantly benefit consumers.

Henry B. McFarland 17. Vice President, Economists Incorporated. “The Amex Decision and the Future of Antitrust for Two-Sided Platforms”. American Bar Association. Section of Antitrust Law https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2961348

Conclusion

After the Amex decision, antitrust plaintiffs will have to consider the effects of challenged behavior on both sides of a two-sided platform. As a result, antitrust enforcement will be more difficult but also better. By requiring a full analysis of the effects of challenged behavior on all groups of a platform’s customers, the decision may prevent actions against behavior that significantly benefits consumers.

#### 4---AmEx Stocks Turn---Plan collapses AmEx stocks.

Dan Caplinger 17. The Motley Foot. "3 Reasons American Express Company Stock Could Fall". Motley Fool. 6-14-2017. https://www.fool.com/investing/2017/06/14/3-reasons-american-express-company-stock-could-fal.aspx

3. Adverse litigation results could hurt the company

Finally, American Express has had to deal with litigation for years concerning its relationship with merchants. Earlier this month, the U.S. Department of Justice (DOJ) decided to drop its antitrust case against the card company, which had questioned whether American Express could ban merchants from encouraging their own customers to use cards from rival networks like Visa and MasterCard. After winning a lower-court decision, the government had its victory reversed at the appellate court level.

The DOJ decision resulted from its choice not to petition the Supreme Court for review of the appellate court judgment. However, several state governments had been parties to the litigation against American Express, and they have moved forward with filing for certiorari in asking the Supreme Court to hear the case. What if the Supreme Court hears the case and decides that the appellate court was incorrect in letting American Express off the hook? According to the card company, an adverse ruling could have a material downward impact on its business going forward.

American Express has done well lately, and its stock has reflected its recent success. Yet with so many issues outstanding, there's always the possibility that the rebound in AmEx shares could come to an abrupt end. Investors need to keep their eyes on these concerns to see if any of them grow into larger threats to the card company.

## 2NC---Platforms Advantage

### 2NC---No Spillover---Amex

#### Amex doesn’t prevent challenging big tech.

Ina Fried and David Mccabe 18. Ina Fried is the chief technology correspondent at Axios. She authors the daily Axios Login newsletter and brings years of Silicon Valley experience to offer a smart take on tech. David Mccabe writes about how tech is colliding with policy and politics. Can talk on encrypted chat on Signal or WhatsApp. "Makan Delrahim, Justice Department's antitrust cop, says Supreme Court ruling won't shield big tech". Axios. 6-26-2018. https://www.axios.com/makan-delrahim-in-aspen-1530038874-a289ad1a-012b-4ccb-9cb7-69658ee78c33.html

The top antitrust lawyer at the Department of Justice said Tuesday that he doesn't think a Supreme Court ruling earlier this week would make it more difficult to take on the biggest online platforms over competition concerns.

Why it matters: Critics of large tech companies worry the ruling in a case concerning credit card providers might offer Silicon Valley companies like Google, Facebook, Amazon and Uber protection from antitrust prosecution because they use so-called two-sided marketplaces to connect parties, such as buyers and sellers.

Speaking at the Aspen Ideas Festival, DOJ antitrust chief Makan Delrahim said he saw the ruling as a "sound decision" overall.

""I was more worried the Supreme Court would come up with a test [that would] cause harm to new business models like Uber and Airbnb," he said, saying that would have been a greater hardship to the economy than just losing this case.

Impact on Big Tech: Responding to a question from Axios, Delrahim said he didn't think the ruling would make it harder to go after Facebook and Google over competition concerns "for a couple of reasons."

First, he said, each case is specific to the facts. Second, the ruling doesn't treat all two-sided marketplaces alike. While it might help protect Uber and Airbnb, which directly connect two parties, Delrahim said he wasn't sure that Google and Facebook would see their businesses similarly affected.

Other companies, like Amazon, might find some parts of their business protected and others not.

"I think to the extent that it creates that transaction and you bring in third party sellers and buyers, they could benefit from that, but not in other areas of their business," he said.

Yes, but: Delrahim did say he thought that the ruling could limit antitrust enforcers' ability to take on Uber, Lyft, and Airbnb, but would not protect the companies in the case of criminal behavior, like price fixing.

The backdrop: The court ruled that, when considering an antitrust case involving some two-sided markets, authorities need to weigh whether there is competitive harm on all sides of the market. Allegedly anticompetitive behavior on one side of a business model wouldn't be actionable in some cases, Justice Clarence Thomas wrote in the court's opinion, if the whole picture wasn't anticompetitive.

#### The *AmEx* decision doesn’t apply to the vast majority of tech platforms and doesn’t change what conduct is allowed

The decision was limited to ‘transaction platforms’ that facilitate *simultaneous* interactions between both sides – like credit cards and rideshare apps – but that excludes Google, Facebook, etc

Tim Wu 18, the Julius Silver Professor of law at Columbia University Law School, 12/24/18, “The American Express Opinion, Tech Platforms & the Rule of Reason,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326667>

**Italics in original**

That’s the first point. The second concerns the future impact of the decision. The Supreme Court’s opinion does have one great merit as compared to the Second Circuit’s: it is narrow, indeed far narrower than some have suggested. In particular, claims that the decision “immunizes” the major tech platforms from antitrust scrutiny are incorrect.2 It seems clear that firms like Google, Facebook, and Twitter are not covered by the *American Express* opinion, as explained here.

It is true that an opinion creating rules for *all* two-sided platforms would have fundamentally changed much of antitrust law, by reaching so much of American commerce. For the concept of a two-sided platform is open-ended enough to conceivably describe businesses as diverse as malls, sports leagues, real estate agents, stock exchanges, and most tech platforms.3 The Second Circuit’s alarmingly open-ended ruling in favor of American Express shows the need for careful treatment in this area.4

But the Court emphasized that credit-card companies are so-called “transaction platforms,” a subset of two-sided platforms.5 The opinion goes on to define transaction platforms as those that can’t provide a service to one side of the market independently— those that, by necessity, facilitate a “simultaneous” interaction between the two sides.6 As such, according to the Court, transaction platforms only compete with other transaction platforms.7

That limitation makes American Express inapplicable to most major tech platforms as well as most of what are traditionally called “two-sided” platforms. Consider, for example, two firms of much interest in the present discourse: Facebook and Google. While both firms, roughly speaking, have business models based on bringing together different groups—advertisers and users—they don’t exist for the sole purpose of facilitating simultaneous transactions between the two. Users do plenty of things on Google or Facebook outside of transactions with advertisers, such as interacting with other platform users, conducting searches, and so on. For that matter, the American Express opinion would not cover a nightclub that offers a subsidized “ladies’ night”—the textbook example of a two-sided platform8 —given that the nightclub doesn’t facilitate a “simultaneous” transaction between the male and female customers, and offers more than just the facilitation of such transactions.

Of course, there are major tech platforms whose existence seems predicated on facilitating simultaneous transactions and little more. An obvious example is ride-sharing companies such as Uber, Lyft, and their brethren. However, that said, it is not entirely clear that American Express offers a defendant something ultimately all that different than what the defendant already might have presented as a pro-competitive justification under the rule-of-reason analysis. This further suggests that American Express is a case of limited long-term import.

#### It won’t immunize big tech---their ev is exaggerated fear-mongering

Hal Singer et al 18, Senior Fellow of the George Washington Institute of Public Policy; Michael Kades, Director, Markets and Competition Policy, Washington Center for Equitable Growth; Randy Picker, the James Parker Hall Distinguished Service Professor of Law at the University of Chicago; and Chris Sagers, Professor of Law at Cleveland-Marshall College of Law, 7/18/18, “Will the Supreme Court's Amex Decision Shield Dominant Tech Platforms From Antitrust Scrutiny?,” https://www.forbes.com/sites/washingtonbytes/2018/07/18/antitrust-enforcement-of-dominant-tech-platforms-in-the-post-american-express-world/?sh=55e559c82f76

Singer: A legitimate concern among plaintiffs attorneys and the New Brandeisian crowd is that antitrust defendants will try to exploit the special rule by characterizing themselves as the type of two-sided platform that qualifies for the special rule. For example, Lina Khan writes that “One can imagine the reams of studies Google would commission to show that targeting users with advertising did indeed amount to a ‘transaction’ with users that users highly valued — a showing that, if successful, would likely qualify it for the shield of the special rule.” How would the special rule apply to a dominant two-sided tech platform such as Google or Amazon? Does it apply differently in the advertising-support model (such as Google) than it does for a transaction platform, such as Amazon or Amex? Is there a basis in the law for such a difference if market power is identical?

Kades: Are Google or Facebook more like a newspaper, which the Court says does not fall into its special rule, or phone directory, which the literature says it should? That seems like a distinction courts will get wrong more often than not. Neither Google nor Facebook create a transaction between the two sides of the market. So, if Amex is read formalistically, one can define each side separately as a market. But, the fees Google and Facebook charge advertisers allow them not to charge consumers, or charge consumers less (I am not taking a position on whether those services are free) for those services. That looks like an indirect externality to me. By increasing advertising fees, the platform provides more or cheaper services that customers want; more customers will use the platform, and the platform is more valuable to the advertiser. At least, that is what I would be arguing based on Amex if I represented a platform.

Sagers: I think it’s going to be case-specific, and that Google and Facebook probably won’t get the benefit of this rule, if they’re ever sued under any relevant theory. They seem to me too closely analogous to newspapers. But the test case (I think) could be Amazon, especially if there is a case concerning its third-party sellers. In that case, Amazon is selling something that’s pretty much a simultaneous transaction with presumably significant network benefits to both sides. My answers are all colored, again, by a certain cynicism, because I think that whatever the theorists say, the lower courts are likely to try to limit this opinion. It will have a history rather like Credit Suisse—all us lefties cried and wailed when it was handed down, but then it never seemed to be applied to anything except exchange-listed securities.

#### AmEx’s precedent is limited to transaction platforms, Courts won’t apply it broadly---Khan is also wrong

Hal Singer et al 18, Senior Fellow of the George Washington Institute of Public Policy; Michael Kades, Director, Markets and Competition Policy, Washington Center for Equitable Growth; Randy Picker, the James Parker Hall Distinguished Service Professor of Law at the University of Chicago; and Chris Sagers, Professor of Law at Cleveland-Marshall College of Law, 7/18/18, “Will the Supreme Court's Amex Decision Shield Dominant Tech Platforms From Antitrust Scrutiny?,” https://www.forbes.com/sites/washingtonbytes/2018/07/18/antitrust-enforcement-of-dominant-tech-platforms-in-the-post-american-express-world/?sh=55e559c82f76

Hal Singer: In a piece in Vox, Lina Khan refers to the new treatment afforded certain two-sided platforms as the “special rule” from Amex. Setting aside the Court’s exemptions under the special rule, which we will get to next, what is the new evidentiary standard for plaintiffs pursuing monopolization claims against two-sided platforms that qualify for the special rule? What must a plaintiff show with respect to harm (or benefit) on the second side of a two-sided market?

Michael Kades: I am not sure what it means for two-sided markets. I am concerned that the Amex decision is not a special rule for multi-sided markets; rather it establishes a requirement that plaintiffs must prove an output effect to rely on direct effects under the rule of reason. After its long digression into multi-sided markets, the Supreme Court grudgingly accepts that the plaintiffs established a price effect: even when one factored in the benefits to consumers, the plaintiffs had established that prices increased. The plaintiffs lost because the Supreme Court decided proving a price effect without an output effect does not satisfies the plaintiff’s initial burden on the rule of reason.

Randy Picker: We often start antitrust cases with a classification question: Is it a horizontal case or is it a vertical case? Now after the Court’s Amex decision, in vertical cases, we have another classification question: Is it a two-sided markets case or not? That determines the how the burdens of proof are allocated.

Chris Sagers: A plaintiff will have to prove what we would conventionally have thought of as two different markets, and then prove a net harm over the two of them as a consequence of the challenged conduct.

Singer: Can you define a net harm? I’ve seen folks toss around the term gross harm and net harm.

Sagers: Well, taking Amex as an example, I think it would mean that the increase in merchant fees attributable to the restraint is not fully offset by increased benefits to consumers. And if you think any plaintiff will ever, ever prove that, I would like to introduce you to Narcotics Anonymous.

Kades: Which the district court found and was not sufficient.

Singer: The majority imposed an additional burden—namely, to show an output effect.

Kades: Right, and moreover, nothing in the opinion even suggests that holding is limited to two-sided markets or to vertical cases. In other words, no longer can a plaintiff can meet its burden by showing that a restraint increased price. As a practical matter, that holding makes all antitrust cases more difficult and is contrary to sound doctrine.

Singer: Now for the promised exemptions. The majority wrote that this “special rule” for two-sided platforms would be limited in certain ways, citing newspapers as an exemption to the special rule because a newspaper is not a “transaction platform” and because its readers are “largely indifferent” to the number of advertisements on newspaper pages, even though advertisers are looking to reach readers. Is this indifference criterion—or lack of any externality or indirect network effect—a workable limit to the scope of this treatment afforded two-sided platforms?

Sagers: The preliminary question will be whether their market is a “two-sided transaction platform,” meaning that sale of the platform’s service requires “simultaneous” exchange between two third-parties to the platform, and moreover, the platform must offer “indirect network effects” that are relatively strong. I expect we may not actually learn what any of this means, because I don’t think there will be any more credit card cases, and I don’t think any lower court judge is going to hold that any market is two-sided outside the payment-system context. And as for the newspaper example, I personally am very cynical. I think the majority specifically mentioned it because, otherwise, there would not be five votes for what would have become a re-visitation of cases like Lorain Journal.

#### The *AmEx* decision made it crystal clear that its precedent only applied to simultaneous transaction platforms and not the vast majority of overall tech platforms that don’t feature simultaneous transactions between both sides

Tim Wu 18, the Julius Silver Professor of law at Columbia University Law School, 12/24/18, “The American Express Opinion, Tech Platforms & the Rule of Reason,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326667>

As already mentioned, the American Express holding is much narrower than it might have been. The Second Circuit and some amici suggested an approach that could have had sweeping implications by potentially establishing a new form of market-definition analysis for any case involving a two-sided platform.36 And the concept of a two-sided platform is expansive. Consider that businesses at issue in many landmark antitrust cases could be thought of as two-sided platforms. An oil refinery like that in Standard Oil Co. of New Jersey v. United States brings together crude oil producers and gasoline buyers;37 a rights association like that in BMI brings together composers and media outlets;38 a sports league like that in National Collegiate Athletic Association v. Board of Regents of the Univ. of Oklahoma brings together sports fans and sponsors;39 an operating system like that in United States v. Microsoft Corp. brings together application makers and computer users.40 Hence, a decision applicable to any two-sided platform might have shaken American antitrust law to its core.

Instead, the American Express holding is limited to “transaction platforms,” explicitly excluding “non-transaction platforms” from its analysis.41 This narrow approach may have reflected discomfort from members of the majority as well as an unwillingness to explicitly overrule prior cases.42 The term “transaction platform” is new to antitrust,43 but the Court defines it as a two-sided market in which the platform “facilitate[s] a single, simultaneous transaction between participants.”44 This means platforms that, by their nature or design, offer only services of simultaneously conducting a transaction between parties on each side of the market—platforms that “cannot sell transaction services to either [one side or the other] individually.”45 In such a setting, the Court reasoned, platforms “exhibit more pronounced indirect network effects and interconnected pricing and demand.”46

The limitation is still abstract but suggests that the American Express decision wouldn’t apply to most two-sided markets, and in particular, wouldn’t apply to most major tech platforms. Accordingly, some of the claims about the case’s relevance to the tech field are overstated. As described above, an enormous range of firms operate what might be called two-sided platforms, but only a small subset are transaction platforms.

To take a few important examples, firms like Google, Facebook, and Twitter are not covered by the American Express opinion. Their business models depend on attracting users and ultimately reselling their audiences to advertisers.47 Users do plenty of things on each of these platforms that doesn’t involve making a transaction with an advertiser. Indeed, the lure of Facebook and Twitter is actually interactions with other users, while Google, in its original conception, primarily offered a means of finding content on the web.

To that end, by the Court’s own implication, Google, Facebook, and Twitter are covered by the rule of Times-Picayune Publishing Co. v. United States48 and not American Express. The Court makes this point clearest in a footnote distinguishing “nontransaction platforms” (and also implicitly recognizes the existence of attention markets49): “Nontransaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers.”50 Consistent with this, Times Picayune had established earlier that the market definition for a newspaper should focus on the entity’s dominance in advertising, not readership.51 The implication is clear for firms like Google, Facebook, and Twitter, which do compete for digital advertising but do not directly compete for users in the relevant attention markets: American Express only applies to firms that are both transactional and in competition on both sides of the platform

A firm like Amazon might seem at first like a closer case, given that the ecommerce giant clearly facilitates transactions between its users and sellers. That said, it seems clear that the Court in American Express could not have intended for every retail operation to be treated as a “transaction platform” in the meaning of the opinion. Stores that bring together buyers and sellers can face competition from stores that exclusively carry their own goods. For example, Best Buy, which sells many brands of computers, still competes with the Apple store, which sells computers only of its own brand. There is far more to the business of Amazon and other retailers than the simultaneous facilitation of a transaction. Indeed, credit card companies are often the entities that complete the retail transaction, suggesting that they are distinct from the retailers themselves.

### 2NC---Fintech---Squo Solves

#### Status quo solves sanctions evasion by cryptocurrency

Robert A. Schwinger 21, partner in the commercial litigation group at Norton Rose Fulbright US, 3/9/21, “Cryptocurrency Offers No Escape From International Sanctions,” New York Law Journal, https://www.law.com/newyorklawjournal/2021/03/08/cryptocurrency-offers-no-escape-from-international-sanctions/

Among the conclusions offered in "Cryptocurrency Enforcement Framework" issued by the Department of Justice this past fall (see generally R. Schwinger, "Blockchain Law: DOJ's 'Cryptocurrency Enforcement Framework'," NYLJ (Jan. 15, 2021)) was the ominous warning that "cryptocurrency presents a troubling new opportunity for individuals and rogue states to avoid international sanctions and to undermine traditional financial markets, thereby harming the interests of the United States and its allies." A spate of recent government enforcement action shows that the United States is not hesitating to tackle cryptocurrency activity being used to try to circumvent the prohibitions of U.S. economic sanctions.

The United States maintains a powerful system of economic sanctions as part of the tools it uses in international relations, such as under the International Emergency Economic Powers Act, 50 U.S.C. §§1701 et seq. (IEEPA). These sanctions target not just particular bad actors but also certain entire countries or regimes. Well-known examples of such sanctioned states include North Korea, Iran, Cuba, Venezuela, Crimea, Sudan and Syria. These sanctions are designed to cut off these countries from much of the modern financial system, as a means of U.S. leverage in international relations.

For persons in or involved with such sanctioned countries, the prospect of being able to make and receive payments through cryptocurrency outside the conventional financial system with its stringent regulations and oversight is a powerful lure, especially given the ability cryptocurrency offers to operate anonymously or pseudonymously. But recent U.S. enforcement activity illustrates how the government is taking strong action against persons involved with such misuses of cryptocurrency in order to meet this threat and deter others.

Talk, Services or Conspiracy?

In United States v. Griffith, 2020 WL 275903 (S.D.N.Y. Jan. 27, 2021), the Court upheld an indictment charging a U.S. citizen with conspiring to violate IEEPA sanctions against North Korea by giving a talk in Pyongyang on blockchain technology and cryptocurrency. The defendant Griffith was an employee of the Ethereum Foundation, which supports the Ethereum blockchain. His indictment centered on a presentation he made at a cryptocurrency conference in North Korea concerning possible applications of blockchain technology.

It was charged that prior to this conference, Griffith had been interested in establishing an Ethereum environment in North Korea, at one point texting a colleague that "we'd love to make an Ethereum trip to [North Korea] and setup an Ethereum node … . It'll help them circumvent the current sanctions on them." He also sent texts to a colleague speculating that while he was not sure why North Korea was interested in cryptocurrencies, it was "probably avoiding sanctions." Despite the State Department's denial of a request Griffith made for permission to travel to North Korea to speak at the cryptocurrency conference about "the applications of blockchain technology to business and anti-corruption," Griffith nevertheless was able to secure a visa from North Korea's mission to the UN in New York and spoke at the conference.

The court held that Griffith's presentation constituted the prohibited export of a service to North Korea, a country subject to comprehensive U.S. sanctions. See Exec. Order 13722, 81 Fed. Reg. 14943 (March 15, 2016); 31 C.F.R. §510.206(a). In so holding, the court rejected several defenses Griffith had raised.

Griffith argued that his presentation could not constitute services because he was not paid, but the court rejected the contention that the receipt of a fee is a necessary element of a "service." It pointed to United States v. Banki, 685 F.3d 99 (2d Cir. 2012), which rejected any fee requirement, relying on the dictionary definition of "service" as well as the policy consideration that if service required a fee to be prohibited, parties would be at liberty to provide uncompensated assistance to persons subject to sanctions without any consequences.

Griffith also raised the issue that U.S. sanctions on North Korea, like other U.S. sanctions programs, exempt "informational materials" from the prohibition on the export of services, and argued that hisconduct fell within the exemption. The regulation from the Treasury Department's Office of Foreign Asset Control (OFAC) on which Griffith relied, however, limited this exemption to materials "fully created and in existence at the date of the transactions." 31 C.F.R. §510.213(c)(2). The court thus rejected Griffith's attempt to challenge his indictment on this ground. It stated that "the key distinction rests between informational materials that are widely circulated in a standardized format and those that are bespoke" (quoting United States v. Amirnazmi, 645 F.3d 564, 587 (3d Cir. 2011)). While Griffith argued that his presentation was nothing more than "highlevel publicly available information" without substantive alteration, and consisted of only "general articles in the public domain" and "very general information … available on the Internet," the government claimed to have evidence that Griffith drew diagrams on a whiteboard while speaking and concluded his time with a brief question-and-answer session. The court concluded that whether Griffith's presentation was fully created and in existence at the date of the presentation was a factual dispute that a jury would have to resolve.

The court also held that ultimately these issues did not affect the validity of the indictment because Griffith was charged with conspiracy to violate IEEPA, not a substantive IEEPA violation. The government charged that Griffith and his co-conspirators agreed to advise North Korea on how "to evade and avoid sanctions by using blockchain and cryptocurrency technologies" and that "Griffith's speaking engagement at the April 2019 conference was a major step in a long-term plan to persuade and assist [North Korea] in using Ethereum to avoid sanctions and launder money." The indictment alleged that the presentation was simply one action in furtherance of a conspiracy that extended from August 2018 through November 2019 (seven months after the speaking engagement). The act in furtherance of the conspiracy did not itself need to be illegal.

Lastly, the court rejected Griffith's contention that the indictment as applied to him violated his First Amendment right to free speech. It concluded that even under a strict scrutiny approach the IEEPA regulatory scheme as applied to Griffith did not violate the First Amendment because it served a compelling foreign policy interest of the United States—maintaining national security—while imposing the least restrictive burden on speech. It determined that the regulatory scheme was narrowly tailored to meet this compelling interest because it was aimed at a designated country, exempted information or informational materials from its coverage, implemented a licensing scheme that permits U.S. persons to apply for authorization to provide services, and required the government to prove willful misconduct beyond a reasonable doubt.

The court stressed that Griffith's challenge to his indictment "has nothing to do with advocacy" but rather with knowingly and willfully participating in a conspiracy to provide services to North Korea. In addition, it noted, "[s]ervices by their nature are intangible and are often rendered through the words of the service-provider, whether lawyer, accountant, financial advisor or technology advisor." Thus, as an "alternative holding," the court concluded that because speech concerning cryptocurrency transactions or blockchain technology is "an essential but subordinate component" of the service in question, "it lowers the level of appropriate judicial scrutiny." The challenge to the indictment thus withstood the defendant's attack on First Amendment grounds as well, notwithstanding that the crime charged centered around giving a talk at a conference.

Cryptocurrency in The North Korean Military Intelligence Toolkit

On Feb. 17, 2021, the Justice Department unsealed a two-count indictment that had been returned on Dec. 8, 2020 against three North Korean officials. These officials, alleged to be part of a North Korean military intelligence agency called the Reconnaissance General Bureau, were charged with various illicit cyber, cryptocurrency and blockchain activities, including as part of an attempt to evade U.S. sanctions. United States v. Jon, Chang HyokKim Il and Park Jin Hyok, No 2:20-cr-00614-DMG (C.D. Cal.). In the first count, the indictment charged the defendants with conspiracy under 18 U.S.C. §371 to violate various provisions of the Computer Fraud and Abuse Act, 18 U.S.C. §1030, by orchestrating various cyber intrusions and attacks, heists and ransomware attacks, and by spreading malware, against victims that included entertainment companies, financial institutions, online casinos, and cryptocurrency companies. The indictment's second count charged the defendants with conspiracy in violation of 18 U.S.C. §1349 to commit bank and wire fraud through various schemes, one of which involved using a cryptocurrency initial coin offering (ICO) and blockchain tokenization of assets for purposes that included evading U.S. sanctions.

Specifically, the indictment's second count alleged that defendant Kim Il and other conspirators developed a plan to create a digital token called the "Marine Chain Token," which would allow investors to "purchase fractional ownership interests in marine shipping vessels, such as cargo ships, supported by a blockchain." Defendant Kim Il would contact individuals in Singapore, where he once lived, regarding potential involvement in creating Marine Chain. He and the other conspirators were also alleged at times to have used false and fraudulent names when contacting individuals they hoped would be involved in creating Marine Chain, not disclosing that they were North Korean citizens or that they were communicating using false and fraudulent names.

The indictment further charged that as part of the defendants' plan, they sought to raise funds for the Marine Chain platform through an ICO. In doing so, they allegedly communicated with potential investors using false and fraudulent names in order to convince them to invest in the Marine Chain platform, again not disclosing they were North Korean citizens or that they were communicating using false and fraudulent names. The indictment also charged that they would not disclose to investors that "a purpose of the Marine Chain Token was to evade United States sanctions on North Korea." According to the allegations, their plan was to "tokenize individual vessels on the Marine Chain platform, allowing investors to purchase ownership interests in marine shipping vessels," and to receive approval from Hong Kong's Securities and Futures Commission to trade the Marine Chain Token as a security.

According to a New York Times report, a Justice Department official acknowledged that there was little chance that any of the three defendants, who live in North Korea, would be arrested. Nevertheless, the official explained that the indictment was intended to show the public the seriousness of the North Korean threat and the Justice Department's ability to identify persons involved in such activities and to warn them and the countries that support them.

More Than Just North Korea

Concern about cryptocurrency being used as a means to evade IEEPA sanctions is not limited to North Korea. Three years ago, President Trump issued Executive Order 13827 (March 19, 2018) directed against Venezuela, in response to Venezuela's efforts to bypass the effect of U.S. economic sanctions by developing its own cryptocurrency called the "Petro."

This Executive Order states that:

In light of recent actions taken by the Maduro regime to attempt to circumvent U.S. sanctions by issuing a digital currency in a process that Venezuela's democratically elected National Assembly has denounced as unlawful … [a]ll transactions related to, provision of financing for, and other dealings in, by a United States person or within the United States, any digital currency, digital coin, or digital token, that was issued by, for, or on behalf of the Government of Venezuela on or after January 9, 2018, are prohibited … .

The order further prohibits "[a]ny transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in th[e] order" and "[a]ny conspiracy formed to violate any of the prohibitions set forth in this order."

The order specifically provides that its references to the "Government of Venezuela" are intended to encompass "any political subdivision, agency, or instrumentality" of that governments, "including the Central Bank of Venezuela and Petroleos de Venezuela, S.A. (PdVSA)" as well as any other person or entity "owned or controlled by, or acting for or on behalf of, the Government of Venezuela."

Due Diligence Risks for Domestic Companies

On Feb. 18, 2021, OFAC issued an Enforcement Release in which it announced that an Atlanta-based company called BitPay, Inc., which offered a payment processing solution to enable merchants to accept digital currency as payment for goods and services, had agreed to pay $507,375 to settle potential civil liability for what OFAC charged were "2,102 apparent violations of multiple sanctions programs." The OFAC release charged that BitPay

allowed persons who appear to have been located in the Crimea region of Ukraine, Cuba, North Korea, Iran, Sudan, and Syria to transact with merchants in the United States and elsewhere using digital currency on [its] platform even though [it] had location information, including Internet Protocol (IP) addresses and other location data, about those persons prior to effecting the transactions.

OFAC explained in its release that "[w]hile BitPay screened its direct customers—the merchants" against OFAC sanctions lists, it allegedly "failed to screen location data that it obtained about its merchants' buyers," which reportedly included the buyers' names, addresses, email addresses, phone numbers and IP addresses. As a result, even though BitPay had implemented certain sanctions compliance controls and made clear in employee training that it prohibited merchant sign-ups from sanctioned jurisdictions and trade with sanctioned individuals and entities, OFAC sought and was able to obtain civil penalties against BitPay.

OFAC stressed:

This action highlights that companies involved in providing digital currency services … should understand the sanctions risks associated with providing digital currency services and should take steps necessary to mitigate those risks. Companies that … process transactions using digital currency are responsible for ensuring that they do not engage in unauthorized transactions prohibited by OFAC sanctions, such as dealings with blocked persons or property, or engaging in prohibited trade or investmentrelated transactions."

Conclusion

Cryptocurrencies and other virtual and digital currencies seek to stake their place in the financial world alongside more conventional financial products and instruments and better known and more historically familiar banks and financial institutions. But in so doing, it should come as little surprise that this new asset class will likewise find itself falling subject to tools like the economic sanctions the United States uses to protect its international interests by wielding power over global financial markets and international transactions. For the United States not to do so would expose it to the risk that its sanctions regime could be rendered toothless by new financial technology. Players in the cryptocurrency space who ignore the restrictions imposed by U.S. international sanctions are being put on notice that they do so at their peril.

#### Bitcoin doesn’t allow Iran to successfully evade sanctions

Michael Sexton 21, Fellow and Director of the Cybersecurity Initiative at the Middle East Institute; and Brett Sudetic, foreign affairs consultant and advisor to Gulf State Analytics, 1/22/21, “Bitcoin: A dirty solution to Iran’s economic troubles?,” https://www.mei.edu/publications/bitcoin-dirty-solution-irans-economic-troubles

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.

### 2NC---Fintech---AT: IL

#### No chance states will invest enough in alternative financial tech to undermine sanctions broadly

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Sanctioned governments and companies clearly have incentives to develop alternatives to the U.S.-dominated international financial system; however, to date there has not been sufficient interest in participating in such systems by legitimate companies and non-sanctioned actors to make such schemes meaningful threats to U.S. coercive economic measures. This situation does not seem likely to change in the near term. For most businesses, there simply isn’t a strong commercial reason to invest significantly in establishing alternatives to the U.S. financial system, and even if companies did develop an alternative, they would still face pressure from other sources of U.S. coercive economic leverage.

Over the past several years, and intensifying in 2018, however, a number of large foreign governments announced plans to work toward developing alternatives to the U.S.-dominated international financial system. Russia, for example, has developed a financial messaging system that Russian authorities say could be used in lieu of the SWIFT financial messaging network, which transmits on average over 15 million payment messages per day as of 2018.77 Russia claims that more than 400 Russian companies, including large state-owned companies, are now connected to the system, and that it is in discussions with non-Russian banks and other companies about joining the network.78 China launched a new national cross-border payment system, the Cross-Border Interbank Payment System (CIPS), in 2015.79

Perhaps most strikingly, in response to President Trump’s May 2018 withdrawal from the JCPOA, major European countries announced plans to develop an SPV, formally known as the Instrument in Support of Trade Exchanges (INSTEX), that European officials hope will enable financial transactions with Iran despite reimposed U.S. sanctions, and has said that the SPV will potentially be open to participation by China, Russia, and other countries as well as European companies.80 In addition, prominent European leaders, including French President Emmanuel Macron and German Foreign Minister Heiko Maas, have called for Europe to develop mechanisms to make European financial transactions less dependent on U.S.-dominated financial infrastructure.81 European Commissioner for Economic and Financial Affairs Pierre Moscovici also called for strengthening the international role of the euro, including efforts to increasingly price oil and negotiate energy contracts in euros, and the European Union has launched a government process to try to shift toward euro pricing for European energy imports.82

These efforts to develop alternatives to the U.S.- dominated international financial system face significant challenges in reaching a scale that poses a serious threat to U.S. coercive economic power. Author interviews with experts suggest that developing a new financial messaging infrastructure is not technically challenging, in the sense that a number of companies could develop the requisite technology to transfer financial messages.83 Deploying an alternative system at a wide enough scale that banks and companies would see it as a commercially viable alternative, however, is a significant challenge given the strong network effects of the existing system.84 SWIFT, the dominant financial payment messaging service, already serves more than 11,000 banks, helping direct over $6 trillion in payments daily as of 2012, and convincing any substantial share of those banks to move to an alternative is not an easy task.85

## 2NC---Cyber Advantage

### 2NC---Monopoly Inevitable

#### Platform markets naturally tend toward monopoly when switching costs are high, even with efficient competitors

Ari Blask 21, Associate, Willkie Farr & Gallagher, Summer 2021, “Undermining Innovation?,” https://www.cato.org/regulation/summer-2021/undermining-innovation

Platform markets / These barriers could be reinforced by search’s platform market structure. Platform markets (also referred to as two‐​sided markets) are markets where businesses provide value, at least in part, by matching providers with consumers; think of Airbnb’s matching property owners and renters. Platform markets are often digitally based because a primary value of the internet is instantaneous processing of large sources of information. Thus, Amazon’s marketplace matches buyers and third‐​party sellers, Uber matches riders and drivers, and Google matches searchers with content. Platform businesses feature consumer network effects because either one or both sets of market participants benefit when more consumers use the platform. When customers have reason to use just one platform and switching costs are high, the market structure might encourage enduring monopoly even in the face of a superior competitor. By contrast, when switching costs are low and when it makes sense for consumers to use more than one platform, the market will support multiple firms, making it easier for new firms with competitive advantages to enter.

### 2NC---AT: Killer Acquisitions

#### Kill zones are good for innovation---they redirect capital to immature markets where innovation potential is higher

Joe Kennedy 20, senior fellow at the Information Technology and Innovation Foundation, 11/9/20, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?,” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones

To the extent established companies are conducting research in a narrow market, it makes sense for entrants to avoid head-on competition and instead exploit complementary markets. This is almost as likely to be true whether the industry is dominated by one firm or five. Breaking into an industry with relatively mature technology dominated by large players is never easy. That is why many industries have gone through periods of heavy investment in the early stages of an industry as companies try to become one of the dominant players. Once the industry has matured to achieve economies of scale or network effects, new entrants tend to focus on complementary technology rather than trying to challenge the larger companies head-on.

Few complained after the 1930s automobile-sector start-ups declined precipitously. By the 1930s, it made little sense to invest in new automobile companies when it was clear the technology system (internal combustion engine) and major players (American Motors, Chrysler, Ford, and GM) had already been established. Investment to create new entrants would have represented a waste of societal resources. Instead, funding went to emerging industries such as radios, chemicals, and machine tools.

Today is no different. The technology and business models for search, social networks, and Internet retailing are relatively mature; society is better off if entrepreneurs and venture capitalists focus on other areas. Indeed, to the extent investors may be focusing their capital outside a few areas where large firms have established positions in what are somewhat mature technologies, it is arguably a good thing because it means there is more capital for other promising areas. Hathaway, in fact, acknowledged the possibility that “venture capital investment may have increased in non-tech sectors too, so that the tech giants have simply diverted the flow of capital to other areas.”25 The is buttressed by an earlier study by Oliver Wyman, which shows that acquisitions by Facebook, Google, and Amazon have not had a negative effect on the amount of venture capital flowing into tech industries.26 (See figures 1 and 2.)

#### Large firms are key exit strategies that attract capital to startups.

Sean J. Linehan 21, J.D. Candidate, May 2022, Loyola University Chicago School of Law, “The Innovation of Harry's Razors: How the FTC is Influencing Venture Capital-Backed Startups,” 33 Loy. Consumer L. Rev. 273, 2021, lexis.

C. Exit Strategies

In order to attract venture capital investors, startups must demonstrate a feasible way toward a return on investors' capital and an exit from their company. 83Link to the text of the noteExit strategies are about money. The exit is the contingency plan for venture capitalists that gives them a return on their investment. 84Link to the text of the noteExit strategies take on [\*284] different forms, but the two most prominent methods are mergers and acquisitions ("M&As" or "acquisition") and initial public offerings ("IPOs"). 85Link to the text of the noteDespite the fact that IPOs are surging, Harry's decided at the time of the proposed merger that the acquisition method fit its needs. 86Link to the text of the note

Acquisition can serve as an important exit for investors in a small company, and thereby attract capital necessary for innovation. 87Link to the text of the noteBlocking or deterring too many acquisitions would be undesirable. 88Link to the text of the noteConceding that the FTC's role in blocking mergers is essential in order to protect consumers from overgrown companies dictating price, innovation is still equally essential to consumer satisfaction. 89Link to the text of the noteConsumers are the ultimate benefactors of a protection on price increases, as well as from the introduction of innovative products. If the Commission prevents an innovative company such as Harry's from finding the capital it needs to continue to disrupt an industry, then innovation will suffer. This possibility of deflated innovation is the long-term fear and most devastating consequence of stalling Harry's.

### AT: Cyber Impact---2NC

# 1NR---Round 5---Harvard

Cap stat dpa

## 1NR---FTC DA

### 2NC---OV

#### **Algorithmic bias risks nuke war.**

Elsa B. Kania 17. Adjunct fellow with the Technology and National Security Program at the Center for a New American Security, 11/15/17. “The critical human element in the machine age of warfare.” https://thebulletin.org/2017/11/the-critical-human-element-in-the-machine-age-of-warfare/

Today, however, the human in question might be considerably less willing to question the machine. The known human tendency towards greater reliance on computer-generated or automated recommendations from intelligent decision-support systems can result in compromised decision-making. This dynamic—known as automation bias or the overreliance on automation that results in complacency—may become more pervasive, as humans accustom themselves to relying more and more upon algorithmic judgment in day-to-day life.

In some cases, the introduction of algorithms could reveal and mitigate human cognitive biases. However, the risks of algorithmic bias have become increasingly apparent. In a societal context, “biased” algorithms have resulted in discrimination; in military applications, the effects could be lethal. In this regard, the use of autonomous weapons necessarily conveys operational risk. Even greater degrees of automation—such as with the introduction of machine learning in systems not directly involved in decisions of lethal force (e.g., early warning and intelligence)—could contribute to a range of risks.

Friendly fire—and worse. As multiple militaries have begun to use AI to enhance their capabilities on the battlefield, several deadly mistakes have shown the risks of automation and semi-autonomous systems, even when human operators are notionally in the loop. In 1988, the USS Vincennes shot down an Iranian passenger jet in the Persian Gulf after the ship’s Aegis radar-and-fire-control system incorrectly identified the civilian airplane as a military fighter jet. In this case, the crew responsible for decision-making failed to recognize this inaccuracy in the system—in part because of the complexities of the user interface—and trusted the Aegis targeting system too much to challenge its determination. Similarly, in 2003, the US Army’s Patriot air defense system, which is highly automated with high levels of complexity, was involved in two incidents of fratricide. In these stances, “naïve” trust in the system and the lack of adequate preparation for its operators resulted in fatal, unintended engagements.

As the US, Chinese, and other militaries seek to leverage AI to support applications that include early warning, automatic target recognition, intelligence analysis, and command decision-making, it is critical that they learn from such prior errors, close calls, and tragedies. In Petrov’s successful intervention, his intuition and willingness to question the system averted a nuclear war. In the case of the USS Vincennes and the Patriot system, human operators placed too much trust in and relied too heavily on complex, automated systems. It is clear that the mitigation of errors associated with highly automated and autonomous systems requires a greater focus on this human dimension.

#### Link turns case. Expanded antitrust enforcement of anticompetitive practices causes backlash.

Alison Jones 20. Professor of Law at King's College London, with William E. Kovacic, March, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” The Antitrust Bulletin. https://journals.sagepub.com/doi/full/10.1177/0003603X20912884

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97

The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

Turns Iran---algorithmic bias both weakens the credibility of US sanctions and integration within the military makes escalation more likely

Turns cyber---increases risk of hacks and errors

#### Turns econ

Kalinda Ukanwa 21. Assistant professor of marketing at the University of Southern California’s Marshall School of Business, 5/23/21. “Algorithmic bias isn’t just unfair — it’s bad for business.” https://www.bostonglobe.com/2021/05/23/opinion/algorithmic-bias-isnt-just-unfair-its-bad-business/

These moves respond to growing concerns that algorithms have been reproducing discrimination in situations such as home lending, the allocation of health care, and decisions about who deserves parole. While many people hoped machines could help us make fairer decisions, as the use of AI has exploded it’s become clear that all too often they simply replicate and even amplify our existing prejudices.

An important part of the story has been missing, however. It’s one that might make businesses more amenable to regulation or even preclude the need for it by motivating them to act on their own. Algorithmic bias is not only a pressing ethical and societal concern — it’s also bad for business.

My research shows that over time, word of mouth about algorithmic bias among customers will hurt demand and sales and cut into profits. This damage won’t just hit a few unlucky companies that find themselves embroiled in public controversy around algorithmic discrimination. It can occur even if the inner workings and biases of an algorithm remain invisible to the public.

To understand how this can happen, consider one tech giant’s failed attempts at algorithmic design. In 2014, Amazon launched an internal tool to evaluate resumes. Although the algorithm was not programmed to look at the gender of the job applicants, it was trained using data from the company’s previous decade of hiring decisions, and the applications in that period mainly came from men. Based on past patterns, the algorithm learned to downgrade resumes that mentioned certain women-only colleges or women’s sports or clubs.

Amazon dropped that tool once these biases were discovered, but companies still widely use algorithms for recruiting and hiring. Not only are employers potentially missing out on valuable candidates, but over time these losses will compound through word of mouth. People learn about opportunities from members of their social circles, who often have race, age, gender, and other demographic characteristics in common. When women hear that their female friends and colleagues have been passed over for jobs at a particular company, they are less likely to apply, even if they know nothing about why these other candidates were rejected.

Using group characteristics to make decisions about whether and how to provide services to individual consumers may seem logical in some cases and may even be profitable in the short term. For example, a property manager might believe there are legitimate business reasons to choose tenants based on their age or education level. But my research, which uses computational methods to simulate consumer behavior, shows that these types of “group-aware” algorithms will tend to become less profitable over time.

In a study I conducted with Roland Rust, we simulated how customers would respond to two banks. One bank is “group-aware” and has various loan-approval thresholds for members of different groups. For example, women might have to meet a higher standard than men to get a loan. The other bank in the model is “group-blind”: It has the same approval threshold for every applicant.

Our model indicates that most members of the favored group meet the loan threshold at both banks, so they are likely to apply to either. But members of the group being discriminated against learn from one another to avoid the group-aware bank in favor of the group-blind one. Furthermore, members of the group experiencing discrimination also influence some members of the favored group to avoid the group-aware bank. As time passes, there is a net movement of customers toward the group-blind bank, hurting the profitability of the group-aware bank.

In short, when consumers learn from one another that a company is less likely to serve them, even if the discrimination is unintentional, they’ll avoid that company and it’ll lose revenue.

Algorithms often become group-aware when they aren’t intended to be. AI teases out correlations in the data that serve as stand-ins for group membership. For example, in our geographically segregated society, ZIP codes and other location data are a common proxy for race. Ride-sharing companies discovered the problem when a study revealed that their location-based pricing algorithms charge customers more for rides to or from neighborhoods primarily occupied by people of color. In other words, programming an AI system to ignore people’s gender or race or leaving this information out of the data set entirely isn’t enough to ensure an algorithm is group-blind.

What can companies do to make algorithms treat people fairly? Here are three key steps they can take:

1. Rather than removing group identifiers, businesses should include demographic characteristics in their data so they can continually audit their algorithms to determine whether they inadvertently discriminate against certain groups. There are a number of tools to evaluate whether bias is creeping in. IBM’s AI Fairness 360 is an open-source tool kit that helps detect bias in machine learning models. Microsoft’s FATE research group produces reports and tools aimed at reducing bias and increasing transparency and accountability in AI.

2. Companies can model how their systems’ decisions will affect demand over the long run among consumers who learn that some groups are treated differently. For example, if a bank used a model similar to the one in my study, it could easily see the long-term impact of a group-aware algorithm for making loans.

3. Whenever possible, algorithms should be designed to make decisions using context-specific data about individuals — looking at someone’s bill payment frequency in loan decisions, for example, or a patient’s cholesterol levels in health care, or a student’s grades in education — rather than trying to infer such information from other data points like their education level or where they live. The data used to train the algorithm is important too. Increasing the variation among and representation of different kinds of consumers allows algorithms to better evaluate individuals on their own merits.

Algorithms can lead to fairer outcomes, but only if they are designed and managed carefully. As computers increasingly make influential decisions about our lives, from the health care and financial services we receive to our educational and career prospects, we must remain alert to the potential for bias. There are strong ethical and moral reasons to do so, but there is also a business case to be made. We need to make sure companies understand how algorithmic bias can hurt their bottom lines.

### AT: 2AC 1

#### 1. FTC is cash-strapped---the plan destroys other enforcement priorities.

Nicolás Rivero 21. Technology reporter at Quartz. “Biden’s antitrust crusaders can’t crusade without Congress.” 3/11/21. https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/

But there are clear limits to their power. The most the FTC can do is bring more antitrust cases that ask courts for more aggressive remedies, like breakups. That would allow the agency to make a point about what it considers acceptable business behavior. But many of those lawsuits would be bound to lose in front of judges who have grown far more skeptical of antitrust cases over the past four decades and far more conservative over the past four years.

A larger caseload would also require Congress to approve more funding for the cash-strapped agency, which is already struggling to pay for its current docket. “The agencies have been asked on many occasions to do a lot with relatively little…but it’s not for free,” says former FTC chair and George Washington University law professor Bill Kovacic. If the FTC wants to pursue more large cases without a bigger budget, “they’ll have to make choices, and those choices will involve backing off of other areas of enforcement.”

#### 2. Limited resources force tradeoffs in enforcement decisions.

Bernard (Barry) A. Nigro Jr. et al., 21 – Chair of Fried Frank's Global Antitrust and Competition Department, former Principal Deputy Assistant Attorney General at the DOJ, with Nathaniel L. Asker and Aleksandr B. Livshits, 1/5/21. “Managing Antitrust Risk in the Biden Administration.” Fried Frank Antitrust & Competition Law Alert. https://www.friedfrank.com/siteFiles/Publications/FFAntitrustAggressiveAntitrustEnforcement01052021.pdf

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.

#### ---Empirics prove---this happened in the 70s---their author

Alison Jones 20 – Professor of Law, King’s College London, with William E. Kovacic – George Washington University, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” *The Antitrust Bulletin* 2020, Vol. 65(2) 227-255. SagePub, DOI: DOI: 10.1177/0003603X20912884

The discussion below, and history, seems to indicate, however, that more courage and more people will not necessarily overcome the implementation obstacles that stand in the way of a program that requires the rapid prosecution of a large number of complex cases against well-resourced and powerful companies. Indeed, the criticisms levied at the current system, the proposals for more effective enforce-ment and reform, and the scale of the action being demanded bear some resemblance to those that led to a more re-invigorated and aggressive antitrust enforcement policy in the 1960s and early 1970s. For exam-ple, at that time complaints that the FTC was in decay, was obsessed with trivial cases and failing to address matters of economic importance, anticompetitive conduct, and rising concentration,77 led the FTC to embark on a new, bold, and astoundingly broad enforcement program.78 In an effort to meet criticisms of it as a shambolic and failing institution, the FTC sought to upgrade its processes for policy planning, made concerted efforts to improve its human capital in management and case handling, and sought to improve substantive processes and the quality of its competition and consumer protection analysis.

In the end, FTC’s efforts to improve capability proved insufficient to support the expanded enforce-ment agenda, partly because the Commission failed to formulate an adequate plan to overcome the full range of implementation obstacles. The FTC seriously overreached because it did not grasp, or devise strategies to deal with, the scale and intricacies of its expanded program of cases and trade regulation rules, the ferocious opposition that big cases with huge remedial stakes would provoke from large defendants seeking to avoid divestitures, compulsory licensing, or other measures striking at the heart of their business, and the resources required to deliver good results. The Commission lacked the capacity to run novel shared monopoly cases that sought the break-up of the country’s eight leading petroleum refiners and four leading breakfast cereal manufacturers79 and simultaneously pursue an abundance of other high stake, difﬁcult matters involving monopolization, distribution practices, and horizontal collaboration. The FTC also overlooked swelling political opposition, stoked by the vigor-ous lobbying of Congress, that its aggressive litigation program provoked.80

New legislation envisaged by reform advocates could ease the path for current government agencies seeking to reduce excessive levels of industrial concentration by arresting anticompetitive behavior of dominant enterprises (through interim and permanent relief) and by blocking mergers that pose incipient threats to competition. It seems clear, however, that such dramatic legislative proposals are likely to be ﬁercely contested through the legislative process and so will take time, and be difﬁcult, to enact. Further, even if armed with a more powerful mandate, the DO] and the FTC will still have to

bring what are likely to be challenging cases applying the new laws (see Section F). The adoption, setting up, and bedding in of new legislation or regulatory structures and bodies is therefore unlikely to happen very quickly and is, consequently, unlikely to meet the demands of those seeking urgent and immediate action now.

These difﬁculties suggest that for the near future, at least, the agencies will have to achieve

successful extensions of policy mainly through launching themselves into a number of lengthy, complex investigations and litigation based on the current regime. This means establishing violations under existing judicial interpretations of the antitrust laws and making a convincing case for the imposition of effective remedies, including structural relief.

#### 3. It directly undermines privacy enforcement.

David Hyman 19 – Professor at Georgetown University Law Center, with William E. Kovacic, “Implementing Privacy Policy: Who Should Do What?” 29 Fordham Intell. Prop. Media & Ent. L.J. 1117 (2019). https://ir.lawnet.fordham.edu/iplj/vol29/iss4/3

The case for making an enhanced FTC the national privacy regulator is straightforward. Of all U.S. privacy implementation institutions, the FTC has unequaled capacity in the form of expert case handling and policy teams and physical resources (including the development, over the past decade, of an internet laboratory to do high-quality forensic work, and the hiring of technology experts to assist in that effort). The agency’s capacity also is the product of extensive experience in applying its UDAP authority and enforcing statutes such as the FCRA and COPPA. The FTC has a broad portfolio of policy instruments (litigation, rulemaking, consumer and business education, data collection, the preparation of reports, the convening of conferences), and it has demonstrated its ability to use all of them to good effect in the privacy domain. The FTC’s stature as an independent agency gives it additional credibility in the eyes of foreign officials, who generally distrust the vesting of privacy powers in an executive department.

Within an enhanced FTC, privacy policy implementation also would be informed by the Commission’s larger experience with consumer protection. The FTC’s privacy unit is one part of its Bureau of Consumer Protection, rather than being a self-contained bureau. This reflected the institution’s reasonable view that the effort to safeguard consumer interests in “privacy” was one dimension of “consumer protection,” rather than a wholly distinct policy realm. Our impression is that many matters that involve privacy issues also raise problems that fit within other areas of the FTC’s consumer protection program. The analysis of the “privacy” issue often benefits from perspectives developed in the course of applying the agency’s deception and unfairness authority in other cases. The intertwining of privacy issues with other consumer protection concerns in many scenarios has important implications for how the mandate of a privacy agency should be defined. In whatever setting one ultimately might place a “privacy” mandate, we would expect that the host agency would have a mandate that incorporates powers that traditionally have been associated with the FTC’s broader consumer protection program.83

The FTC’s expertise in antitrust should also help it develop and enforce privacy policy. Enforcing antitrust law has given the FTC ongoing involvement in multiple high-tech markets—as well as an understanding of how competition can motivate companies to offer better privacy protections. The FTC’s work in both consumer protection and antitrust draws upon a Bureau of Economics with over 80 PhDs in economics.84 The Bureau of Economics has developed considerable skill in sub-disciplines (including behavioral economics) with special application to privacy issues.

Of course, inputs are not the same thing as outputs. The FTC has not always achieved the full integration of perspectives that the combination of these institutional capacities would permit. And, although there are policy complementarities across the domains of antitrust, consumer protection, and privacy, this combination of functions is not an unmixed blessing. An agency with all three functions might seek to use its position as a gatekeeper with respect to one policy domain to leverage concessions from firms over which it exercises oversight in another domain.85 Such temptations have been present when the FTC has applied its antitrust powers to review mergers involving companies in the information services sector.86

Finally, there is the possibility that any one of these functions might be diminished if all three are contained in the same agency. An agency focused solely on privacy will make privacy policy its single concern. An agency responsible for antitrust, consumer protection, and privacy is likely to find itself making tradeoffs as it sets priorities for how to use its resources.

#### 4. Companies will drag out cases and drain FTC resources.

Michael Kades 21 – the director for markets and competition policy at the Washington Center for Equitable Growth, 7/28/21. “Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law.” https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

#### 5. Congressional backlash scares them off from overexerting themselves.

Chris Jay Hoofnagle et al 19. Adjunct Professor of Information and Law - University of California, Berkeley, and Woodrow Hartzog, Professor of Law and Computer Science - Northeastern University, and Daniel J. Solove, John Marshall Harlan Research Professor of Law - George Washington University Law School. “The FTC can rise to the privacy challenge, but not without help from Congress.” Brookings. 8/8/2019. <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/>

**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**.

#### Turns the whole case---causes Congress to strip funding and authority from the FTC.

J. Howard Beales 03. Former Director, Bureau of Consumer Protection. “The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection.” https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection

The breadth, overreaching, and lack of focus in the FTC's ambitious rulemaking agenda outraged many in business, Congress, and the media . Even the Washington Post editorialized that the FTC had become the "National Nanny."(16) Most significantly, these concerns reverberated in Congress. At one point, Congress refused to provide the necessary funding, and simply shut down the FTC for several days. Entire industries sought exemption from FTC jurisdiction, fortunately without success. Eventually, Congress acted to restrict the FTC's authority, including legislation preventing the FTC from using unfairness in new rulemakings to restrict advertising.(17) So great were the concerns that Congress did not reauthorize the FTC for fourteen years. Thus chastened, the Commission abandoned most of its rulemaking initiatives, and began to re-examine unfairness to develop a focused, injury-based test to evaluate practices that were allegedly unfair.

#### Backlash kills other areas of FTC enforcement.

Adam Speegle 12. J.D. Candidate, May 2012. “Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process”. Michigan Law Review. March 2012, Vol. 110, No. 5 (March 2012), pp. 847-873. https://www.jstor.org/stable/23216802

Another major concern with bringing cases under an independent Section 5 is that, as the application of the provision expands and the bounds of its flexibility are tested, the FTC risks eventual backlash from the courts or Congress similar to the backlash it experienced in the 1980s.129 The FTC relies on Section 5 in both antitrust and consumer protection actions. A negative holding on Section 5's use in the standard-setting context may not only bear on future patent holdup enforcement efforts but may also severely impede the FTC's efforts in other areas. If the FTC fails to limit the application of Section 5, it risks subjecting Section 5 to the same or more severe judicial and congressional treatment than it experienced in the past.130 Additionally, many states have their own statutes that are modeled after the FTCA. These state statutes are interdependent with the federal FTCA, and state courts interpret them using federal FTCA precedent.131 Because holdings related to the FTCA at the federal level can, for better or for worse, impact these state statutes, unfavorable Section 5 precedent could also undermine actions at the state level.

#### 6. Increased antitrust enforcement incentivizes data-driven competition, which trades off with privacy enforcement

Erika M. Douglas 21. Assistant Professor at Temple University Beasley School of Law. “The New Antitrust/Data Privacy Law Interface.” 1/18/21. https://www.yalelawjournal.org/forum/the-new-antitrustdata-privacy-law-interface

Second, non-complementarity raises the problem of antitrust law and data privacy law pursuing opposing interests. Data privacy does not exist only as an element of quality within antitrust analysis. Data privacy law is also a distinct area of doctrine that, at times, pursues interest at odds with the antitrust goal of promoting competition. In that sense, data privacy law is much like intellectual property or consumer protection law. The difference is that, while we have long examined these other interfaces with antitrust law,45 we have scarcely begun to consider the equivalent interaction with data privacy law. The remainder of this Essay addresses this second dilemma, because it is novel and it is not addressed by existing theories. Separatist and integrationist theories both lack an explanation of how antitrust law interacts with data privacy law in its capacity as a distinct area of legal doctrine. Though separatist theory acknowledges privacy as a distinct area of law, it assumes away any interaction by insisting that antitrust and data privacy are separate. But, the fact that two areas of law are doctrinally separate does not preclude their meeting. Separate doctrinal areas of law often interact with antitrust law. It is correct to say, for example, that antitrust law and patent law are historically and doctrinally separate, but equally correct to observe the significant judicial and scholarly thought devoted to their interaction. Likewise, antitrust law and consumer protection law are separate in U.S. legal doctrine, but interact at their edges.46 The same is now true for data privacy law and antitrust law. Integrationist theory leaves a similar gap. When there is no privacy-as-quality competition, integrationist theory dismisses data privacy as outside the ambit of antitrust analysis. In fact, data privacy may remain highly relevant, as a separate area of law that seeks disparate treatment of consumer data and reduces competition. The central disagreement between the two existing theories is whether data privacy is properly considered a factor in antitrust analysis. This is a valid question. However, it is not the only question at this intersection of law. Regardless of whether or not data privacy is integrated into antitrust analysis as a quality-type factor, it remains true that these two areas of law may intersect. To be clear, this is not an argument that there is a hard conflict of law wherein antitrust law requires action that privacy law prohibits (or vice versa).47 Rather, it is a contention that these two areas of law are increasingly interacting, and, at times, that they pursue opposing interests. In the digital economy, this potential for antitrust and data privacy to pursue opposing interests is particularly apparent. From an antitrust perspective, consumer data plays an undeniably significant role in digital competition. Leading digital platforms rely on collection and analysis of masses of data about consumers to drive their services, like search and social media—and to drive their profits as well.48 The companies that collect and monetize digital data in the smartest ways win the race to compete, attracting users, and benefit from the network effects that characterize many of these online services. New theories of anti-competitive harm focus on this data-driven competition, and the power gained by digital platforms through their control and accumulation of data.49 From a data privacy perspective, much of that same information is personally identifiable and thus limited in its collection, use, and sale by the FTC’s new common law of data privacy. The FTC’s enforcement of section 5 has long been directed at internet companies, including the digital platforms that collect and use our data to compete. When privacy law restricts the collection and use of information, that creates potential tradeoffs with the benefits of data-driven competition. For example, Catherine Tucker observes that increased privacy regulation decreases data sharing between firms, which she predicts will reduce competition in online advertising.50 Early research on the General Data Protection Regulation (GDPR), a tough new European data privacy protection law, suggests that improved consumer control over personal data may also reduce competition in consumer data-intensive markets, because it limits data sharing.51 The FTC itself has begun to recognize this tradeoff between data competition and privacy.52 Enforcers, courts and digital platforms are left with two opposing legal pressures on the treatment of personal data. What happens if data privacy law encourages conduct that antitrust law or policy discourages, or even prohibits? When, and to what extent, should competition be traded at the margins for data privacy—or vice versa? The preoccupation with complementarity in existing theories has left enforcers, courts and companies with little insight on how to address these questions. This is not to say that complementarity is an inaccurate description of the antitrust/data privacy interface—only that it is incomplete. As described above on the prevailing views, the interests of both areas of law can certainly be complementary. Nor does this Essay contend that every new antitrust case will pit data competition against data privacy, or even that most cases will. Information at issue in a given case may well be non-personal and unprotected by data privacy law. Or, competition may be driven by factors other than data in a particular market. However, it is precisely the cases of tension, not complementarity, that will present agencies and courts with the most complex analytical challenges. Those cases will demand new analysis of tradeoffs between antitrust law and data privacy law. Further, those cases are likely to involve the complex businesses of digital platforms, which operate at the new nexus of antitrust and data privacy law. Despite this layered complexity, non-complementary interactions of privacy and antitrust have seen scant attention.

#### Antitrust enforcement directly threatens privacy enforcement.

Andrea Vittorio 21. Reporter, Bloomberg Law, 6/17. “Lina Khan Brings Scrutiny to Big Tech Data Dominance as FTC Chair.” https://news.bloomberglaw.com/tech-and-telecom-law/khan-to-bring-scrutiny-to-big-techs-data-dominance-as-ftc-chair

The Federal Trade Commission’s new chairwoman, Lina Khan, is expected to examine how consumer data collection contributes to the dominance of U.S. tech giants as the head of the agency. Khan takes the helm at the commission as privacy advocates, including Consumer Reports and the Electronic Privacy Information Center, push for the agency to flex its enforcement powers and tap into its rulemaking abilities to safeguard consumer data. Khan, previously a professor at Columbia Law School, has a reputation as an advocate of aggressive antitrust enforcement against big tech platforms. She’s tied consumer privacy to antitrust policy, with a focus on the way tech companies’ dominance depends on data and how that allows for its misuse. The intersection of competition and privacy policy could test Khan’s views on potential tensions between the two, according to Justin Brookman, a former FTC official who’s now director of consumer privacy and technology policy at Consumer Reports. Moves that promote tech company competition can sideline privacy and vice versa, he said, pointing to a recent decision by Alphabet Inc.'s Google to phase out third-party tracking cookies used to target ads online. The policy is seen as promoting privacy but hamstringing ad-tech companies that compete with Google. “It will be interesting to see where Lina comes down on that” kind of privacy-competition conflict, Brookman said.

#### AT: 2AC 2

It’s not a turn---talks about one case, and generally talks about the process about why it’s hard, is not reverse casual about why lowering the burden of proof makes it easier

#### Plan collapses the FTC.

Alan Devlin 21. Partner, Latham & Walkins Law Firm. “Part II - The Case for Change.” *Reforming Antitrust*. Cambridge University Press. 2021. DOI: 10.1017/9781009000260. 109-226.

Meanwhile, flipping the burden of proof upends the American tradition in which free contract is the default and the government must prove its case in order to enjoin private conduct. As described below, easing the agencies’ need to establish harm to competition would usher forth diminished rigor of analysis and, in time, an abundance of unmeritorious cases. Separately, eliminating divestitures as a means for resolving horizontal merger issues – a neo-Brandeisian favoriteFootnote121 – is unworkable. Resource constraints pose a threshold problem. Suing to block every transaction that features, in some line, a problematic horizontal overlap would require a massive increase in staff and budget for the agencies. More fundamentally, however, the policy would be unsustainable. Sophisticated parties to a transaction could agree to sell an overlap unit as a precedent condition to their merger. The government would then face a fait accompli, and be left with trying to challenge a transaction that involves no competitive overlap – a case that, even on the proposals above – would likely be dead on arrival.

#### The plans require heavy resources.

#### 1. It requires millions of dollars, litigation staffing, and timing conflicts. That’s Reinhart.

#### 2. The FTC doesn’t have the resources for expanded antitrust enforcement.

Alex Kantrowitz 20 – Silicon Valley-based journalist covering Big Tech and society, 9/17/20. “‘It’s Ridiculous’: Underfunded U.S. Regulators Can’t Keep Fighting the Tech Giants Like This.” https://onezero.medium.com/its-ridiculous-underfunded-u-s-regulators-can-t-keep-fighting-the-tech-giants-like-this-3b57487b4d63

As politicians, the press, and the public scrutinize the tech giants and grow wary of their power, the most important organizations tasked with restraining them — the U.S. regulatory agencies — aren’t getting enough funding to do the job. “The agencies are severely resource-constrained,” Michael Kades, an-ex FTC trial lawyer who spent 11 years at the agency, told Big Technology. The Federal Trade Commission and Department of Justice’s antitrust division have a combined annual budget below what Facebook makes in three days. The FTC runs on less than $350 million per year, the DOJ’s antitrust division on less than $200 million. Facebook made $18 billion last quarter alone. The funding disparity between the tech giants and their regulators leads to an unbalanced fight, current and ex-staffers said: The agencies can’t investigate the tech giants to the extent they’d like. They might shy away from complex cases fearing a resource-draining battle. And when they investigate the tech giants, they often see former colleagues with intricate knowledge of their strategy and ability to act (or lack thereof) representing these companies. Without significant budget increases, the tech giants may well continue to act unrestrained with little fear of repercussions. “DOJ is under-resourced, FTC it’s ridiculous,” one ex DOJ-staffer told Big Technology. This doesn’t mean these agencies are entirely hamstrung; they can typically marshall the resources to bring a clear-cut case. “They want to win,” one ex-FTC official said. “If it’s really egregious, and they find that in discovery, the attorneys are going to put a case together and go after it.” But when you can only take up a limited number of cases due to resource constraints, things inevitably slip through. “When I was there, the privacy wing had maybe 50 people, and that’s probably generous. That’s lawyers, support staff, everyone,” Justin Brookman, the former policy director at the FTC’s office of technology research and investigation, told Big Technology. “If they were to bring a case, that would tie up half the resources of the group. And they had two litigations ongoing and that took up most of everyone’s time.” The agency’s budget has barely increased since Brookman left in 2017, while the tech giants have added trillions of dollars to their market caps. Inside the FTC and DOJ, employees are aware of the tech giants’ ability to fight, and the corporations’ budgets tend to live inside their heads. “Facebook will have the ability to raise every single issue, if they want to,” Kades said. “It doesn’t have to be a winner, doesn’t have to be close to winner. If they wanted to take this position in litigation, they can make every procedural maneuver difficult, they can not cooperate on discovery, they can fight on scheduling, they don’t have to win even half of those, but it would just suck up resources.” The ability to do this, not even the action itself, can impact regulators’ thinking. Agency staffers are typically mission-driven and knowingly work for salaries below private-sector rates, but the resource-rich tech giants are now poaching directly from agencies at a rate remarkable even for Washington’s revolving door between the private and public sector.

#### 3. The FTC is looking to avoid added prohibitions.

MARIANELA LOPEZ-GALDOS 21. Global Competition Counsel at the Computer & Communications Industry Association, 7/28/21. “Policy Decisions of Antitrust Institutions Series: The Future of the FTC and Its Perils.” https://www.project-disco.org/competition/072821-policy-decisions-of-antitrust-institutions-series-the-future-of-the-ftc-and-its-perils/

But most importantly, the Section 5 Policy Guidelines acted as the guardrails to avoid situations where the FTC, in an effort to expand its enforcement authority, would lose many antitrust stand-alone Section 5 cases in court, to the detriment of the institution itself. Indeed, the Section 5 Policy Guidelines were the result of lessons learned throughout the history of the FTC and represented a tool to avoid history repeating itself. In this respect, it is important to recall that back in the 70s, under Chairman Pertschuck, and in the following years, the FTC suffered immensely due to disparities between enforcement promises and implementation capabilities. Much of the institutional suffering came from the agency not self-imposing limitations and standards to bring cases under Section 5 of the FTC Act which led to numerous litigation losses, consequential institutional reputational damage, and lack of political support.

### AT: 2ac 3

#### Takes out the aff---blue

Alison Jones, Professor of Law at King's and a solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, George Mason University Foundation Professor at the George Mason University School of Law, former FTC Commissioner, 2020, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, The Antitrust Bulletin 2020, Vol. 65(2) 227-255

The modern critique of the U.S. system often describes the federal agencies as captured by the business community or beholden to ideas that disfavor robust intervention.143 Advocates of change suggest that the execution of their reform program at the federal antitrust agencies will require the appointment of senior managers and new staff who repudiate the consumer welfare standard, or at least embrace a vision for expanded enforcement under the consumer welfare, and embrace the multidimensional conception of the proper goals of competition law. Those already employed by the enforcement agencies as managers and staff will be expected to accept the expanded (goals) framework or they will find their duties reduced and their roles marginalized. New appointees to top leadership positions will not be tainted by substantial previous experience in the private sector, nor will they have spent too much time as civil servants in a government enforcement culture that assumed the primacy of consumer welfare as the aim of antitrust law and accepted norms that tilted toward underenforcement. The concern about compromised motives is also likely to disqualify many academics who, though sympathetic to some expansion of antitrust enforcement, remain excessively beholden to some notion of a consumer (rather than citizen) welfare standard, or have engaged in consulting on behalf of large corporate interests.

One consequence of the acute anxiety about capture is to slam the revolving door shut, or at least to slow the rate at which it spins. We offer two cautions about this approach. First, the modern experience of the FTC raises reasons to question the strength of the theory. For example, if business perspectives dominate the FTC, why did the agency persist in its efforts to challenge reverse payment agreements involving leading pharmaceutical producers?144 Was it because the pharmaceutical firms weren’t as good at lobbying as, say, the information services giants? And what explains the FTC’s decision to sue Qualcomm for monopolization early in 2017?145 Is this simply attributable to the inadequacy of Qualcomm’s Washington, DC, lobbyists, or is the capture explanation for the behavior of the federal antitrust agencies not entirely airtight?

Our second caution is that severe restrictions on the revolving door could deny the federal agencies access to skills they will need to carry out a major expansion of antitrust enforcement. Recruiting attorneys, economists, and other specialists from the private sector can give the agencies a vital infusion of talent which, when combined with agency careerists, permit the creation of project teams that can equal the capability of the best teams that the defense can mount in major litigation matters. We also are wary of the idea that an attorney or economist coming from the private sector will discourage effective intervention during the period of public service as a way to pave the road to a better private sector position upon leaving the agency. Rather, there is evidence to suggest that creating a reputation for aggressiveness and toughness as an enforcer increases one’s post-agency employment options. More than a few individuals have development prosperous careers based on piloting businesses through navigational hazards that they helped create while they were senior officials in public agencies.

#### Only the FTC solves algorithmic bias---it has the expertise and history.

Sara Collins 21. Policy Counsel at Public Knowledge, former Policy Counsel on Future of Privacy Forum’s Education & Youth Privacy team, 10/13/21. “21st Century Snake Oil: The Consequences of Unregulated, Unproven AI.” https://techpolicy.press/21st-century-snake-oil-the-consequences-of-unregulated-unproven-ai/

There is growing evidence that assigning algorithms the responsibility to make significant decisions about people is causing harm. Much has been written about the biases algorithms can codify and steps to mitigate the damage. However, detecting bias is difficult. If we could shift the burden to companies to demonstrate that their algorithms are safe and effective, we could greatly reduce the likelihood that biased algorithms enter the market at all.

For example, facial recognition’s trouble with detecting Black faces has been well documented. But facial recognition is not just used in surveillance cameras. It is also used in online hiring platforms, student proctoring software, and even for unemployment verification. Misidentification in these contexts has grave consequences. While this problem has often been framed in terms of bias, it also demonstrates a lack of effectiveness. If your software has trouble working on almost 15% of the population, your algorithm doesn’t do what you say it does. If you have an algorithm that is designed to allocate healthcare, but Black patients have to be significantly sicker than white patients in order to get the same level of care, your algorithm doesn’t work.

Unfortunately there is no requirement that companies demonstrate an algorithm’s effectiveness before putting it to use

. The Algorithmic Justice and Online Transparency Act, introduced this year, has a requirement that algorithms used by online platforms be “safe and effective,” but that would only apply to sites like Facebook or Youtube, according to the proposed bill. Congress should consider expanding such protections to all products and services.

But even if Congress does not act, that doesn’t mean nothing can be done. Fortunately, the Federal Trade Commission (FTC) has a long history of prosecuting snake oil salesmen. Under Section 5 of the FTC Act, the commission has broad authority to go after companies that engage in unfair or deceptive acts or practices. This is why the FTC just sent a warning letter to purveyors of fake coronavirus cures, and how the FTC was able to fine companies that made scam weight loss products. In each instance these companies made claims about their products that weren’t backed by evidence. This same approach should be used for algorithms.

#### This is irrelevant---Their evidence is about staff technologists---the aff overstretches FTC investigators and lawyers.

#### FTC can deal with turnover---they have strategies for recruitment and retention.

Natalie Runyon 21. Director of enterprise content for talent, inclusion and culture within the brand marketing function of Thomson Reuters, has more than 20 years of experience working and volunteering for multinational organizations, including Thomson Reuters, Goldman Sachs, and the Central Intelligence Agency, 7/9/21. “The FTC’s unique approach to legal talent.” https://www.reuters.com/legal/legalindustry/ftcs-unique-approach-legal-talent-2021-07-09/

Because the purpose of the FTC is to preserve competition and protect consumers, it is hard to argue that the public service that the agency is providing is not meaningful. To that end, the agency has gone to great lengths to ensure its mission and career growth were front and center for its employees:

Aligning all employees, including support, staff to the mission — Among the program changes Bak implemented was broadening on-boarding training for new employees to include support staff. (Previously, this training had only been done for new lawyers.) She also made sure that the team in charge of planning and executing the two-day training program was led by FTC’s Honors Paralegals, which gave the elite group developmental opportunities around collaboration, budgeting, public speaking, and networking with the most senior agency executives. “It is hard to do support work and to really understand your work in the absence of understanding the mission,” Bak says, adding that this change was also an important component of the agency’s commitment to diversity, equity & inclusion since many of the support staff were employees of color.

Leave the FTC and come back — Bak advises other FTC lawyers to follow her example by transitioning to and from the private sector, for two primary reasons: i) their experience in the private sector will bring a different perspective when they return to the FTC; and ii) to earn private sector compensation. “We’ve ingrained the idea that at some point you should leave to go to that law firm to do something else, and then, come back to us to lead in some capacity,” she explains.

Staying in touch with alumni — Because government agencies are not able to compete on pay, Bak is a big advocate for government agencies staying in touch with alumni to bolster their ongoing relationship with the agency. “People have longstanding relationships with the FTC long after they’ve left,” she adds. “And, the agency does have this continued revolving relationship with alumni.”

Explore internal opportunities — To increase retention of attorneys in public service, Bak helped to carry the legacy of exploration and freedom at the FTC during a time called “open season,” where lawyers have the option of moving around to other divisions to maintain their thirst for learning and alleviate any feelings of stagnation in their careers.

#### New commissioner will lead the privacy push now.

Timothy Butler et al. 10/14/21. Partner at Troutman Pepper, with Carlin McCrory, Elizabeth Waldbeser, Matthew White. “FTC Reports to Congress on Data Security and Privacy Priorities.” https://www.jdsupra.com/legalnews/ftc-reports-to-congress-on-data-5727533/

Our Take. The FTC has an ambitious data security and privacy agenda. As we have previously reported, we expect aggressive enforcement and rulemaking efforts (see prior article, prior article), and expect Alvaro Bedoya, a privacy advocate who was recently nominated to serve as an FTC commissioner, to take the lead on many of those efforts (see prior article). And given Chair Lina Khan’s vocal support of increased FTC regulation of Big Tech (see prior article), privacy-related rulemaking will likely be a priority for the agency moving forward, as will a concerted push for the resources needed to support the agency’s expansive agenda (see prior article).

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#### The aff can’t topically fiat funding for enforcement---Expand the scope of antitrust refers exclusively to formal law not enforcement---means the plan is circumvented.

Sinisa Milosevic et al. 18. Commission for Protection of Competition, The Republic of Serbia. Dejan Trifunovic, Faculty of Economics, University of Belgrade, Belgrade, The Republic of Serbia. Jelena Popovic Markopoulos, Commission for Protection of Competition, The Republic of Serbia. “The Impact of the Competition Policy on Economic Development in the Case of Developing Countries”. Economic Horizons, May - August 2018, Volume 20, Number 2, 153 – 167. http://scindeks-clanci.ceon.rs/data/pdf/1450-863X/2018/1450-863X1802157M.pdf

The paper that analyzes the impact of the competition policy on the GDP growth in developing and developed countries in the Solow growth model framework is T. C. Ma’s (2011). The presence and scope of the competition policy is captured by the SCOPE variable that is defined in the paper by K. N. Hylton and F. Deng (2007). The overall effectiveness of the government’s application of policies, not only of the competition policy, is captured by the EFFICIENCY variable that is defined in the paper by D. Kaufmann, A. Kraay and M. Mastruzzi (2009). The results show that the SCOPE variable is not significant and the formal existence of the competition law cannot influence economic growth. The interacting variable of SCOPE x EFFICIENCY is named EFFLAW. For poor countries, the coefficient for this variable is 0.04 and is significant, whereas for rich countries the coefficient is 0.064 and is also significant. Therefore, the competition law must be complemented with the effective enforcement of this policy.

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#### Fraud prevention’s funded now---unexpected demands trade off

Bilirakis et al. 21, Gus Michael Bilirakis is an American lawyer and politician serving as the U.S. Representative for Florida's 12th congressional district since 2013; Hon. Noah Joshua Phillips is a Commissioner at the Federal Trade Commission; Hon. Lina Khan is the Chair of the Federal Trade Commission, “Transforming the FTC: Legislation to Modernize Consumer Protection,” Committee on Energy and Commerce, 6/28/21, https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer

Gus Bilirakis (3:12:44): Thank you. Our committee has worked extensively in a bipartisan manner to protect consumers from fraud and scams. Mr. Carter's Combating Pandemic Scams Act was enacted at the beginning of the year thanks to all of our leadership here. Representive Blunt Rochester's Fraud and Scam Reduction Act, as well as Representative Kelly's Protecting Seniors from Emergency Scams Act both cleared our chamber with bipartisan support this year. My bill, HR 2672, the FTC Reports Act, would require the FTC to report on fraud against our seniors. Commissioner Philips, how important is the work the FTC staff does to protect Americans from scams?

Noah Josuha Phillips (3:13:33): Congressman, thank you for your question. The work we do to protect American consumers against frauds and scams, is our bread and butter as an agency. There is no work that makes me feel better as a commissioner, when we watch our ability to find bad guys, or taking money from American consumers, dipping into their life savings, and get that money back to them. So the work that you have done on the committee to provide funding, to provide tools for us to go after scam artists, is critical. And I think that needs to continue with the agency.

Gus Bilirakis (3:14:05): Thank you, and Chair Khan, again, as you pursue other initiatives, when staff and resources be shifted away from the fraud program, which is so essential in preventing bad actors from harming our constituents? That's the question, please.

Lina Khan (3:14:22): Sorry, could you repeat the question - when should services be shifted...

Gus Bilirakis (3:14:26): Yes, of course. As you pursue other initiatives, when staff and resources be shifted away from your fraud program, which is so essential in preventing bad actors from harming our constituents?

Lina Khan (3:14:40): Well, of course, we're always limited by the appropriations bills when it comes to thinking through how we're delegating resources across the agency. In certain instances, I think there are exigent needs that can arise in certain aspects.

Gus Bilirakis (3:14:54): But you don't anticipate moving money from the fraud program, is that correct?

Lina Khan (3:15:00): Not especially, but I mean, I think overall, we are trying to look through the prism of managerial efficiency and trying to understand how we can best use our resources, especially given some of the exigent circumstances and so we'll be continuing to make those determinations.

Gus Bilirakis (3:15:15): I suggest that you not because this is such a very important program. Commissioner Wilson, can you elaborate on why the FTC Reports Act would also prove beneficial to increasing much needed transparency and the flow of information within the commission?

#### Fraud crackdowns stop major terror attacks

Michael Tierney 18, George & Mary Hylton Professor of International Relations; Director Global Research Institute (GRI), “#TerroristFinancing: An Examination of Terrorism Financing via the Internet,” International Journal of Cyber Warfare and Terrorism, vol. 8, no. 1, 01/2018, pp. 1–11

2. TERRORIST FINANCING AND THE INTERNET

As mentioned, terrorists’ use of the internet has become a major concern for security officials across the world in recent years. Like many other users, terrorists have found that the internet is an invaluable tool to share information quickly, in order to disseminate ideas and link up with likeminded individuals (Jacobson, 2010; Okolie-Osemene & Okoh, 2015). In this manner, terrorists use the internet for a variety of purposes, including recruitment, propaganda, and financing. As scholars have also noted, the internet is an attractive option for extremists due to the security and anonymity it provides (Jacobson, 2010). Yet while there have been a growing number of studies completed on the ways in which terrorist organizations use the internet to recruit and indoctrinate others, there has been relatively little focus on the methods by which terrorists finance themselves through online activities. Some researchers have attempted to fill gaps in this area by broadly studying internet aspects of terrorism financing. However, research on this particular aspect of terrorism financing still appears to be lacking, with little focus on new methods of terrorist financing via the internet or a marrying of strategies to combat online financing trends available to practitioners in the field.

For instance, Sean Paul Ashley (2012) assessed the mobile banking phenomenon, which is prevalent in regions such as the Middle East and Africa, and provides extremists with the ability to easily connect to the internet and remit funds around the world. The decentralization of this kind of banking, due to the fact that brick-and-mortar facilities are not needed to conduct transactions, has allowed terrorist financiersto more efficiently move funds while avoiding detection from authorities. Other researchers,such as MichaelJacobson (2010), have studied the waysin which terrorists engage in cyber-crime to raise and move funds. For example, Jacobson (2010) found that online credit card fraud was a fairly major source of terrorist financing. By stealing a victim’s private credit information, terrorists are able to co-opt needed funds and provide support to themselves or their counterparts. Yet as James Okolie-Osemene and Rosemary Ifeanyi Okoh (2015) note, the internet is mostly used to augment and assist activities which occur in the physical world. In this way, it would appear that the internet is far more useful as a means to move funds globally in support of terrorism, rather than simply as a method to raise funds.

#### Nuclear war---cash is key

Dr. Peter J. Hayes 18, Executive Director of the Nautilus Institute for Security and Sustainability, Ph.D. in Energy and Resources from the University of California-Berkeley, Professor of International Relations at RMIT University, “Non-State Terrorism and Inadvertent Nuclear War”, NAPSNet Special Reports, 1/18/2018, <https://nautilus.org/napsnet/napsnet-special-reports/non-state-terrorism-and-inadvertent-nuclear-war/>

The critical issue is how a nuclear terrorist attack may “catalyze” inter-state nuclear war, especially the NC3 systems that inform and partly determine how leaders respond to nuclear threat. Current conditions in Northeast Asia suggest that multiple precursory conditions for nuclear terrorism already exist or exist in nascent form. In Japan, for example, low-level, individual, terroristic violence with nuclear materials, against nuclear facilities, is real. In all countries of the region, the risk of diversion of nuclear material is real, although the risk is likely higher due to volume and laxity of security in some countries of the region than in others. In all countries, the risk of an insider “sleeper” threat is real in security and nuclear agencies, and such insiders already operated in actual terrorist organizations. Insider corruption is also observable in nuclear fuel cycle agencies in all countries of the region. The threat of extortion to induce insider cooperation is also real in all countries. The possibility of a cult attempting to build and buy nuclear weapons is real and has already occurred in the region.[15] Cyber-terrorism against nuclear reactors is real and such attacks have already taken place in South Korea (although it remains difficult to attribute the source of the attacks with certainty). The stand-off ballistic and drone threat to nuclear weapons and fuel cycle facilities is real in the region, including from non-state actors, some of whom have already adopted and used such technology almost instantly from when it becomes accessible (for example, drones).[16]

Two other broad risk factors are also present in the region. The social and political conditions for extreme ethnic and xenophobic nationalism are emerging in China, Korea, Japan, and Russia. Although there has been no risk of attack on or loss of control over nuclear weapons since their removal from Japan in 1972 and from South Korea in 1991, this risk continues to exist in North Korea, China, and Russia, and to the extent that they are deployed on aircraft and ships of these and other nuclear weapons states (including submarines) deployed in the region’s high seas, also outside their territorial borders.

The most conducive circumstance for catalysis to occur due to a nuclear terrorist attack might involve the following nexi of timing and conditions:

1. Low-level, tactical, or random individual terrorist attacks for whatever reasons, even assassination of national leaders, up to and including dirty radiological bomb attacks, that overlap with inter-state crisis dynamics in ways that affect state decisions to threaten with or to use nuclear weapons. This might be undertaken by an opportunist nuclear terrorist entity in search of rapid and high political impact.
2. Attacks on major national or international events in each country to maximize terror and to de-legitimate national leaders and whole governments. In Japan, for example, more than ten heads of state and senior ministerial international meetings are held each year. For the strategic nuclear terrorist, patiently acquiring higher level nuclear threat capabilities for such attacks and then staging them to maximum effect could accrue strategic gains.
3. Attacks or threatened attacks, including deception and disguised attacks, will have maximum leverage when nuclear-armed states are near or on the brink of war or during a national crisis (such as Fukushima), when intelligence agencies, national leaders, facility operators, surveillance and policing agencies, and first responders are already maximally committed and over-extended.

At this point, we note an important caveat to the original concept of catalytic nuclear war as it might pertain to nuclear terrorist threats or attacks. Although an attack might be disguised so that it is attributed to a nuclear-armed state, or a ruse might be undertaken to threaten such attacks by deception, in reality a catalytic strike by a nuclear weapons state in conditions of mutual vulnerability to nuclear retaliation for such a strike from other nuclear armed states would be highly irrational.

Accordingly, the effect of nuclear terrorism involving a nuclear detonation or major radiological release may not of itself be *catalytic* of *nuclear* war—at least not intentionally–because it will not lead directly to the destruction of a targeted nuclear-armed state. Rather, it may be catalytic of non-nuclear war between states, especially if the non-state actor turns out to be aligned with or sponsored by a state (in many Japanese minds, the natural candidate for the perpetrator of such an attack is the pro-North Korean General Association of Korean Residents, often called Chosen Soren, which represents many of the otherwise stateless Koreans who were born and live in Japan) and a further sequence of coincident events is necessary to drive escalation to the point of nuclear first use by a state. Also, the catalyst—the non-state actor–is almost assured of discovery and destruction either during the attack itself (if it takes the form of a nuclear suicide attack then self-immolation is assured) or as a result of a search-and-destroy campaign from the targeted state (unless the targeted government is annihilated by the initial terrorist nuclear attack).

It follows that the effects of a non-state nuclear attack may be characterized better as a *trigger* effect, bringing about a *cascade* of nuclear use decisions

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within NC3 systems that shift each state increasingly away from nuclear non-use and increasingly towards nuclear use by releasing negative controls and enhancing positive controls in multiple action-reaction escalation spirals (depending on how many nuclear armed states are party to an inter-state conflict that is already underway at the time of the non-state nuclear attack); and/or by inducing concatenating nuclear attacks across geographically proximate nuclear weapons forces of states already caught in the crossfire of nuclear threat or attacks of their own making before a nuclear terrorist attack.[17]

### AT: 2ac 6

#### FTC enforcement is key against algorithmic discrimination.

#### 1. Actualizing scrutiny to bias is key.

K.C. Halm 21. Partner at Davis Wright Tremaine LLP, with Nancy Libin, 4/26/21. “FTC Warns of Greater Scrutiny Over Biased AI, Offers Best Practices to Mitigate Potential Harm.” https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2021/04/ftc-ai-bias-best-practices-guidance

Building on prior guidance issued in 2020, the Federal Trade Commission (FTC) recently warned in a new blog post that it will use its authority under existing laws to take enforcement action against companies that sell or use algorithms or artificial intelligence (AI) technology that results in discrimination by race or other legally protected classes. The agency urged companies developing or using AI to ensure their AI tools or applications do not result in biased outcomes because a failure to do so may result in "deception, discrimination—and an FTC [] enforcement action." The agency's latest pronouncement leaves no doubt that the FTC will be actively reviewing the market for potential bias or discrimination when AI-enabled applications and services are used to provide access to housing, credit, finance, insurance, or other important services. As our readers know, AI is emerging as a transformative technology that is enabling new systems, tools, applications, and use cases. At the same time, perceived risks arising from potential bias, discrimination, or other negative outcomes is leading regulators to look more closely at both the benefits and potential risks of the technology. To that end, the FTC is moving quickly to assert itself as a leading regulator with authority to oversee a broad range of AI providers, systems, and applications on the market. Basis of Potential AI-related FTC Enforcement Actions Three statutes provide the FTC significant authority to act in this area. Specifically, Section 5 of the FTC Act prohibits unfair or deceptive practices. The FTC's latest statement suggests that the agency believes it can use Section 5 authority, for example, to penalize entities selling or using "racially biased algorithms." Further, the agency also has authority to act under the Fair Credit Reporting Act (FCRA), which could be applied when an algorithm is used in a process that results in the denial of employment, housing, credit, insurance, or other benefits. Similarly, the Equal Credit Opportunity Act (ECOA)—which prohibits a company from using a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance—could be another basis for the agency to act. Thus, for example, if your algorithm results in credit discrimination against a protected class, you could find yourself facing a complaint alleging violations of the FTC Act and ECOA. Notably, the FTC's blog post is framed as both guidance and a reaffirmation that the FTC has been policing issues around AI and big data for many years and sends a clear signal that it intends to do so going forward. This reinforces Acting Chair Rebecca Kelly Slaughter's recent speech on algorithmic discrimination in which she cited a study demonstrating that an algorithm used with good intentions—to target medical interventions to the sickest patients—ended up funneling resources to a healthier, white population, to the detriment of sicker, patients of color. She asked the FTC staff "to actively investigate biased and discriminatory algorithms" and expressed an interest "in further exploring the best ways to address AI-generated consumer harms." Indeed, as we explained in recent blog posts, recent FTC enforcement actions reflect increased scrutiny of companies using algorithms, automated processes, and/or AI-enabled applications. The FTC's recent settlement with Everalbum is instructive in that it illustrates the agency's latest remedial tool: the so-called "disgorgement" of ill-gotten data. In the recent enforcement case, the FTC alleged that Everalbum, an app developer that used photos uploaded by users to train its facial recognition technology, failed to properly obtain users' consent. The agency also alleged that Everalbum made false statements about the users' ability to delete their photos upon deactivating their accounts. On these facts, the FTC secured a settlement and consent decree that required Everalbum to delete algorithms that used the data obtained without consent—a remedy that is akin to the "fruit of the poisonous tree" concept—and obtain consent before using facial recognition technology on user content. The FTC's latest reaffirmation of its authority to act in this area demonstrates that the agency will hold businesses accountable for using AI that may result in biased outcomes or for making promises that the technology cannot deliver. Its message is clear: "Hold yourself accountable – or be ready for the FTC to do it for you."

#### 2. FTC enforcement key to check algorithmic bias.

Heather Landi 21 – senior editor at Fierce Healthcare, 4/22/21. “FTC issues warning that using biased AI could violate consumer protection laws.” https://www.fiercehealthcare.com/tech/ftc-issues-warning-using-biased-ai-could-violate-consumer-protection-laws

The Federal Trade Commission issued a warning to businesses and health systems this week that the use of discriminatory algorithms could violate consumer protection laws.

It could signal that the agency plans to take a hard look at bias in artificial intelligence technologies.

"Hold yourself accountable—or be ready for the FTC to do it for you," Elisa Jillson, an attorney in FTC’s privacy and identity protection division, wrote in an official blog post.

The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of—for example—racially biased algorithms, Jillson wrote.

Using biased AI technology also could potentially violate the Fair Credit Reporting Act, which comes into play in certain circumstances where an algorithm is used to deny people employment, housing, credit, insurance, or other benefits and also the Equal Credit Opportunity Act, according to the FTC. The ECOA makes it illegal for a company to use a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance.

"Under the FTC Act, your statements to business customers and consumers alike must be truthful, non-deceptive, and backed up by evidence," Jillson wrote in the blog post. "In a rush to embrace new technology, be careful not to overpromise what your algorithm can deliver. For example, let’s say an AI developer tells clients that its product will provide “100% unbiased hiring decisions,” but the algorithm was built with data that lacked racial or gender diversity. The result may be deception, discrimination—and an FTC law enforcement action."

Jillson cited the example of using AI for COVID-19 prediction models to help health systems combat the virus through efficient allocation of ICU beds, ventilators, and other resources. But a recent study in the Journal of the American Medical Informatics Association suggests that if those models use data that reflect existing racial bias in healthcare delivery, AI that was meant to benefit all patients may worsen healthcare disparities for people of color, according to Jillson.

One study that has been widely cited found that a commonly used healthcare algorithm that helps determine which patients need additional attention was found to have a significant racial bias, favoring white patients over blacks ones who were sicker and had more chronic health conditions. The algorithm used health costs to predict and rank which patients would benefit most from extra care that could help them stay on their medications or keep them out of the hospital. But researchers said that using health costs as a proxy for health needs is biased because black patients, facing disproportionate levels of poverty, often spend less on health care than whites.

The authors of the study, which was published in the journal Science, estimated that this racial bias reduces the number of black patients identified for extra care by more than half.

Citing that study, Jillson wrote that businesses need to test their algorithms—both before you use it and periodically after that—to make sure that it doesn’t discriminate on the basis of race, gender, or other protected class.

In a tweet, University of Washington School of Law professor Ryan Calo called the FTC's strong language a "shot across the bow."

The blog post signals "a shift in the way the FTC thinks about enforcing the FTC Act in the context of emerging technology. The concreteness of the examples coupled with repeated references to statutory authority is uncommon," Calo wrote.

The FTC outlined a number of recommendations for businesses and health systems to address bias in AI technology including being more transparent about the data being used and using independent researchers to evaluate the algorithms.

"As your company develops and uses AI, think about ways to embrace transparency and independence — for example, by using transparency frameworks and independent standards, by conducting and publishing the results of independent audits, and by opening your data or source code to outside inspection," Jillson wrote.

If an AI model causes more harm than good—that is, in FTC parlance, if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or to competition—the FTC can challenge the use of that model as unfair, she wrote.

The stern warnings about selling and using discriminatory AI technology and overpromising on their capabilities suggest the FTC might be eyeing stricter enforcement.

#### 3. FTC enforcement keeps the AI industry in line.

Ryan Calo 21. Professor of Law, University of Washington, 4/27/21. “FTC warns the AI industry: Don’t discriminate, or else.” https://theconversation.com/ftc-warns-the-ai-industry-dont-discriminate-or-else-159622

The U.S. Federal Trade Commission just fired a shot across the bow of the artificial intelligence industry. On April 19, 2021, a staff attorney at the agency, which serves as the nation’s leading consumer protection authority, wrote a blog post about biased AI algorithms that included a blunt warning: “Keep in mind that if you don’t hold yourself accountable, the FTC may do it for you.”

The post, titled “Aiming for truth, fairness, and equity in your company’s use of AI,” was notable for its tough and specific rhetoric about discriminatory AI. The author observed that the commission’s authority to prohibit unfair and deceptive practices

“would include the sale or use of – for example – racially biased algorithms” and that industry exaggerations regarding the capability of AI to make fair or unbiased hiring decisions could result in “deception, discrimination – and an FTC law enforcement action.”

Bias seems to pervade the AI industry. Companies large and small are selling demonstrably biased systems, and their customers are in turn applying them in ways that disproportionately affect the vulnerable and marginalized. Examples of areas where they are being abused include health care, criminal justice and hiring.

Whatever they say or do, companies seem unable or unwilling to rid their data sets and models of the racial, gender and other biases that suffuse society. Industry efforts to address fairness and equity have come under fire as inadequate or poorly supported by leadership, sometimes collapsing entirely.

As a researcher who studies law and technology and a longtime observer of the FTC, I took particular note of the not-so-veiled threat of agency action. Agencies routinely use formal and informal policy statements to put regulated entities on notice that they are paying attention to a particular industry or issue. But such a direct threat of agency action – get your act together, or else – is relatively rare for the commission.

What the FTC can do – but hasn’t done

The FTC’s approach on discriminatory AI stands in stark contrast to, for instance, the early days of internet privacy. In the 1990s, the agency embraced a more hands-off, self-regulatory paradigm, becoming more assertive only after years of privacy and security lapses.

How much should industry or the public read into a blog post by one government attorney? In my experience, FTC staff generally don’t go rogue. If anything, that a staff attorney apparently felt empowered to use such strong rhetoric on behalf of the commission confirms a broader basis of support within the agency for policing AI.

Can a federal agency, or anyone, define what makes AI fair or equitable? Not easily. But that’s not the FTC’s charge. The agency only has to determine whether the AI industry’s business practices are unfair or deceptive – a standard the agency has almost a century of experience enforcing – or otherwise in violation of laws that Congress has asked the agency to enforce.

1. Only in relation to Amazon, *see e.g.* Jennifer Rankin, ‘Third-party sellers and Amazon – a double- edged sword in e-commerce’ (*The Guardian*, 23 June 2015) <https://www.theguardian.com/technology/2015/jun/23/amazon marketplace-third-party-seller-faustian-pact>; Spencer Soper, ‘Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too’ (*Bloomberg*, 20 April 2016) <https://www.bloomberg.com/news/articles/2016-04-20/got-a-hot - [↑](#footnote-ref-1)