# 1NC---Round 2---Wake

## OFF

### 1NC---T

#### Prohibitions are distinct from remedies that only block the anticompetitive elements of a practice, rather than the practice itself.

Jo Seldeslachts et al. ‘7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

Let us now think about the differences between the two antitrust actions of prohibitions and remedies.7 In the case of a prohibition, the penalty for proposing a merger with significant anti-competitive problems involves the full prohibition of the merger: both the pro-competitive and the anti-competitive profits for merging firms are negated by the prohibition. The throwing out of the pro-competitive profits along with the anti-competitive profits is important, as this brings about the punitive measure that Posner (1970) acknowledges as being crucial for deterrence. The big difference between remedies and prohibitions is that remedies attempt to identify and eliminate the anti-competitive elements of a merger. In essence, the merging firms are able to hold on to the pro-competitive elements of the merger—so they keep (ΠPC), but the anti-competitive elements of the merger (ΠAC) are negated by the remedial action. If an antitrust authority imposes remedies, then the disincentive for firms to propose anti-competitive mergers is clearly lower. In short, prohibitions seemingly involve more deterrence than do remedies, as prohibitions represent larger punishments.

#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97. Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis.

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Violation: The plan only increases behavioral remedies that target anticompetitive aspects of the practice---topical affs must increase prohibitions on the practices themselves.

#### Vote neg for limits and ground---infinite behavioral remedies and no link uniqueness for offense.

### 1NC---CP

#### The United States federal government should create a non-antitrust Digital Authority responsible for regulating digital platform policy through the mechanisms outlined in the Stigler evidence.

For reference, these include:

---imposing market standards

---mandating portability and accessibility of data

---monitor and correct negative market developments

---review mergers

---work with applicable agencies in other countries.

#### Solves the aff

Stigler Committee on Digital Platforms 19. The Steigler Committee is an independent committee of over 30 area experts and scholars tasked with creating a report on the regulation of digital platforms. What follows are the credentials of the report’s main organizers, but a full list of scholars and qualifications can be found at the link listed later in this cite. Luigi Zingales is the Robert C. McCormack Distinguished Service Professor of Entrepreneurship and Finance at the University of Chicago Booth School of Business. Guy Rolnik is a Clinical Associate Professor of Strategic Management at the University of Chicago Booth School of Business. Filippo Maria Lancieri is a fellow at the George J. Stigler Center for the Study of the Economy and the State. "Stigler Committee on Digital Platforms: Final Report." The University of Chicago Booth School of Business. 9-16-2019. https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report

Longer-term—the creation of a Digital Authority: The strongest indication emerging from the four reports is the importance of having a single powerful regulator capable of overseeing all aspects of DPs. DPs generate several concerns across different fields, all linked to the power of data. To address these concerns in a holistic way, there needs to be a single regulator able to impose open standards, to mandate portability of and accessibility to data, to monitor the use of dark patterns and the risks of addiction, and to complement the FTC and the DoJ in merger reviews. Countries like the UK are considering the set-up of a Digital Markets Unit. The United States and other nations should follow their example.[[1]](#footnote-1)

### 1NC---CP

#### Text: The 50 states, DC, and all relevant territories should uniformly adopt the principle of separating platforms from commerce for platforms in the private sector.

#### States can pursue autonomous anti-trust enforcement even when conflicting with federal law.

Erik **Knudsen 20.** Erik G. Knudsen is a partner in the Corporate Department and Private Equity Buyouts & Investment Group. Erik focuses his practice on complex business transactions, including leveraged buyouts, strategic mergers, acquisitions, investments and joint ventures, reorganizations, growth equity and venture capital investments, and divestitures. He has led transactions in a wide variety of industries, including healthcare, internet, technology, real estate, distribution and manufacturing. "Trends In State Antitrust Enforcement: Colorado Expands Attorney General’s Authority To Challenge Transactions On Competition Grounds." JD Supra. 4-16-2020. https://www.jdsupra.com/legalnews/trends-in-state-antitrust-enforcement-42950

At the federal level, the U.S. antitrust laws—including the Sherman Act and the Clayton Act, which governs mergers and acquisitions—are enforced by the FTC and DOJ. States also have antitrust laws, which are enforced by state AGs and are often patterned after their federal analogs, but can contain important differences. States frequently collaborate with the federal antitrust agencies and/or other states on merger investigations. However, the Supreme Court has recognized that states are not required to do so, and have the right to make enforcement decisions that differ from other federal and state authorities.[[3]](https://www.jdsupra.com/legalnews/trends-in-state-antitrust-enforcement-42950/#_ftn3) States have sometimes exercised this authority in order to “fill the gap” of perceived under-enforcement at the federal level. For example, in June 2017, the California AG sued to block Valero Energy Partners LP’s acquisition of two petroleum terminals in Northern California, despite the FTC’s decision not to challenge the deal. Several months later, the parties abandoned the transaction. More broadly, in recent years, there has been a growing trend of robust and autonomous state antitrust enforcement, as illustrated by major investigations and enforcement actions by state coalitions in the healthcare, pharmaceutical, telecom, and technology sectors, among others. Consistent with this trend, Colorado AG Phil Weiser—who previously served as Deputy Assistant Attorney General in the DOJ Antitrust Division under the Obama administration—has affirmed his commitment to “protecting all Coloradans from anticompetitive consolidation and practices…whether or not the federal government acts to protect Coloradans.” In keeping with this mandate, the Amendment will bring Colorado increasingly in line with states such as California and New York that have demonstrated an appetite for aggressive, independent antitrust enforcement, even where it may depart (or conflict) with federal action.

### 1NC---K

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

Kwet 20 [Michael Kwet is a 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---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.”

### 1NC---DA

#### Reconciliation bill passes now, but Biden’s PC key to moderate’s votes. Solves warming

Emma Dumain, 11-8-2021, "Democrats cheer reconciliation vote, but big fights remain," E&E News, https://www.eenews.net/articles/democrats-cheer-reconciliation-vote-but-big-fights-remain/

Congressional Democrats painted a rosy view this past weekend of the prospects for swift legislative action on their massive, $1.7 trillion climate and social spending package. From the White House on Saturday, President Biden said without equivocation, “We will pass this in the House, and we’ll pass it in the Senate.” From Glasgow, Scotland, on a panel at the United Nations climate talks, Sen. Ed Markey (D-Mass.) said his message to the entire international community was that the Senate would ultimately get the votes to advance the reconciliation bill, enabling Biden to meet his goal of achieving 50 percent emissions reductions below 2005 levels by the year 2030. “We will get this job done,” said Markey of legislation that would invest roughly $550 billion to fight the climate crisis — the biggest federal investment in the environment in history. And yesterday, White House chief of staff Ron Klain hammered the point home: “We are going to lead the world in tackling climate change,” he said on on NBC’s “Meet The Press,” adding, “We’re going to pass this bill and have the tools to do it.” But simmering beneath this optimism are real uncertainties as to how lingering disagreements over the cost and content of the reconciliation bill, known as the “Build Back Better Act,” will get resolved and fulfill the many promises on climate action Democrats intend to tout in Glasgow over the next several days. This past Friday, progressives finally agreed to clear the separate, $1 trillion bipartisan infrastructure package for the president’s signature, even without ironclad commitments from moderate Democratic Sens. Joe Manchin of West Virginia and Kyrsten Sinema of Arizona that they would vote for the separate, partisan bill. Those commitments had been a hard line that liberals had held on to for weeks. Meanwhile, another dilemma emerged: House Democratic moderates said they would not support the reconciliation bill until it had received an official cost estimate from the nonpartisan Congressional Budget Office. House Democratic leadership ultimately culled together the votes to pass the bipartisan infrastructure bill, 228-206, with all but six Democrats supporting and with help from 13 Republicans to make up the shortfall. Moderates essentially promised progressives they’d vote for the reconciliation bill once the CBO score is finalized. At the same time, Congress took a procedural step, 221-213, regarding the reconciliation bill to bring that measure closer to a final passage vote the week of Nov. 15, when the House returns following the Veterans Day recess. Rep. Josh Gottheimer (D-N.J.), one of the moderates who insisted the reconciliation bill be scored prior to a vote, said on CNN’s “State of the Union” yesterday he expected the score to be in line with White House projections, in which case he and his colleagues would back the bill as soon as next week. Party leaders, however, are taking a tremendous gamble that the CBO score will be sufficient. They are now working against a much tighter deadline to resolve intraparty differences on multiple policy proposals by the year’s end, where the final weeks of December will also be consumed by other legislative battles relating to the appropriations process and the debt ceiling. They are also putting tremendous trust in Biden’s ability to convince Manchin and Sinema to support the larger spending package, about which Manchin has expressed serious reservations while Sinema has stayed mostly mum.

#### Antitrust reform requires PC and trades off with other legislative priorities.

Peter C. Carstensen 21, the Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, February 2021, “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST,” https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Warming causes extinction---AND every increment is key because of invisible thresholds and exponential feedbacks.

Dr. Yew-Kwang Ng 19, Winsemius Professor of Economics at Nanyang Technological University, Fellow of the Academy of Social Sciences in Australia and Member of Advisory Board at the Global Priorities Institute at Oxford University, PhD in Economics from Sydney University, “Keynote: Global Extinction and Animal Welfare: Two Priorities for Effective Altruism”, Global Policy, Volume 10, Number 2, May 2019, pp. 258–266

Catastrophic climate change

Though by no means certain, CCC causing global extinction is possible due to interrelated factors of non-linearity, cascading effects, positive feedbacks, multiplicative factors, critical thresholds and tipping points (e.g. Barnosky and Hadly, 2016; Belaia et al., 2017; Buldyrev et al., 2010; Grainger, 2017; Hansen and Sato, 2012; IPCC 2014; Kareiva and Carranza, 2018; Osmond and Klausmeier, 2017; Rothman, 2017; Schuur et al., 2015; Sims and Finnoff, 2016; Van Aalst, 2006).7

A possibly imminent tipping point could be in the form of ‘an abrupt ice sheet collapse [that] could cause a rapid sea level rise’ (Baum et al., 2011, p. 399). There are many avenues for positive feedback in global warming, including:

• the replacement of an ice sea by a liquid ocean surface from melting reduces the reflection and increases the absorption of sunlight, leading to faster warming;

• the drying of forests from warming increases forest fires and the release of more carbon; and

• higher ocean temperatures may lead to the release of methane trapped under the ocean floor, producing runaway global warming.

Though there are also avenues for negative feedback, the scientific consensus is for an overall net positive feedback (Roe and Baker, 2007). Thus, the Global Challenges Foundation (2017, p. 25) concludes, ‘The world is currently completely unprepared to envisage, and even less deal with, the consequences of CCC’.

The threat of sea-level rising from global warming is well known, but there are also other likely and more imminent threats to the survivability of mankind and other living things. For example, Sherwood and Huber (2010) emphasize the adaptability limit to climate change due to heat stress from high environmental wet-bulb temperature. They show that ‘even modest global warming could ... expose large fractions of the [world] population to unprecedented heat stress’ p. 9552 and that with substantial global warming, ‘the area of land rendered uninhabitable by heat stress would dwarf that affected by rising sea level’ p. 9555, making extinction much more likely and the relatively moderate damages estimated by most integrated assessment models unreliably low.

While imminent extinction is very unlikely and may not come for a long time even under business as usual, the main point is that we cannot rule it out. Annan and Hargreaves (2011, pp. 434–435) may be right that there is ‘an upper 95 per cent probability limit for S [temperature increase] ... to lie close to 4°C, and certainly well below 6°C’. However, probabilities of 5 per cent, 0.5 per cent, 0.05 per cent or even 0.005 per cent of excessive warming and the resulting extinction probabilities cannot be ruled out and are unacceptable. Even if there is only a 1 per cent probability that there is a time bomb in the airplane, you probably want to change your flight. Extinction of the whole world is more important to avoid by literally a trillion times.

## Adv – Dynamism

### 1NC---Turn

#### Anti-trust law can’t be distinguished in specific industries. It’s enforced in generalist common law unlike regulation.

Dr. William Rogerson 20, Charles E. and Emma H. Morrison Professor of Economics at Northwestern University, Ph.D. in Social Sciences from the California Institute of Technology, and Dr. Howard Shelanski, Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust Enforcement, Regulation, and Digital Platforms”, University of Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911, June 2020, Lexis

I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable legal shifts wreck business confidence.

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery.

Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook.

Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak.

Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show.

“Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.”

Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic.

Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists.

Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence.

The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’”

Businesses appear to be less risk-averse now, he said.

After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital.

Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit.

Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first.

“We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities.

Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

### 1NC---Innovation Turn

#### Khan is wrong---the platform separation’s arbitrary and vague nature tubes innovation

A. Douglas Melamed & Nicolas Petit 19. Professor of the Practice of Law at Stanford Law School. \*\*Joint Chair in Competition Law at the European University Institute in the Department of Law and at the Robert Schuman Center for Advanced Studies. "The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets." Review of Industrial Organization. 2-11-2019. https://link.springer.com/article/10.1007/s11151-019-09688-4#Sec13

5 Competitive Process, “No Fault” Antitrust, and Conduct‑Based Rules

Many of the critics of CW have in mind an alternative to the CW standard for antitrust policy: “protection of competition” or the “competitive process” (Khan 2017; Wu 2018). The words themselves to do not necessarily imply a departure from the CW standard because, as was explained above, both of the key elements of existing US antitrust law—anticompetitive conduct, and increased market power—are focused on harm to the competitive process. The courts have recognized this connection as well.

The critics are often unclear about the concrete elements of antitrust liability that would operationalize a “protection of competition” policy in relation to platformbased firms, but their remedy proposals enable us to draw inferences about their preferred antitrust doctrine. The core idea seems to be the removal of one of the three elements of a violation of antitrust law: bad conduct, market power, and a causal link between them. There are two variants to this idea:

Some CW critics want to decrease the importance of the “bad conduct” element, so as to migrate towards a more “no fault” antitrust intervention on the basis of a showing of a situation of “structural dominance” (Khan 2017). Others would retain the conduct requirement and dispense with the market power screen. Both proposals are unsound.

5.1 No‑Fault Antitrust for Platforms

Some critics of CW display sympathy for a “no fault” antitrust or something very close to this (Khan 2017; Woodcock 2017). In this alternative framework, the bad conduct requirement that is necessary to establish antitrust liability—in Section 1 cases, concerted action; in Section 2 cases, exclusionary conduct—is either removed or marginalized (for example, through greater reliance on incipiency theories in antitrust doctrine or the concept of “special responsibility” of dominant firms that is used in the EU). Instead, a market power screen of some sort would be used to identify a position of “structural dominance” that provides the basis for antitrust intervention. In effect, these critics seem to be saying, the law should give less deference to efficiency and should focus more on rivalry.

The normative idea is that society is better off when more than one platform, and/or related upstream and downstream businesses, operate in a market. When this condition is not met, the concentrated structure of the platform market creates anticompetitive conflicts of interests and perverse behavioral incentives, such as discrimination and leveraging (Khan 2017). The promotion of inter- and intra-platform rivalry would require the imposition of positive obligations—e.g., must-carry requirements, mandatory API sharing, data portability measures—on platformbased firms. It might also require heightened M&A restrictions and possible divestitures that are aimed at eliminating structural dominance.

A no-fault antitrust law would almost certainly inflict static welfare losses on society. To start, breaking up platforms horizontally would likely reduce productive efficiencies, require replication of fixed costs not fully utilized and thereby increase average total costs, and reduce the benefits of network effects on the various sides of the platform. Moreover, when improperly executed—which is a non-trivial possibility—a platform break-up might give rise to negative network externalities, transaction costs, and excessive platform fragmentation.

To capture this intuition, we invite readers to travel back to the world of Internet search before 2000, when users searched web pages through multiple platforms and then had to compare search results. The upshot was lost time for users and costly campaigns for advertisers.

Breaking up vertically integrated companies or those providing complements could also reduce static efficiency.

Productive efficiency could be harmed by diseconomies of scope and lost spillovers. And allocative inefficiency might result from the increased potential for double marginalization, which would lead to increased prices and reduced output. Similar but perhaps less substantial welfare losses would result from conduct restrictions that limited the ability of platforms to take full advantage of whatever efficiencies are created by their size and scope.

A no-fault antitrust law would also have dynamic costs: By reducing the rewards to “skill, foresight and industry”, as the court put it in Alcoa, the law would reduce the incentives for and thus the likely investment in such productive endeavors. And by offering the prospect of antitrust intervention to assist rivals and complementors, no-fault antitrust law could reduce their incentives to innovate and otherwise compete vigorously in order to flourish without such aid. Such a law would also require on-going industry monitoring. If, for example, there are strong network effects in a market, there are likely to be recurring monopolies as markets tip to one rival or another.

On the other hand, no-fault antitrust law could promote economic welfare by reducing the deadweight loss that results from enduring market power and by facilitating the entry of rivals and complementors and thus inducing investment in such rivals. Whether no-fault antitrust law would on balance increase or decrease welfare is an empirical question, and the answer might differ depending on the industry or even the specific company. In the platform world, for example, Amazon seems to have large fixed costs (for example, those related to its fulfillment infrastructure), while platforms such as Facebook and Google have relatively lower fixed costs and higher variable costs (for example, those that are related to labor-intensive content moderation); but the latter probably provide greater network efficiencies.

U.S. antitrust law takes a clear stand on this issue: No antitrust violation is found, and no antitrust remedy is warranted, unless the defendant has engaged in anticompetitive conduct: conduct that does not increase efficiency but does tend to increase market power by coordinating the conduct of competitors or weakening or excluding competitors. The stand seems to reflect both a normative judgment—if you play by the rules, you can enjoy the fruits of success—and a crude empirical judgment that the welfare costs of no-fault intervention exceed the benefits as a general matter and trying to carve out the exceptional case would be too difficult or costly.

The CW standard does not require antitrust law to be based on either that normative judgment or that empirical judgment. Certainly, those have not been the premises of EU competition law, at least until recently. Several leading EU cases declared that dominant firms are under a “special responsibility” that was often understood, for example, to imply access and nondiscrimination obligations. Even today, EU competition law guidelines make clear that stricter standards apply where inaction would leave only a single firm in the relevant market. The idea is that preserving access by outsiders, small firms, and less efficient upstarts, and ensuring that some competitors remain in the market, would promote welfare over the long run (Fox 2008a, b).

The EU seems to be moving away from this kind of no-fault competition law, not because the CW standard compels such a move but for other, more pragmatic reasons that arise from the difficulty of determining when and how to intervene in a nofault system. How should the law define threshold levels of platform monopoly that warrant antitrust intervention? How should it account for the welfare costs of intervention? Are some markets or firms too valuable or too innovative for government intervention, even if concentrated or powerful? Are some remedies too disruptive and costly? The CW critics that sympathize with a migration of antitrust towards a no-fault approach have not addressed these questions. Absent satisfactory answers to them, no-fault antitrust—or anything close to it—would likely be a recipe for arbitrary and welfare-reducing government regulation.

There is another problem with no-fault antitrust law that suggests that it would have—at best—an uneasy relationship with U.S. antitrust law, although the unease has little to do with the CW standard itself: U.S. antitrust law proscribes certain kinds of conduct and otherwise leaves parties free to compete in the marketplace. In effect, it punishes and seeks to deter what it regards as bad conduct. If one imagines a continuum with proscriptive law enforcement at one end and prescriptive regulation on the other, antitrust law is on the law enforcement side. The law enforcement approach reflects both a normative judgment about the limited role of the State and specific, antitrust judgments: that competition is better than regulation; that markets (policed by rules of fair play) know better than central planners; and that proscriptive rules promote business compliance, legal certainty, and economic activity. If antitrust intervention is based on market conditions rather than specific bad conduct, it becomes a kind of regulation and to that extent departs from a core premise of U.S. antitrust law.

### 1NC---Rulemaking

#### Rulemaking fails:

#### Uncertainty over the scope and extent of deference.

Alexander Paul Okuliar et al. 21. Morrison & Foerster LLP. "FTC Lays Groundwork For Rulemakings: Are New Substantive Competition Rules Coming?". No Publication. 3-25-2021. https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1067906/ftc-lays-groundwork-for-rulemakings-are-new-substantive-competition-rules-coming

The FTC's foray into rulemaking could lead to a period of uncertainty and legal challenges in those areas touched by a new agency rule. There is likely to be significant debate over the scope of the FTC's authority, the particulars of the rulemaking process, the substance of any proposed rules, and, when tested in court, the extent of Chevron deference to which the agency is entitled. Substantive FTC competition rules could also create potential divergence in enforcement policy or activity between the DOJ and FTC brought about by the new rules.

#### Congress circumvents---amending the FTC Act to undo rulemaking expanding “unfairness” proves.

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Miller’s efforts to have Congress enact the three-pronged substantial injury test into law finally bore fruit when Republicans took control of Congress in 1994.514 In that year, the first reauthorization of the FTC since 1980 amended the FTC Act to require the FTC to run all of its unfairness analysis through the substantial injury test.515 The amendment also prohibited “public policy considerations” from “serv[ing] as a primary basis” for a determination that “[an] act or practice is unfair,” though “established public policies” could be used as “evidence . . . considered with all other evidence.”516 This amendment clearly limited the FTC’s unfairness authority, both in the trivial sense that it created some statutory standards where none existed previously and in the more substantial sense that it—at least nominally—limited the role of “public policy” considerations. But it cannot fairly be read as an attempt to rein in the FTC or to compel it to adopt neoclassical theories of the market.

### 1NC---I/L Defense

#### Platform utility regulation doesn’t solve competition – too vague

Will Rinehart, 19. Will Rinehart is Former Director of Technology and Innovation Policy at the American Action Forum. “FOUR REASONS WHY SENATOR WARREN’S PUBLIC UTILITY PROPOSAL WILL BACKFIRE.” March 12, 2019. https://www.americanactionforum.org/insight/four-reasons-why-senator-warrens-public-utility-proposal-will-backfire/

Senator Elizabeth Warren recently offered a new proposal to break up tech companies, which she is calling platform utility regulation. If put in place, companies that have annual global revenue of $25 billion or higher and that provide an online marketplace, an exchange, or a platform would be broken up, while all platforms, regardless of size, would be subject to a new series of regulations. Here are four reasons why the proposal will backfire. Reason One: The Proposal Won’t Induce Competition, But Chaos Under Warren’s proposal, the companies would be prohibited from owning both “the platform utility and any participants on that platform.” Apple and Google would be prohibited from preloading apps on their mobile operating systems. In its strictest form, this rule would mean a structural separation between the advertising side of the platform and the users. Without both sides of the market, there is no business model. As Michael Moritz, a major investor in Google, said of those early years before the ad side was combined with users, “We really couldn’t figure out the business model. There was a period where things were looking pretty bleak.” Because these businesses depend on the combination of the two sides, any action meant to break them up would be a death knell. Moreover, all platforms would be required to engage in “fair, reasonable, and nondiscriminatory dealing with users,” swinging open the door to regulation. Because these terms are hard to define, an agency would need to be given wide latitude, much like the amorphous public-interest standard at the Federal Communications Commission (FCC). As former FCC Commissioner Glen Robinson explained, this standard “is vague to the point of vacuousness, providing neither guidance nor constraint on the agency’s action.” Something similar would be expected for platform regulation under this proposal.

#### Plan doesn’t solve – size isn’t the issue

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And had it not accepted a buyout from Facebook, there isn’t any guarantee that it would have ever gotten to over a billion users as it had by last summer. The integration of Instagram onto Facebook’s social graph almost certainly had a major impact on its adoption curve. When it was acquired, there were many other photo-sharing sites and apps offering similar features. To hear the anti-monopolists tell it, Facebook had acquired a competing social platform and thus took over a market. In reality, Facebook built Instagram into what it is today.

So the question becomes one of incentives. If we want to see our large technology companies continue to generate profits for shareholders, promote growth in the overall economy, pay good wages for employees and invent new businesses that keep America’s dynamism the envy of the world, then why would we seek to punish them for having done so? Facebook’s success at growing the user base of Instagram and then its revenue base should not, in and of itself, be grounds for a breakup. Size alone is not the real issue. The monopolies of past eras of American history attracted the ire of antitrust proponents because, upon attaining a certain size within their industries, they had become abusive to everyday consumers who found themselves with a limited amount of choice. By cutting out smaller operators, Rockefeller and Morgan were able to effectively set prices for oil or steel and then defend their monopoly by using their influence over shippers, rail operators, miners, politicians and construction companies. What’s tricky about today’s alleged monopolists is that they’ve actually used their size to do the opposite. Consumers have not been harmed by Amazon’s dominance over e-commerce, they actually love it, which is why there are over 100 million Prime users paying an annual membership fee for the privilege. If anything, Amazon’s size has been a deflationary force for the consumer, in much the same way that Walmart had been for decades prior. This perhaps explains why no serious political proposal has come along to stop Amazon up until now, as it’s grown from an online bookstore to one of the largest employers in America. If consumers were complaining, it might have come up sooner. But people love being able to buy everything in one place, they love everyday discounts, they love having items suggested to them that compliment the items they’ve already bought, they love free shipping and they love a shopping experience that anticipates what they’re going to need before they even need it.

### 1NC---AT: Digital Authoritarianism

#### Plan doesn’t solve digital authoritarianism.

Casey Newton 18, Silicon Valley Editor, 11-1-2018, "Internet freedom continues to decline around the world, a new report says," Verge, https://www.theverge.com/2018/11/1/18050394/internet-freedom-report-2018-freedom-house-chertoff

Digital authoritarianism is on the rise, according to a new report from a group that monitors internet freedoms. Freedom House, a pro-democracy think tank, said today that governments are seeking more control over users’ data while also using laws nominally intended to address “fake news” to suppress dissent. It marked the eighth consecutive year that Freedom House found a decline in online freedoms around the world. “The clear emergent theme in this report is the growing recognition that the internet, once seen as a liberating technology, is increasingly being used to disrupt democracies as opposed to destabilizing dictatorships,” said Mike Abramowitz, president of Freedom House, in a call with reporters. “Propaganda and disinformation are increasingly poisoning the digital sphere, and authoritarians and populists are using the fight against fake news as a pretext to jail prominent journalists and social media critics, often through laws that criminalize the spread of false information.” In the United States, internet freedom declined in 2018 due to the Federal Communications Commission’s repeal of net neutrality rules. Other countries fared much worse — 17 out of 65 surveyed had adopted laws restricting online media. Of those, 13 prosecuted citizens for allegedly spreading false information. And more countries are accepting training and technology from China, which Freedom House describes as an effort to export a system of censorship and surveillance around the world. “PROPAGANDA AND DISINFORMATION ARE INCREASINGLY POISONING THE DIGITAL SPHERE, AND AUTHORITARIANS AND POPULISTS ARE USING THE FIGHT AGAINST FAKE NEWS AS A PRETEXT TO JAIL PROMINENT JOURNALISTS.” Of course, there are tradeoffs between freedom and security. The report is critical of Sri Lanka and India, which have periodically shut down or limited access to the internet in response to the outbreak of ethnic and religious conflict. In both cases, citizens were being murdered by mobs that had encountered misinformation spread through social media. “Cutting off internet service is a draconian response, particularly at a time when citizens may need it the most, whether to dispel rumors, check in with loved ones, or avoid dangerous areas,” said Adrian Shahbaz, research director for technology and democracy. “While deliberately falsified content is a genuine problem, some governments are increasingly using ‘fake news’ as a pretense to consolidate their control over information and suppress dissent.” The report also found: Governments in 18 countries increased state surveillance between June 2017 and now, with 15 considering new “data protection” laws, which can require companies to store user data locally and potentially make it easier for governments to access. Governments in 32 countries used paid commentators, bots, and trolls in an effort to manipulate online conversations. WhatsApp and other closed messaging apps are becoming more popular targets for manipulation, the authors write.

### 1NC---AT: Slow Growth

#### COVID thumps---literally had our GDP in the shitter for over a year---should’ve caused their impacts.

#### No slow growth impact---it induces restraint.

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

#### Growth is surging.

Halloran ’9-14 [Michael; 2021; M.B.A. from Carnegie Mellon University, former aerospace research engineer, Equity Strategist; Janney, “Despite Potential Headwinds, Key Labor Market Indicators Bode Well for the Economy,” https://www.janney.com/latest-articles-commentary/all-insights/insights/2021/09/14/despite-potential-headwinds-key-labor-market-indicators-bode-well-for-the-economy]

However, we remain encouraged by the recovery that has been unfolding since the economy began reopening. We continue to see improvement in important cyclical sectors of the economy while consumers are historically healthy and still have pent-up demand. Business confidence has rebounded with strong corporate profits that should support further capital spending and hiring (there are now more job openings than there are unemployed people by a record amount).

We expect to see further improvement in the international backdrop, supported by unprecedented fiscal and monetary stimulus and accelerating rates of vaccination. Although the impact of the Delta wave is still being felt, recent evidence confirms the effectiveness of vaccines in limiting deaths and hospitalizations. With the pace of vaccination now picking up in the areas most impacted by this wave—Asia and Australia—the case for fading headwinds leading to improving economic growth later this year remains positive.

The signals from financial markets themselves remain positive. Despite consolidating last week, stocks remain near record highs while the 10-year Treasury remains well above the lows of earlier this summer when concerns about Delta first emerged.

These factors support our view of a durable economic recovery from the pandemic that should continue supporting stock prices. A healthy labor market is a critical element for a sustainable recovery that supports profit growth and last week’s news from the labor market remains encouraging.

## Adv – Dependency

### 1NC---AT: Krauspof/Buthelezi & Hodge

#### Internet access outweighs

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In developing countries, reducing market concentration, whether in the old economy or new digital economy is directly linked to economic inclusion.41 This applies to individual, firm and national inclusion. In a developing country context, poor households lacking Internet access may be excluded from the benefits of a digital world and local firms may lack the skills and finance to compete in the digital markets and create back-end jobs domestically. In South Africa this would limit the ability of SMEs and firms owned by historically disadvantaged persons to participate in the economy.

One of the ways to foster inclusion in South Africa is universal access to broadband. While mobile broadband coverage may be pervasive in a country like South Africa, there is a demand gap as low-income individuals are unable to afford devices and data costs to access digital services. This lack of access is highly problematic as economic, social and political life shifts online, threatening to exclude even those currently included. For instance, many job or university applications are made online. Participation in democracy requires accessing the political debates, which have increasingly shifted from print to online media. There is thus a real threat of not just economic exclusion, but also exclusion from full participation in society.

Responding to these challenges requires a domestic focus on the development of broadband infrastructure and a reduction in data costs. South Africa has a highly concentrated mobile sector and the CCSA’s completed market inquiry covered this and the high data costs.42 Unfortunately, even if data costs are reduced, it is apparent that there will always be those who are too poor to participate extensively in the digital age if private paid access is the only means of access. Therefore, part of the recommendations in the data market inquiry is the development of free public Wi-Fi in lower-income areas to ensure greater inclusion. However, as free WiFi is not something that can easily be provided, given the inevitable budget constraints of national and local governments in developing economies, a range of funding models are being explored.

#### AND so does skills financing

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Developing domestic firms to compete in this space is another area for competition and even industrial policy. Online businesses can sell products globally without a physical presence in the countries they service. Such global reach and costless replication mean that the previous drivers of localized production are frequently left out. For instance, transport costs for raw materials, import tariffs or domestic distribution all provided a rationale for a local presence. That rationale may be missing in many (but not all) future digital markets. As a result, the driving force of innovation and back-end jobs created by these firms may remain in their headquartered country, leading to even greater exclusion of developing countries. Furthermore, global platforms may choose to shift their profits to low-tax jurisdictions – a strategy not necessarily viable for local platforms – that provide these global firms with a significant competitive advantage over local platforms.

If this is to be avoided, then developing countries will need to provide industrial policy incentives for global firms to station operations in their jurisdictions. It will also need to support the development of local digital firms to participate in the digital age, much like the infant industry arguments of old times. It will also require investment in skills and capital financing. This must include the funding of research through universities and will require regulators such as the CCSA to invest in-house talent focused on digitalization of the economy.

### 1NC---AT: First---Alt Cause

#### Lack of infrastructure outweighs.

First ’21 [Harry; Professor of Trade Regulation @ NYU; “Digital Platforms and Competition Policy in Developing Countries”; <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864953>; AS]

C. Does Competition Law Matter for Innovation in Developing Countries?

There are many factors that might lead one to be skeptical about whether competition law provides much value added when it comes to increasing innovation in developing countries. Infrastructure support for innovation generally, and for digital products and services specifically, may be more of a hurdle for innovation than weak competition law enforcement. Competition law enforcement agencies have had difficulty incorporating innovation into antitrust policy even in major developed economies; how much more so for resource‐starved agencies in developing countries? Perhaps it would be better to let the major enforcement agencies take the lead, particularly when the major digital platforms are involved, on the assumption that changes in structure or business practices will likely spill over to developing countries in any event.

---DARTMOUTH’S CARD STARTS---

Despite these caveats, it would be unwise for agencies in developing countries to ignore innovation issues in competition law enforcement. Developing countries have particular policy concerns that may seem less important to developed countries. One major concern, of course, is economic development, for which innovation may be a critical driver, particularly if we view innovation in a less technology‐centric way. Another major concern is inclusive economic growth, making certain that the gains from markets are distributed more widely rather than less, particularly when it comes to groups that have faced discrimination or have not adequately participated in the economy. A third concern is sovereignty, to make sure that a developing economy is not dominated by outside economic interests. Competition enforcement that increases innovation, particularly through an emphasis on competitive rivalry in dynamic markets, offers the possibility of advancing all three goals.

II. Digital Platform Use in Developing Countries

A. An Overview

Digital platforms are in widespread use in developing countries. The major U.S. digital platforms tend to be ubiquitous—in South Africa, for example, nearly half of all Internet users use Facebook, YouTube, and WhatsApp39— but there are also more local platforms in developing countries that are of significant size.40

Digital platforms can be categorized in different ways. Most common is to categorize them by the type of service they offer; the proposed EU Digital Markets Act, for example, has eight categories of “core platform service,” such as search engines, social networks, and operating systems.41 This type of categorization is similar to product markets as analyzed under competition law. A more functional approach divides digital platforms into transaction platforms and innovation platforms.42 Transaction platforms are generally multi‐sided and “support exchanges between a number of different parties,” Amazon and Uber being good examples. Innovation platforms (sometimes called technology or engineering platforms) provide components that a firms in a sector can use in common for their interactions. Computer operating systems and technology standards are good examples of these platforms.43

Entrepreneurs in developing countries have generally not created innovation platforms.44 Rather, they have used platform technologies created elsewhere to offer products that are distributed digitally, mostly on a relatively localized basis, that is, within the home country of the entrepreneur. Platform technologies are thus tools for these enterprises, allowing them to create new products and distribute them more efficiently. Even if entrepreneurs in developing countries do not create the tools, however, their use of platform technologies can still be market‐creating or sustaining and thereby qualify as innovation that can drive economic growth.

As the following examples will show, whether platforms are successful depends on many factors beyond competition law enforcement. Indeed, at the moment, competition law violations may not as yet have emerged. The question, though, is whether competition policy can play a role in keeping digital platform tools accessible and digital product markets competitive.

B. Mapping Platform Use in Africa: Four Areas

1. Online retail sales

Online retail sale of physical products and services is developing in Africa, but slowly. In South Africa, for example, e‐commerce is estimated to have only approximately 1‐2 percent of total retail sales, in comparison to 18 percent in the UK, with customers generally being higher income earners mostly concentrated in metropolitan areas.45 Nevertheless, throughout Africa a wide range of products are sold through online retail platforms, including food, consumer electronics, fashion, and apparel.46

Retailers use platforms in three ways. First, traditional brick‐and‐mortar stores use internet sales as a complement to their sales in physical stores; this has given major retailers a strong presence in online retail selling.47 Second, some sellers have an online presence only, selling their products at retail on various digital platforms. The “most ubiquitous” digital enterprises in Africa are e‐commerce sites that present their products on Facebook.48 Third, Africa‐based platforms offer marketplace services for other retailers. Takealot in South Africa has become the largest online retail marketplace in South Africa, for example, with more traffic than international competitors such as Amazon or eBay.49 It has also begun integrating into offering its own exclusive brands in competition with other retailers on the platform, raising potential concerns for self‐preferencing.50

Online retail sellers in Africa, particularly small and medium business enterprises, face a set of challenges that make it difficult to compete successfully. Online advertising is critical for these enterprises, but the two main advertising channels are Facebook and Google, and their use is expensive and complex for smaller businesses.51 Most e‐ commerce payment transactions are made by credit card, but fees can be high, payments can be slow, and concern for fraud has been high.52 Delivery may require investments in expensive assets to assure delivery (trucks, motorcycles, warehouses), particularly if the postal service is unreliable.53 On the other hand, the expense of drop‐ shipping international packages, the unreliability of the postal service, the relatively small size and geographical isolation of many African countries can make it difficult for international platforms like Amazon to compete successfully with local e‐commerce sites.54

2. Value chains

Companies in Africa use digital platforms to participate in “value chains,” that is, as intermediate transactors in the production and sale of goods and services. The ultimate consumer in the chain may be located outside the country or inside. For many African countries, participation in global value chains has been seen as an important way to stimulate economic growth, particularly if small and medium size businesses are the beneficiaries of such participation.55

The extent to which digital platforms have increased such participation by African firms is unclear. A study of value chains in Kenya and Rwanda examined how tourism firms integrated with international tourism sites to provide booking availability and service information, but found that their participation was often limited by a lack of technical skills and by the platforms’ managerial requirements.56 A study of small‐scale fresh fruit and vegetable farmers in Tanzania and Kenya focused on the use of certain basic platform technologies (mobile phones, Internet, and Facebook) to access payment systems, get pricing and production information, and reach export markets. Such usage was actually rather small (only 11 percent of farmers surveyed). Although the use of cellphones was helpful to small farmers in many local markets, reaching export markets required use of the Internet more than the use of basic cellphones, a step that excluded farmers who lacked sophistication (technical and linguistic).57

The difficulties of establishing digital value chains is not just limited by access to technology. More tractably for competition law, existing market structures and entrenched competitors may stand in the way as well.

A good example is the effort to create an online tea auction market in Mombasa, Kenya. The Mombasa Tea Auction provides the link between East African tea processors and international buyers.58 Kenya is the world’s leading exporter of tea and tea is Kenya’s number one foreign exchange earner.59 Tea is transported from highland areas in Africa to storage warehouses in Mombasa, where it is subsequently auctioned. Two groups have been the main intermediaries between growers and buyers in this process—tea brokers and storage warehouses—and only tea brokers could negotiate with buyers in the auction. Sellers made payments to the auction and then collected the tea from the warehouses for export. About 95% of tea exported from Kenya was sold through the Mombasa Tea Auction.

Asian competitors had been using online auctions but the Mombasa Tea Auction was done in person. Recognizing the auction’s inefficiencies, in 2012 an effort was made by the East African Tea Trade Association (EATTA) to introduce an online auction system. EATTA has 200 members from 10 African countries (mostly in East Africa) and includes all groups in the industry (producers, buyers, brokers, warehouses, and packers). Intermediaries were most opposed to an online auction, particularly the brokers who were believed to have controlled the in‐person auction and feared disintermediation.60 Interestingly, the brokers also feared that buyers would find it easier to collude when they didn’t have to place bids in an open auction, perhaps a not misplaced worry given a later antitrust suit against EATTA for fixing brokers’ and warehouse owners’ fees in the tea auction.61

After a trial run of an online auction, the EATTA members voted against its continuation. Apparently the brokers were able to convince smaller producers, whose only link to these markets was through the brokers, that an online auction would harm the brokers and thereby harm them.62 It was not until 2019 that an online tea auction became operational.63

3. FinTech

Financial technology products (“fintech”) operate as multisided platforms connecting buyers and sellers of financial services using the internet, mobile devices, software technology, and/or cloud services.64 Fintech products can cover aspects of banking, digital currencies, insurance, lending, money transfers, and payments. Fintech products can be deeply disruptive of existing banking and financial services but they can also offer platform infrastructure for many businesses. As such, fintech products are widely used throughout Africa.

Probably the most widely‐lauded fintech product in Africa is M‐Pesa, the payments service that runs on mobile phones.65 M‐Pesa was launched in 2007 by Vodafone, the U.K.‐based telecom company, in partnership with two African mobile phone system operators, Safaricom in Kenya and Vodacom in Tanzania.66 M‐Pesa “allows users to deposit money into an account stored on their cell phones, to send balances using SMS technology to other users (including sellers of goods and services), and to redeem deposits for regular money.”67 There is no charge for depositing the cash with the mobile phone company; charges are deducted when “e‐float” or “e‐money” is sent to recipients or when cash is withdrawn.68

M‐Pesa spread quickly following its introduction, with 10,000 new registrations by the end of its first year; two years later there were 7.7 million M‐Pesa registered accounts.69 In its first ten years the service expanded to ten countries, including one in Eastern Europe. By that time 21 percent of all adults in Sub‐Saharan Africa had a mobile money account; 73 percent of the population of Kenya and more than 50 percent of the population of Uganda and Zimbabwe used mobile money.

For all of M‐Pesa’s important success, its growth has actually been fairly limited, as has been the growth of fintech firms generally, which “have been slow to penetrate other sectors and other countries.”70 M‐Pesa has been limited by the fact that it operates a low‐tech service, using basic cellphones and text technology but not relying on more advanced smartphones.71 Thus it has proved less attractive in countries like South Africa that already had more advanced smartphone use and a “much more advanced banking network” that was able to meet the needs that M‐Pesa met.72 M‐ Pesa’s technological limits also made it less attractive for integrating its mobile payments API into other software applications.73

Whether the slow diffusion of fintech in Africa is a result of technological impediments or competitor resistance is unclear. One author concludes that the “largest impediment to more rapid FinTech growth appears to be the electrical and communications infrastructure in many developing countries, which have only limited, unreliable access to broadband Internet connections and smartphone handsets.”74 There is little doubt that these infrastructure issues affect the ability of digital platforms to thrive in Africa, but it may also be the case that the powerful financial companies can create legal roadblocks to fintech entry as well as try to preempt that entry by offering products similar to what potentially disruptive fintech entrants are offering. Indeed, this may be the case in South Africa. As the South Africa Competition Commission points out, one approach is for incumbents to accommodate the competitive threat by partnering with the upstart fintech firm: “the Fintech firm commits to remain small, providing the incumbent with its offerings whilst being able to ride on the scale, distribution channels and licenses of the traditional bank.”75 Another possibility is for the incumbent to acquire the fintech firm outright. A third is for the incumbent firm to compete with the fintech’s offerings, potentially leading to anticompetitive actions such as denying the fintech firm needed access to infrastructure assets.76

4. Sharing platforms

Sharing platforms are used by a wide variety of businesses in Africa. The South Africa Competition Commission defines these platforms as offering “short‐term peer‐to‐ peer transactions to share the use of idle assets and services or to facilitate collaboration.”77 Sharing platforms include not only firms that allow owners of vehicles and accommodations to “share” them with users, but also allows the sharing of work spaces, money (loans), clothing, and free‐lance services.78

Sharing platforms is an area in which the major international companies face competition with local enterprises. In the ride‐hailing segment, for example, Uber’s entry into African markets triggered the spread of mobile mapping technology for collecting location data from mobile vehicles. This allowed local companies to develop their own products suited to the needs of customers in different cities and countries, “giving themselves an edge over foreign services.”79 In South Africa, for example, Taxi Live and Mr D Foods (both South African firms) compete with Uber for taxi ride‐hailing and food delivery; Afri Ride, a South African company, competes by allowing commuters or drivers to offer unoccupied seats on their trips.80 In Kenya Little Cab competed with Uber by accepting M‐Pesa payments.81

Even with the existence of local companies, international firms appear to be the major competitors in most of these sharing platform markets. In a survey of users in Nairobi, Little Cab, four years after its entry, was running a distant third to the international platforms, Uber and Bolt.82 A 2020 survey in South Africa showed that three of the fifteen most popular applications in South Africa were international ride‐sharing platforms; none of the platforms in the survey was South African or African.83

The competitive problems that firms in sharing platform markets face do not appear to be the result of the exercise of anticompetitive conduct by dominant firms. Of course, as in developed countries, these platform companies do face opposition from the traditional operators in the fields that the platforms challenge. In the ride‐sharing market, for example, the metered taxi industry has responded to Uber’s entry in ways that are similar to the responses in developed countries. Taxi drivers have tried to physically block Uber drivers;84 they have also tried to invoke government action to stop Uber from engaging in certain business practices.85 But they have also tried to meet the challenge with the more competitive response of developing their own apps to connect passengers to metered taxis.86

C. Conclusion

The mapping just presented of digital platform use in Africa is by no means complete. Digital platforms are being developed in many other areas. In agriculture, for example, Kenya‐based mobile apps have been launched to help farmers better manage crops such as cassava, maize, and potatoes.87 In health care, there is a long list of available apps: “Hello Doctor” provides free essential medical information in 10 African countries; FD Detector (developed by five teenage girls from Nigeria) detects fake drugs by using bar codes; mTrac allows health care workers in Uganda to submit weekly health data via SMS; Omomi provides women in Nigeria with maternal and child health information and connects them to doctors.88

Even though the overview is necessarily incomplete, the picture that does emerge shows that digital platforms do hold out the promise not just of extending traditional industries into new means of distribution. Digital technologies also hold out the promise of dealing with certain problems that are more acute in developing countries (although not absent in developed countries). Access to capital can be increased through fintech applications; business transactions can be facilitated if payment systems are more secure; small enterprises can reach markets more efficiently if digital platforms are available and open; health care information and data can be shared more easily where mobile applications are available. Many of these improvements are more incremental than fundamental, but they all lead to better market‐driven outcomes.

III. Lessons For Competition Policy For Digital Platforms

It is not surprising that even a brief survey of the adoption of digital platforms in Africa shows that their use is both important and spreading. To a large degree these platform technologies are tools for a variety of improvements in the production and distribution of old and new products. The ability to use these tools to create new offerings is an important aspect of innovation.

Developed countries now seem obsessed with the power of the major platforms over many aspects of our economy and life. Developing countries seem less obsessed but, in a significant way, more dependent. Mobile technology is a key tool for delivering new digital products, but this technology often comes with a hidden “tax” imposed by developed world patent holders that control the standards on which these devices (now smartphones) are based and set the fees for licensing those standards.89 Developed world competition law enforcers seem powerless to control this pricing power; we wouldn’t expect developing world enforcers to do better. This tax, however, may be more critical in economies where the incomes are lower and smartphone use more limited.

What about the power of the GAFA? Although the use of Google and Facebook products is clearly ubiquitous, Apple and Amazon seem less powerful. In particular, Amazon’s business model puts it at a disadvantage in many developing economies, where shipping costs, tariffs, and delivery systems give local online sellers an edge.

Facebook and Google, but especially Facebook, loom larger. Search is important for delivering advertising, but Facebook, combined with WhatsApp, is vital not only for digital advertising but for digital presence. Sellers have come to rely on Facebook for connecting to consumers and establishing a network of users with whom to communicate and from whom to get information and data. Entrepreneurs in the developing world have complained about Facebook and Google’s high advertising rates, but with Facebook the problem goes deeper. Should Facebook or WhatsApp change their terms of use in some way, there would be little that developing countries could do. If Australia is having trouble controlling Facebook, what would we expect from countries with fewer users and smaller economies?90

This means that the first lesson for competition policy toward digital platforms is actually aimed at developed countries. If antitrust authorities in the U.S. are successful in their litigation against Facebook and Google, at least some thought should be given to how the remedies sought will affect developing countries.91 Although consideration of extraterritorial effects is not part of the case against these companies, remedy is broader. Positive spillovers should be part of the governments’ calculus.

---DARTMOUTH’S CARD ENDS---

The second lesson is that competition law enforcement may not be the most critical driver of platform innovation in developing countries. Many commentators have pointed out that basic physical infrastructure is primary—better Internet access, more broadband service, less expensive smartphones—as is better managerial training and even better ability to use English. Competition law enforcement is a good tool to keep things from getting worse, but not necessarily the best tool to make things better.92

The third lesson is that the hope that digital platforms will allow local small and medium sized businesses more access to global value chains remains just that, a hope. Local marketplace platforms don’t yet have a global reach and key international platforms have proven difficult to access, but not because of any anticompetitive conduct. Developing country competition law enforcers should still be alert to anticompetitive practices, like self‐preferencing, but not for the purpose of driving exports. Impact on local markets and local business should be reason enough to act.

### 1NC---AT: Wong/Digital Divide

#### Their “digital divide” impact is about authoritarian blocks not access---plan can’t solve incentives for China to make a separate internet.

Wong ’20 [Johnson; Graduate School of Public and International Affairs @ UOttowa; “Digital Divide: Geotechnology, Politics and the International System”; <https://ruor.uottawa.ca/bitstream/10393/41017/1/WONG%2C%20Johnson%2020205.pdf>; AS]

Governing cyberspace

This fundamental difference in understanding how 5G technological innovation as a tool of the state reflected in cultural norms is at the crux of the digital divide in the international system. The principles that guide ICANN which seek a “multi-stakeholder, community-based and consensus-driven approach” to the governance of the Internet, is anathema to the harmonious and strong central state championed by autocrats and their allies. The liberal governance model of technological innovation based on pluralism, freedom and consensus, are linked to Western democracy which in turn challenges the legitimacy of the authoritarian rule of the state. To maintain their political power, and unable to escape the trappings of technological modernity, China, Russia and other authoritarians will be determined to build a separate “other”-net to compete with the Western version, and in some cases, surpass it. Muller argues,

The proclaimed differences are in interpretation and implementation, with China emphasizing the issue of priorities and progressive realization and rejecting the liberal model not as such, but the notion that it is the only model. In one respect, this reflects the indeterminacy and generality of the rhetoric of the ‘international community’. However, it also raises the question of the nature of the international community. In some liberal views, all roads lead to liberal democracy along more or less western models. However, a truly pluralist international society which accommodates cultural diversity and accepts the principle of self-determination, would accept that countries can also take a different development path, as emphasized by China (Muller, 2015, 236).

While modern liberal democracies seek to accommodate diverse perspectives and build a plural political order, geopolitical interests based on nationalistic factors continue to dominate the discourse (Sidorenko, 2015, 1260). Even within liberal governments themselves, various data protection laws are becoming a point of contention between countries, with the European Union taking a more teleological vision about its universal development model and placing its model above geopolitical power politics and nationalism, to encompass a historical imperative that they believe should be replicated around the world (Browning, 2016, 110). The irony is that a liberal system that values and respects plurality should accept equal but alternative value systems as legitimate (Muller, 2015, 219).

Digital sovereignty and the primacy of alliances

The three drivers mentioned above, 5G standardization, strategic economic dependency, and competing normative values, are transforming the international system and will result in a digital divide. Globalization continues to increase socio-economic transactions between states, and the growth of cyberspace has created economic value from consumer data. Various state operators compete with each other for consumer dollars while, at the same time, the need to cooperate to connect their networks with each other – using internationally recognized protocols – is creating tension between the public good of a seamless system, and the private interests of operators and the state (O’Hara and Hall, 2020, 10). Controversies related to 5G standard-setting by companies that are supposed to be impartial are contributing to a difficult process for all major players involved. Huawei, the leading Chinese operator that is participating on the 5G standard-setting consortium, has been repeatedly accused of being under the influence of the central Chinese state party. This poses a challenge in the existing liberal model of standardsetting for, if Huawei succeeds in its efforts to control the technical standards of 5G, will secure for the Chinese state a much bigger stake (and control) of the 5G patent licensing system. Once standards have been set and essential patents defined, companies must build to the agreed standards and pay royalties to patent licensees as required (Triolo, 2018, 10). These are supposed to be separate – and most importantly, independent – processes, but there is little doubt among the international 5G and telecommunications community that the Chinese state is directing Huawei in order to obtain a substantial stake in the upcoming technological transition in order to secure its political and economic ambitions. It is important to note that once standards are set, governments and companies will be compelled to follow them or risk being non-interoperable with the rest of the world. In some cases, this is the strategic vision for China: By controlling the vast majority of 5G licensing patents and creating networked systems that only work with Chinese-branded equipment, it will be able to project its digital power abroad and force compliance. Without access to Chinese equipment, and a licensee payment system that is indebted to a Chinese state-backed company, antagonistic states will quickly become isolated and find themselves cut off. Sidorenko argues that, “The world is becoming more unified, but not safer; traditional regional conflicts are escalating into geopolitical conflicts ushered by the phenomena of globalization and all the changes and nuances it brings to the economic, political, socio-cultural and spiritual spheres” (Sidorenko, 2015, 1261).

The relativity by which actors are able to influence the political discourse and debate state sovereignty has never before been so uncertain, with the digital world becoming the new arena for states to challenge existing norms, values and economic systems of the past. The digital realm offers a different variation of sovereignty challengers that include the dynamics of nonstate actors, such as private companies, civil society, non-governmental organizations, and even individuals, to question the legitimacy of the state and its relationship to external actors and those within the state (Timmers, 2019, 12; Adonis, 2019, 268). The fundamental challenge and struggle for states to maintain their independence in this space relies upon the extent to which state control of the technological tools, systems and structures are within their influence, and the extent to which they are able to maintain the independence of their national security networks without being isolated from the rest of the world.

Therefore, to achieve this global network based on common standards and shared values, an alliance of liked-minded partners is needed to buttress this digital divide. Timmers says, “Like-mindedness is based on shared values, whether these pertain to the individual (such as respect for privacy and autonomy) or to economy (liberal market economy) or to society and democracy (independent judiciary, freedom of expression, free elections) or to international relations (respect for the system of sovereign states and multilateralism). A wide range of governance tools can be mobilized for supervision, decision-making, and certification” (Timmers, 2019, 15). In the context of the digital divide, countries allied with authoritarian regimes will align their 5G technical standards, find commonalities in terms of political structure, and seek to share in the economic union driven by the divide. Alliances – especially historical alliances – will play a key role in accelerating this digital divide through collaboration between liked-minded states on both sides of the gap. The alliance between cooperating states will not just be an alliance of authoritarians – rather, it will be based on a common set of values and norms shared by the people and state government. These norms and values, as previously mentioned, will originate primarily from common values about the role of the state, its obligations to its peoples, and the extent that it is seen as legitimate by its citizens. Even in democracies, it is feasible for a country to ally itself with China if it finds that it shares more in common with the CCP than the US.

#### Its about divide between great powers not developing countries

Wong ’20 [Johnson; Graduate School of Public and International Affairs @ UOttowa; “Digital Divide: Geotechnology, Politics and the International System”; <https://ruor.uottawa.ca/bitstream/10393/41017/1/WONG%2C%20Johnson%2020205.pdf>; AS]

Thus, this paper will examine how geotechnology will underpin and accelerate a digital divide between the great powers which will fundamentally alter the international system. The first section of this paper will describe the key drivers of this disruption from a technological, economic and cultural perspective. The first part will broadly explain what is 5G and the importance of this technology within the paradigm of great power politics; then, there will be an analysis of key economic sources of conflict, particularly the central role of China in the global manufacturing supply chain; the last part will take a comparative view of values as they relate to the development of technology, and how culture contributes to the divide between liberal democracies and authoritarian states. The second section of this paper will examine how these drivers impact the notion of sovereignty, and how global alliances will accelerate the bifurcation of global systems, including technological standards and the Internet itself. The final section of the paper will describe this emerging international system and how the digital divide could manifest, raise important criticisms of this analysis, and answer the question as to whether this future is inevitable.

#### Wong concludes its inevitable.

Wong ’20 [Johnson; Graduate School of Public and International Affairs @ UOttowa; “Digital Divide: Geotechnology, Politics and the International System”; <https://ruor.uottawa.ca/bitstream/10393/41017/1/WONG%2C%20Johnson%2020205.pdf>; AS]

Despite the power of institutions and the strength of international organizations to resolve conflicts, the digital divide brought on by technology, economic self-interest, and centuries of culture, will necessarily disrupt the existing international system. Even within Western liberal democratic countries, there continues to be significant systemic confrontations as long-running grievances remain unresolved, such as historical racial divisions, the surge in right-wing populism, and a growing inequality gap. Internationally, there is a shift in the character and ability of international institutions themselves to resolve disputes through existing mechanisms, such as the ABM treaty, the CFE treaty, and the INF treaty. These are a few examples of the breakdown of existing international constructs (Hall, 2019, 4). At the same time, China will continue to offer, in partnership with its Russian and other Eurasian allies, an alternative political model that will emphasize the values and qualities which are important to those societies: social stability, economic prosperity, and national strength. Zhao summarizes this argument “In the final analysis, there is a choice between a Confucius capitalist China that is trying to integrate with a socially and ecologically unsustainable planetary capitalist order and a renewed socialist China that is leading a post-capitalist and post-consumerist, sustainable developmental path as part and parcel of an alternative globalization” (Zhao, 2013, 27). The separation between capitalism and political liberalism is an intentional strategy meant to demonstrate that state governance can be effective without political change. The Chinese model will also emphasize regional strength while avoiding ideas about global tyranny so long as the US continues to be portrayed as an international bully and troublemaker that acts with impunity. On the character about the Internet itself, the seeds of doubt had already been made in various forums: “At the Forum of Independent Local and Regional Media in 2014, Putin labeled the Internet ‘a special CIA project’, adding that the United States wanted to retain their monopoly over it” (Budnitsky and Jia, 2018, 607). The digital divide will become another point of division to separate the global community this century, and as a means for authoritarians to consolidate power. While military conflict may be avoidable, cyberconflict and the use of hybrid warfare – involving careful coordination between state and non-state actors – may take place more often as state forces engage online in efforts to upset the new status quo. The benefits of technology, such as 5G and beyond, may also challenge trends and perspectives about values and culture on both sides as societies and the role of technology to support individual, corporate or state interests evolve.

---DARTMOUTH’S CARD ENDS---

Despite the conviction I have about the inevitably of an impending digital divide, it also raises the question as to whether this re-ordering of the international system is a permanent feature or is merely a phase in the development cycle of states. The Western liberal economic order has lasted more than a half-century and brought some of the greatest economic prosperity and positive humanism to the world, all without a catastrophic global war. Is it then possible that in spite of a competing cyber-alliance, states can find common ground and avert a disastrous global conflict? While history does not provide many examples of peaceful transitions of power within the international system, we are living in unprecedented times.

### 1NC---AT: Inequality Collapses LIO

#### Economic hardship doesn’t cause nativism---other alt causes outweigh.

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WHAT CAUSES NATIVISM?

Studies conflict on the causes of nativist sentiment—many people struggle to define nativism and many conflate nativism and populism, making root causes even harder to disentangle. Yet the most rigorous research seems to find that economic status plays only a minor role. Most researchers agree that living in poverty, being working class or unemployed, or fearing economic loss do not automatically lead to support for nativist policies.48

Which factors, then, best explain support for nativist politicians and policies? On this point, existing research is conflicted. Some studies suggest that nativism is driven by large demographic changes or, alternatively, by changes that happen rapidly, even if they are smaller.49 Another body of research makes the case that the fear of demographic change is a more powerful predictor of nativist attitudes, rather than the extent or rapidity of the change itself.50 Some evidence suggests that voters are more likely to be nativist if they believe that their social, political, or economic status has declined relative to others.51 There does seem to be some emerging consensus that, in white-majority democracies, white voters are more likely to support nativist politicians if they perceive that their privileged position is eroding.52

It also appears that political leaders play a key role in mobilizing nativist sentiment by appealing to voters’ nostalgia for an era in which their privileges were more secure or to their fears of a decline in their social or economic position.53

Politicians can mobilize nativist sentiment in various ways, but a common strategy is to make nonmajority population groups the scapegoats for a perceived decline in living conditions, regardless of the reality. For instance, politicians might associate Muslims with terrorism, link Latinos to criminality, or connect minorities such as Roma or African-Americans to abuses of the social safety net. This gives majority population groups the opportunity to blame a rigged system for their grievances and to then point the finger at groups who are allegedly benefitting from the rigging.

### 1NC---AT: LIO

#### The ILO is doomed---backlash and technology destroy the foundations of order

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This task was complicated by the Cold War, but “the free world” (as Americans then called the noncommunist countries) continued to develop along Wilsonian lines. Inevitable compromises, such as U.S. support for ruthless dictators and military rulers in many parts of the world, were seen as regrettable necessities imposed by the need to fight the much greater evil of Soviet communism. When the Berlin Wall fell, in 1989, it seemed that the opportunity for a Wilsonian world order had finally come. The former Soviet empire could be reconstructed along Wilsonian lines, and the West could embrace Wilsonian principles more consistently now that the Soviet threat had disappeared. Self-determination, the rule of law between and within countries, liberal economics, and the protection of human rights: the “new world order” that both the George H. W. Bush and the Clinton administrations worked to create was very much in the Wilsonian mold. Today, however, the most important fact in world politics is that this noble effort has failed. The next stage in world history will not unfold along Wilsonian lines. The nations of the earth will continue to seek some kind of political order, because they must. And human rights activists and others will continue to work toward their goals. But the dream of a universal order, grounded in law, that secures peace between countries and democracy inside them will figure less and less in the work of world leaders. To state this truth is not to welcome it. There are many advantages to a Wilsonian world order, even when that order is partial and incomplete. Many analysts, some associated with the presidential campaign of former U.S. Vice President Joe Biden, think they can put Humpty Dumpty together again. One wishes them every success. But the centrifugal forces tearing at the Wilsonian order are so deeply rooted in the nature of the contemporary world that not even the end of the Trump era can revive the Wilsonian project in its most ambitious form. Although Wilsonian ideals will not disappear and there will be a continuing influence of Wilsonian thought on U.S. foreign policies, the halcyon days of the post–Cold War era, when American presidents organized their foreign policies around the principles of liberal internationalism, are unlikely to return anytime soon. THE ORDER OF THINGS Wilsonianism is only one version of a rules-based world order among many. The Westphalian system, which emerged in Europe after the Thirty Years’ War ended in 1648, and the Congress system, which arose in the wake of the Napoleonic Wars of the early nineteenth century, were both rules-based and even law-based; some of the foundational ideas of international law date from those eras. And the Holy Roman Empire—a transnational collection of territories that stretched from France into modern-day Poland and from Hamburg to Milan—was an international system that foreshadowed the European Union, with highly complex rules governing everything from trade to sovereign inheritance among princely houses. As for human rights, by the early twentieth century, the pre-Wilsonian European system had been moving for a century in the direction of putting egregious violations of human rights onto the international agenda. Then, as now, it was chiefly weak countries whose oppressive behavior attracted the most attention. The genocidal murder of Ottoman Christian minorities at the hands of Ottoman troops and irregular forces in the late nineteenth and early twentieth centuries received substantially more attention than atrocities carried out around the same time by Russian forces against rebellious Muslim peoples in the Caucasus. No delegation of European powers came to Washington to discuss the treatment of Native Americans or to make representations concerning the status of African Americans. Nevertheless, the pre-Wilsonian European order had moved significantly in the direction of elevating human rights to the level of diplomacy. Wilson, therefore, was not introducing the ideas of world order and human rights to a collection of previously anarchic states and unenlightened polities. Rather, his quest was to reform an existing international order whose defects had been conclusively demonstrated by the horrors of World War I. In the pre-Wilsonian order, established dynastic rulers were generally regarded as legitimate, and interventions such as the 1849 Russian invasion of Hungary, which restored Habsburg rule, were considered lawful. Except in the most glaring instances, states were more or less free to treat their citizens or subjects as they wished, and although governments were expected to observe the accepted principles of public international law, no supranational body was charged with the enforcement of these standards. The preservation of the balance of power was invoked as a goal to guide states; war, although regrettable, was seen as a legitimate element of the system. From Wilson’s standpoint, these were fatal flaws that made future conflagrations inevitable. To redress them, he sought to build an order in which states would accept enforceable legal restrictions on their behavior at home and their international conduct. That never quite materialized, but until recent years, the U.S.-led postwar order resembled Wilson’s vision in important respects. And, it should be noted, that vision is not equally dead everywhere. Although Wilson was an American, his view of world order was first and foremost developed as a method for managing international politics in Europe, and it is in Europe where Wilson’s ideas have had their greatest success and where their prospects continue to look strongest. His ideas were treated with bitter and cynical contempt by most European statesmen when he first proposed them, but they later became the fundamental basis of the European order, enshrined in the laws and practices of the EU. Arguably, no ruler since Charlemagne has made as deep an impression on the European political order as the much-mocked Presbyterian from the Shenandoah Valley. THE ARC OF HISTORY Beyond Europe, the prospects for the Wilsonian order are bleak. The reasons behind its demise, however, are different from what many assume. Critics of the Wilsonian approach to foreign affairs often decry what they see as its idealism. In fact, as Wilson demonstrated during the negotiations over the Treaty of Versailles, he was perfectly capable of the most cynical realpolitik when it suited him. The real problem of Wilsonianism is not a naive faith in good intentions but a simplistic view of the historical process, especially when it comes to the impact of technological progress on human social order. Wilson’s problem was not that he was a prig but that he was a Whig. Like early-twentieth-century progressives generally and many American intellectuals to this day, Wilson was a liberal determinist of the Anglo-Saxon school; he shared the optimism of what the scholar Herbert Butterfield called “the Whig historians,” the Victorian-era British thinkers who saw human history as a narrative of inexorable progress and betterment. Wilson believed that the so-called ordered liberty that characterized the Anglo-American countries had opened a path to permanent prosperity and peace. This belief represents a sort of Anglo-Saxon Hegelianism and holds that the mix of free markets, free government, and the rule of law that developed in the United Kingdom and the United States is inevitably transforming the rest of the world—and that as this process continues, the world will slowly and for the most part voluntarily converge on the values that made the Anglo-Saxon world as wealthy, attractive, and free as it has become. Wilson was the devout son of a minister, deeply steeped in Calvinist teachings about predestination and the utter sovereignty of God, and he believed that the arc of progress was fated. The future would fulfill biblical prophecies of a coming millennium: a thousand-year reign of peace and prosperity before the final consummation of human existence, when a returning Christ would unite heaven and earth. (Today’s Wilsonians have given this determinism a secular twist: in their eyes, liberalism will rule the future and bring humanity to “the end of history” as a result of human nature rather than divine purpose.) Wilson believed that the defeat of imperial Germany in World War I and the collapse of the Austro-Hungarian, Russian, and Ottoman empires meant that the hour of a universal League of Nations had finally arrived. In 1945, American leaders ranging from Eleanor Roosevelt and Henry Wallace on the left to Wendell Willkie and Thomas Dewey on the right would interpret the fall of Germany and Japan in much the same way. In the early 1990s, leading U.S. foreign policymakers and commentators saw the fall of the Soviet Union through the same deterministic prism: as a signal that the time had come for a truly global and truly liberal world order. On all three occasions, Wilsonian order builders seemed to be in sight of their goal. But each time, like Ulysses, they were blown off course by contrary winds. TECHNICAL DIFFICULTIES Today, those winds are gaining strength. Anyone hoping to reinvigorate the flagging Wilsonian project must contend with a number of obstacles. The most obvious is the return of ideology-fueled geopolitics. China, Russia, and a number of smaller powers aligned with them—Iran, for example—correctly see Wilsonian ideals as a deadly threat to their domestic arrangements. Earlier in the post–Cold War period, U.S. primacy was so thorough that those countries attempted to downplay or disguise their opposition to the prevailing pro-democracy consensus. Beginning in U.S. President Barack Obama’s second term, however, and continuing through the Trump era, they have become less inhibited. Seeing Wilsonianism as a cover for American and, to some degree, EU ambitions, Beijing and Moscow have grown increasingly bold about contesting Wilsonian ideas and initiatives inside international institutions such as the UN and on the ground in places from Syria to the South China Sea. These powers’ opposition to the Wilsonian order is corrosive in several ways. It raises the risks and costs for Wilsonian powers to intervene in conflicts beyond their own borders. Consider, for example, how Iranian and Russian support for the Assad regime in Syria has helped prevent the United States and European countries from getting more directly involved in that country’s civil war. The presence of great powers in the anti-Wilsonian coalition also provides shelter and assistance to smaller powers that otherwise might not choose to resist the status quo. Finally, the membership of countries such as China and Russia in international institutions makes it more difficult for those institutions to operate in support of Wilsonian norms: take, for example, Chinese and Russian vetoes in the UN Security Council, the election of anti-Wilsonian representatives to various UN bodies, and the opposition by countries such as Hungary and Poland to EU measures intended to promote the rule of law. Meanwhile, the torrent of technological innovation and change known as “the information revolution” creates obstacles for Wilsonian goals within countries and in the international system. The irony is that Wilsonians often believe that technological progress will make the world more governable and politics more rational—even if it also adds to the danger of war by making it so much more destructive. Wilson himself believed just that, as did the postwar order builders and the liberals who sought to extend the U.S.-led order after the Cold War. Each time, however, this faith in technological change was misplaced. As seen most recently with the rise of the Internet, although new technologies often contribute to the spread of liberal ideas and practices, they can also undermine democratic systems and aid authoritarian regimes. Today, as new technologies disrupt entire industries, and as social media upends the news media and election campaigning, politics is becoming more turbulent and polarized in many countries. That makes the victory of populist and antiestablishment candidates from both the left and the right more likely in many places. It also makes it harder for national leaders to pursue the compromises that international cooperation inevitably requires and increases the chances that incoming governments will refuse to be bound by the acts of their predecessors. The information revolution is destabilizing international life in other ways that make it harder for rules-based international institutions to cope. Take, for example, the issue of arms control, a central concern of Wilsonian foreign policy since World War I and one that grew even more important following the development of nuclear weapons. Wilsonians prioritize arms control not just because nuclear warfare could destroy the human race but also because, even if unused, nuclear weapons or their equivalent put the Wilsonian dream of a completely rules-based, law-bound international order out of reach. Weapons of mass destruction guarantee exactly the kind of state sovereignty that Wilsonians think is incompatible with humanity’s long-term security. One cannot easily stage a humanitarian intervention against a nuclear power. The fight against proliferation has had its successes, and the spread of nuclear weapons has been delayed—but it has not stopped, and the fight is getting harder over time. In the 1940s, it took the world’s richest nation and a consortium of leading scientists to assemble the first nuclear weapon. Today, second- and third-rate scientific establishments in low-income countries can manage the feat. That does not mean that the fight against proliferation should be abandoned. It is merely a reminder that not all diseases have cures. What is more, the technological progress that underlies the information revolution significantly exacerbates the problem of arms control. The development of cyberweapons and the potential of biological agents to inflict strategic damage on adversaries—graphically demonstrated by the COVID-19 pandemic—serve as warnings that new tools of warfare will be significantly more difficult to monitor or control than nuclear technology. Effective arms control in these fields may well not be possible. The science is changing too quickly, the research behind them is too hard to detect, and too many of the key technologies cannot be banned outright because they also have beneficial civilian applications. In addition, economic incentives that did not exist in the Cold War are now pushing arms races in new fields. Nuclear weapons and long-range missile technology were extremely expensive and brought few benefits to the civilian economy. Biological and technological research, by contrast, are critical for any country or company that hopes to remain competitive in the twenty-first century. An uncontrollable, multipolar arms race across a range of cutting-edge technologies is on the horizon, and it will undercut hopes for a revived Wilsonian order. IT’S NOT FOR EVERYBODY One of the central assumptions behind the quest for a Wilsonian order is the belief that as countries develop, they become more similar to already developed countries and will eventually converge on the liberal capitalist model that shapes North America and western Europe. The Wilsonian project requires a high degree of convergence to succeed; the member states of a Wilsonian order must be democratic, and they must be willing and able to conduct their international relations within liberal multilateral institutions. At least for the medium term, the belief in convergence can no longer be sustained. Today, China, India, Russia, and Turkey all seem less likely to converge on liberal democracy than they did in 1990. These countries and many others have developed economically and technologically not in order to become more like the West but rather to achieve a deeper independence from the West and to pursue civilizational and political goals of their own. In truth, Wilsonianism is a particularly European solution to a particularly European set of problems. Since the fall of the Roman Empire, Europe has been divided into peer and near-peer competitors. War was the constant condition of Europe for much of its history, and Europe’s global dominance in the nineteenth century and early twentieth century can be attributed in no small part to the long contest for supremacy between France and the United Kingdom, which promoted developments in finance, state organization, industrial techniques, and the art of war that made European states fierce and ferocious competitors. With the specter of great-power war constantly hanging over them, European states developed a more intricate system of diplomacy and international politics than did countries in other parts of the world. Well-developed international institutions and doctrines of legitimacy existed in Europe well before Wilson sailed across the Atlantic to pitch the League of Nations, which was in essence an upgraded version of preexisting European forms of international governance. Although it would take another devastating world war to ensure that Germany, as well as its Western neighbors, would adhere to the rules of a new system, Europe was already prepared for the establishment of a Wilsonian order. But Europe’s experience has not been the global norm. Although China has been periodically invaded by nomads, and there were periods in its history when several independent Chinese states struggled for power, China has been a single entity for most of its history. The idea of a single legitimate state with no true international peers is as deeply embedded in the political culture of China as the idea of a multistate system grounded in mutual recognition is embedded in that of Europe. There have been clashes among Chinese, Japanese, and Koreans, but until the late nineteenth century, interstate conflict was rare. In human history as a whole, enduring civilizational states seem more typical than the European pattern of rivalry among peer states. Early modern India was dominated by the Mughal Empire. Between the sixteenth century and the nineteenth century, the Ottoman and Persian Empires dominated what is now known as the Middle East. And the Incas and the Aztecs knew no true rivals in their regions. War seems universal or nearly so among human cultures, but the European pattern, in which an escalating cycle of war forced a mobilization and the development of technological, political, and bureaucratic resources to ensure the survival of the state, does not seem to have characterized international life in the rest of the world. For states and peoples in much of the world, the problem of modern history that needed to be solved was not the recurrence of great-power conflict. The problem, instead, was figuring out how to drive European powers away, which involved a wrenching cultural and economic adjustment in order to harness natural and industrial resources. Europe’s internecine quarrels struck non-Europeans not as an existential civilizational challenge to be solved but as a welcome opportunity to achieve independence. Postcolonial and non-Western states often joined international institutions as a way to recover and enhance their sovereignty, not to surrender it, and their chief interest in international law was to protect weak states from strong ones, not to limit the power of national leaders to consolidate their authority. Unlike their European counterparts, these states did not have formative political experiences of tyrannical regimes suppressing dissent and drafting helpless populations into the service of colonial conquest. Their experiences, instead, involved a humiliating consciousness of the inability of local authorities and elites to protect their subjects and citizens from the arrogant actions and decrees of foreign powers. After colonialism formally ended and nascent countries began to assert control over their new territories, the classic problems of governance in the postcolonial world remained weak states and compromised sovereignty. Even within Europe, differences in historical experiences help explain varying levels of commitment to Wilsonian ideals. Countries such as France, Germany, Italy, and the Netherlands came to the EU understanding that they could meet their basic national goals only by pooling their sovereignty. For many former Warsaw Pact members, however, the motive for joining Western clubs such as the EU and NATO was to regain their lost sovereignty. They did not share the feelings of guilt and remorse over the colonial past—and, in Germany, over the Holocaust—that led many in western Europe to embrace the idea of a new approach to international affairs, and they felt no qualms about taking full advantage of the privileges of EU and NATO membership without feeling in any way bound by those organizations’ stated tenets, which many regarded as hypocritical boilerplate. EXPERT TEXPERT The recent rise of populist movements across the West has revealed another danger to the Wilsonian project. If the United States could elect Donald Trump as president in 2016, what might it do in the future? What might the electorates in other important countries do? And if the Wilsonian order has become so controversial in the West, what are its prospects in the rest of the world? Wilson lived in an era when democratic governance faced problems that many feared were insurmountable. The Industrial Revolution had divided American society, creating unprecedented levels of inequality. Titanic corporations and trusts had acquired immense political power and were quite selfishly exploiting that power to resist all challenges to their economic interests. At that time, the richest man in the United States, John D. Rockefeller, had a fortune greater than the annual budget of the federal government. By contrast, in 2020, the wealthiest American, Jeff Bezos, had a net worth equal to about three percent of budgeted federal expenditures. Yet from the standpoint of Wilson and his fellow progressives, the solution to these problems could not be simply to vest power in the voters. At the time, most Americans still had an eighth-grade education or less, and a wave of migration from Europe had filled the country’s burgeoning cities with millions of voters who could not speak English, were often illiterate, and routinely voted for corrupt urban machine politicians. The progressives’ answer to this problem was to support the creation of an apolitical expert class of managers and administrators. The progressives sought to build an administrative state that would curb the excessive power of the rich and redress the moral and political deficiencies of the poor. (Prohibition was an important part of Wilson’s electoral program, and during World War I and afterward, he moved aggressively to arrest and in some cases deport socialists and other radicals.) Through measures such as improved education, strict limits on immigration, and eugenic birth-control policies, the progressives hoped to create better-educated and more responsible voters who would reliably support the technocratic state. A century later, elements of this progressive thinking remain critical to Wilsonian governance in the United States and elsewhere, but public support is less readily forthcoming than in the past. The Internet and social media have undermined respect for all forms of expertise. Ordinary citizens today are significantly better educated and feel less need to rely on expert guidance. And events including the U.S. invasion of Iraq in 2003, the 2008 financial crisis, and the inept government responses during the 2020 pandemic have seriously reduced confidence in experts and technocrats, whom many people have come to see as forming a nefarious “deep state.” International institutions face an even greater crisis of confidence. Voters skeptical of the value of technocratic rule by fellow citizens are even more skeptical of foreign technocrats with suspiciously cosmopolitan views. Just as the inhabitants of European colonial territories preferred home rule (even when badly administered) to rule by colonial civil servants (even when competent), many people in the West and in the postcolonial world are likely to reject even the best-intentioned plans of global institutions. Meanwhile, in developed countries, problems such as the loss of manufacturing jobs, the stagnation or decline of wages, persistent poverty among minority groups, and the opioid epidemic have resisted technocratic solutions. And when it comes to international challenges such as climate change and mass migration, there is little evidence that the cumbersome institutions of global governance and the quarrelsome countries that run them will produce the kind of cheap, elegant solutions that could inspire public trust. WHAT IT MEANS FOR BIDEN For all these reasons, the movement away from the Wilsonian order is likely to continue, and world politics will increasingly be carried out along non-Wilsonian and in some cases even anti-Wilsonian lines. Institutions such as NATO, the UN, and the World Trade Organization may well survive (bureaucratic tenacity should never be discounted), but they will be less able and perhaps less willing to fulfill even their original purposes, much less take on new challenges. Meanwhile, the international order will increasingly be shaped by states that are on diverging paths. This does not mean an inevitable future of civilizational clashes, but it does mean that global institutions will have to accommodate a much wider range of views and values than they have in the past. There is hope that many of the gains of the Wilsonian order can be preserved and perhaps in a few areas even extended. But fixating on past glories will not help develop the ideas and policies needed in an increasingly dangerous time. Non-Wilsonian orders have existed both in Europe and in other parts of the world in the past, and the nations of the world will likely need to draw on these examples as they seek to cobble together some kind of framework for stability and, if possible, peace under contemporary conditions. For U.S. policymakers, the developing crisis of the Wilsonian order worldwide presents vexing problems that are likely to preoccupy presidential administrations for decades to come. One problem is that many career officials and powerful voices in Congress, civil society organizations, and the press deeply believe not only that a Wilsonian foreign policy is a good and useful thing for the United States but also that it is the only path to peace and security and even to the survival of civilization and humanity. They will continue to fight for their cause, conducting trench warfare inside the bureaucracy and employing congressional oversight powers and steady leaks to sympathetic press outlets to keep the flame alive. Those factions will be hemmed in by the fact that any internationalist coalition in American foreign policy must rely to a significant degree on Wilsonian voters. But a generation of overreach and poor political judgment has significantly reduced the credibility of Wilsonian ideas among the American electorate. Neither President George W. Bush’s nation-building disaster in Iraq nor Obama’s humanitarian-intervention fiasco in Libya struck most Americans as successful, and there is little public enthusiasm for democracy building abroad.

## Adv – Systemic Risk

### 1NC---Rant

#### This is a disad not an advantage--- their uniqueness that monopolies control all information now means the plan immediately causes a complete overthrow of the internet and instantly decimates cyber security.

### 1NC---Digital Resilience

#### Digital economy is uniquely good for risk resilience

Dmitry Ivanov & Alexandre Dolgui 20. Professor of Supply Chain and Operations Management at Berlin School of Economics and Law (HWR Berlin) and deputy director of Institute for Logistics at HWR Berlin. \*\*Distinguished Professor and the Head of Automation, Production and Computer Sciences Department at the IMT Atlantique, Nantes, France campus. "A digital supply chain twin for managing the disruption risks and resilience in the era of Industry 4.0." Product Planning & Control: The Management of Operations. 5-21-2020. https://www.tandfonline.com/doi/full/10.1080/09537287.2020.1768450

6. Conclusion

A combination of model-driven and data-driven decision-making support became a visible research trend in the last years. The quality of model-based decision-making support strongly depends on data, its completeness, fullness, validity, consistency, and timely availability. These data requirements are of special importance in SC risk management for predicting disruptions and reacting to them. Industry 4.0 in general and digital technology in particular give rise to data analytics applications to achieve a new quality of decision-making support when managing severe disruptions. The combination of simulation, optimisation, and data analytics constitutes a digital twin: a novel datadriven framework of managing disruption risks in the SC.

A digital SC twin is a model that represents the network state for any given moment in time and allows for complete end-to-end SC visibility to improve resilience and test contingency plans. The need and value of SC digital twins have become indisputably evident amid the COVID-19 pandemic when many firms needed to adapt their supply-demand allocations very quickly. Moreover, the experts expect the growing role of SC monitoring and visibility in post-pandemic recoveries.

This study focussed on creating a generic structure of a digital SC twin for managing disruption risks, i.e. a DSS for data-driven modelling of proactive resilient SC designs and reactive real-time disruption risk management. With the results of this study, we contribute to both theory and practice of decision-making support in SC disruption risk management by enhancing decision-makers’ understanding of the value and use of harnessing a firm’s own risk data and that of their partners for predictive and reactive decision-making.

First, the methodological principles of data-driven DSS and information technology for SC disruption risk management were derived using system-cybernetic analysis. Future DSS in SC disruption risk management will extensively utilise datadriven technologies

and be united by three basic principles of system-cybernetic research to form SC risk analytics decision support and learning frameworks. A combination of these principles builds a framework of future digital SC twins for managing disruptions, i.e. DSS for SC disruption risk management which utilises integrated disruption risk modelling with simulation, optimisation, and analytics components to support situational forecasting, predictive simulation, prescriptive optimisation, and adaptive learning based on a transition from offline to online simulation and optimisation.

To prove the implementation feasibility of these principles in different contextual settings, a DSS for disruption risk management and business continuity in the SC was developed and tested. In addition, the framework of a generalised DSS was proposed. At the SC design stage and in the pre-disruption mode, the system should allow visualisation of SC risks, assessment of supplier disruption risks, prediction of possible supply interruptions, and computation of alternative supply network topologies and back-up routes with assessment of estimated times of arrival. In the dynamic mode, the system should be applied using real-time data to simulate disruption impacts on the SC and alternative SC designs that contain non-disrupted network nodes and arcs depending on real-time inventory, demand, and capacity data. The SC redesign results can be reported to ERP systems and quantified by means of KPIs, such as revenues, sales, on-time-delivery, etc.

The methodological principles and a generalised design of the digital SC twin proposed in this study can potentially enhance research on proactive and reactive resilient strategies and contingency plans by using the advantages of SC visualisation, historical disruption data analysis, and real-time disruption data to ensure business continuity in global companies. The findings presented can also guide a firm in properly maintaining data for model-based decision-making support. Ignoring accurate data on supplier and route disruption probabilities, advanced supply signal recognition, and real-time disruption detection can result in misleading disruption scenarios for SC design resilience and late deployment of recovery policies.

When generalising the insights gained in this study, the following directions can be observed. Ivanov et al. (2018) proposed that in the future competition will occur not between SCs, but rather between the information services and analytics algorithms behind the SCs. This is also true for SC disruption risk management. Examples of SC and operations risk analytics applications include logistics and SC control with real-time data, inventory control, and management using sensing data, dynamic resource allocation, improving recovery forecasting models using big data, SC visibility and risk control, optimising systems based on predictive information, and combining optimisation and machine learning algorithms. Success in SC disruption risk management will become more and more dependent on data analytics in combination with optimisation and simulation modelling.

Our study has a few limitations. First, a discussion of technical requirements on data processing capacities remained outside of the scope of this paper. Second, the detailed technical analysis of disruption data filtering, e.g. using machine learning techniques would make this study more comprehensive, however, going beyond of the scope of the paper.

A number of future research directions for extending these applications with the help of data driven techniques can be identified with regards to applications to SC disruption risk management. Detailed, technical analysis of the proposed technologies and how they can be integrated with each other could extend the content of this study. The speed and scope of SC digitalisation comprise a trend whereby the success of SC risk management will be more and more dependent on SC risk analytics. As such, a promising future research avenue is the development and testing of different manufacturing and logistics cloud platforms from the positions of both efficiency and resilience. Finally, the understanding of organisational changes in the new decision-making settings with an increased role of artificial intelligence algorithms belong to the crucial research areas helping to underpin the theoretical foundations of the new emerging field of a digital SC.

### 1NC---AT: Malware

#### No impact.

Jesse Dunietz and Robert M. Lee 17. \*\*Scientific American's 2017 AAAS Mass Media fellow, and a Ph.D. candidate in computer science at Carnegie Mellon University. \*\*CEO of industrial cybersecurity firm Dragos. “Is the Power Grid Getting More Vulnerable to Cyber Attacks?” Scientific American. <https://www.scientificamerican.com/article/is-the-power-grid-getting-more-vulnerable-to-cyber-attacks/>

Two weeks ago it was cyberattacks on the Irish power grid. Last month it was a digital assault on U.S. energy companies, including a nuclear power plant. Back in December a Russian hack of a Vermont utility was all over the news. From the media buzz, one might conclude that power grid infrastructure is teetering on the brink of a hacker-induced meltdown. The real story is more nuanced, however. Scientific American spoke with grid cybersecurity expert Robert M. Lee, CEO of industrial cybersecurity firm Dragos, Inc., to sort out fact from hype. Dragos, which aims to protect critical infrastructure from cyberattacks, recently raised $10 million from investors to further its mission. Before he founded the company, Lee worked for the U.S. government analyzing and defending against cyberattacks on infrastructure. For a portion of his military career, he also worked on the government’s offensive front. His work has given him a front-row view on both sides of infrastructure cybersecurity. [An edited transcript of the interview follows.] How concerned should we be about grid and infrastructure cybersecurity, and what should we be most worried about? The electric grid and most infrastructure we have is actually fairly well built for reliability and safety. We’ve had a strong safety culture in industrial engineering for decades. That safety and reliability has never been thought of from a cybersecurity perspective, but it has afforded us a very defensible environment. As an example: if a portion of the U.S. power grid goes down. We usually anticipate those things for hurricanes or winter-weather storms. And we’re good at moving away from the computers and doing manual operations, just working the infrastructure to get it back. Usually it’s hours, maybe days; never more than a week or so. A lot of these cyberattacks deal with the computer technology and the interconnected nature of the infrastructure. And so when they target it in that way, you’re talking hours, maybe a day, at most a week of disruption. For reasonable scenarios, we’re not talking about a long time of outages, and we’re not talking about compromising safety. Now, the scary side of it is [twofold]. One, our adversaries are getting much more aggressive. They’re learning a lot about our industrial systems, not just from a computer technology standpoint but from an industrial engineering standpoint, thinking about how to disrupt or maybe even destroy equipment. That’s where you start reaching some particularly alarming scenarios. The second thing is, a lot of that ability to return to manual operation, the rugged nature of our infrastructure—a lot of that’s changing. Because of business reasons, because of lack of people to man the jobs, we’re starting to see more and more computer-based systems. We’re starting to see more common operating platforms. And this facilitates a scale for adversaries that they couldn’t previously get. When you say our adversaries are getting more aggressive, what are you referring to? The key events are things like the Ukraine attack in 2015–2016, [in which a cyberattack brought down portions of the Ukrainian power grid], as well as two different campaigns in 2013–2014, BlackEnergy2 and Havex, [two malware programs that were deployed against energy sector companies]. Basically, far-reaching espionage on industrial facilities one year; the next year getting into industrial environments; and then culmination in attacks in 2015–2016. That’s aggressive in itself. For my own firm, what we’re seeing in the [overall] activity in the space is it’s growing. Over the last decade, I have seen adversary activity increase in some measure, and then around 2013–2014 just start spiking. What are the adversaries actually doing in these attacks? [There are two broad categories of attacks.] Stage I intrusions are those designed to gain information. These are the traditional espionage efforts we’ve become accustomed to hearing about, where information is stolen or deleted. A Stage II attack could result in temporary loss of power, physical damage to equipment, or other types of scenarios we often hear about. It is important to note these are not trivial to accomplish. If an attacker wants to progress to a Stage II attack, during the Stage I intrusion they have to steal information specific to [that] industrial environment. The 2013–2014 campaigns that I mentioned were exactly the kinds of Stage I activity that you’d want to use to pivot into a Stage II activity. And so they scared the heck out of all of us. But the stuff we’ve heard about recently—the nuclear site and about a dozen energy companies that were compromised in a phishing campaign that made the news—none of that sounded tailored toward pivoting into a Stage II. Once an adversary has broken into the “business networks” used for email, documents and so on, how far a jump is it for them to access the industrial control system (ICS) networks used to control and monitor the industrial equipment? In nuclear environments, [business networks and control networks are] airgapped—[i.e., computers on one network cannot talk to those on the other]—because of safety regulations. The idea that because you got into the business network you can easily move into the ICS network is ridiculous. That is not true with other industrial infrastructures—electric energy, oil and gas, manufacturing, etc. You absolutely have [ICS] networks that are connected up. The nuance here is that we have a joke in the community: you’ll get security folks who don’t know much about ICS coming in with penetration testers and saying, “Oh my gosh, I found so many vulnerabilities!” And so the joke is, why don’t I just sit you down at the terminal? I will give you 100 percent access. Now make the lights blink. There’s a big gap there. [So the challenge is] not so much getting access. It’s once you get access, do you know what to do in a way that’s not just going to be embarrassing? What motivation do these adversaries have to attack the U.S. grid? I do not feel that there is a legitimate reason for adversaries to disrupt or destroy industrial infrastructure outside of a conflict scenario. Ukraine and Russia is a great example. I don’t necessarily mean declared war, but in places where we see conflict, I think we’ll see industrial attacks: North Korea-South Korea, China-Taiwan. But there are some scenarios that concern me, where we might have our hands forced and not have clarity around what happened. I’m aware of at least one case where a skilled adversary broke into an industrial environment, and in the course of intelligence operations they accidentally knocked over some sensitive system that led to visible destruction and almost to multiple casualties. And the worst part is, we didn’t actually realize it was a failed operation until about a month after, because the forensics and analysis take time. So you could have a scenario where the U.S., Russia, China, Iran—big players—are doing intelligence operations on each other, are doing pre-positioning to have deterrence or political leverage, and mess up that operation in a way that looks like an attack that we do not have transparency on for some time. We do not have international norms around how to handle that. Outside of conflict scenarios, though, I don’t see the advantage to [deliberate] disruptive or destructive attacks. I think we haven’t seen it not because they haven’t wanted to, but because the return on investment is minimal. What’s really advantageous is sitting U.S. congressmen and policymakers fearing what can happen with industrial infrastructure. That fear drives policy far more than actually turning the lights off and having them realize [they will] come back on in six hours.

# 2NC---Round 2---Wake

## 2NC---Regs CP

### 2NC---Overview

### 2NC---AT: PDB

2AC 1

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

Carl W. Hittinger and Tyson Y. Herrold 19. Carl W. Hittinger (LAW ’79) is a senior partner and serves as BakerHostetler’s Antitrust and Competition Practice National Team Leader and the litigation group coordinator for the firm’s Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. Tyson Y. Herrold is an associate in the firm’s Philadelphia office in its litigation group. His practice focuses on complex commercial litigation, particularly antitrust and unfair competition matters, as well as civil rights litigation. "Antitrust Agency Turf War Over Big Tech Investigations". Temple 10-Q. https://www2.law.temple.edu/10q/antitrust-agency-turf-war-over-big-tech-investigations/

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: PDCP

#### “Expanding the scope” of “anti-trust laws” must be the DOJ and FTC.

Jarod Bona 21. Bona Law PC. "Five U.S. Antitrust Law Tips for Foreign Companies". Antitrust Attorney Blog. 1-16-2021. https://www.theantitrustattorney.com/five-u-s-antitrust-tips-foreign-companies/

1. Two federal and many state agencies enforce antitrust laws in the United States

The United States government has two separate antitrust agencies—the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The FTC is an independent federal agency controlled by several Commissioners, while the Antitrust Division of the DOJ is part of the Executive Branch, under the President.

Both of them enforce federal antitrust laws (among other laws). Their jurisdictions technically overlaps, but they tend to have informal agreements between each other for one or the other to handle certain industries or subjects. If you are part of a major industry, your antitrust lawyer may be able to tell you whether the DOJ or FTC is likely to oversee competition issues in your field.

#### 2. Jurisdiction: the plan expands the DOJ and FTC role.

Babette E. Boliek 11. Associate Professor of Law at Pepperdine University School of Law. J.D., Columbia University School of Law; Ph.D., Economics University of California, Davis. FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries, 52 B.C.L. Rev. 1627 (2011). <http://lawdigitalcommons.bc.edu/bclr/vol52/iss5/2>

There is a crucial battle playing out in the world of Internet access provision. While the Internet is the natural home of competing business giants and warring digital avatars, the contest that will have the most sweeping ramifications for the future of the Internet is the turf war being waged between the Federal Communications Commission (FCC), on the one hand, and the Federal Trade Commission (FTC) and the Department of Justice (DOJ), on the other.1 Nothing less than jurisdiction over the development of the Internet is at stake.

Jurisdiction over Internet access provision is not the first confrontation between these particular government agencies; in fact, they have clashed many times.2 But it is the current iteration of the FCC’s “net neutrality” regulations that has generated the latest contest. Roughly defined, net neutrality encompasses principles of commercial Internet access that include equal treatment and delivery of all Internet applications and content.3 For some, net neutrality stands further for the proposition that Internet access operators should not be permitted to provide different qualities of service for certain application providers (e.g., guaranteed speeds of transmission), even if those application providers can freely choose their desired quality of service.4 Net neutrality has reinvigorated what may be described as an underlying interagency tug of war that reaches deep within, and far beyond, the communications industry.

Although the two regimes share a commonality of purpose—to protect consumers and to promote allocative efficiencies in production—the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws “typically aim at similar goals—i.e., low and economically efficient prices, innovation, and efficient production methods” —regulation looks to achieve these goals directly “through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about.”5 The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?6

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets— regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures.7 Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly.8 In the vast major- ity of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

This Article sets forth a framework to identify the boundaries between FCC regulatory power and antitrust authority. The goal is to pinpoint for Congress the problematic use of regulatory discretion in defining, or redefining, those boundaries and to propose the standard by which Congress may address inappropriate use of existing FCC jurisdiction. Specifically, this Article creates a new categorization of “procedural opportunism” and “substantive opportunism” to identify problematic, regulatory assertions of jurisdiction. The central issue examined in this Article is to posit what is (or should be) the boundaries of antitrust law in relation to the FCC’s regulatory authority. This important issue has reached a point of public crises in the current net neutrality debate.9 Rather than act reflexively, this is an opportunity for Congress to act clearly to redefine the boundaries between the two regimes that have otherwise been blurred by regulatory overreach.

#### 3. Legal code---antitrust requires Title 15 of US Code.

Sanjukta M. Paul 16. David J. Epstein Fellow, UCLA School of Law. The Enduring Ambiguities of Antitrust Liability for Worker Collective Action. Loyola University Chicago Law Journal. https://www.congress.gov/116/meeting/house/110152/witnesses/HHRG-116-JU05-Wstate-PaulS-20191029-SD002.pdf

Unlike the Clayton Act, which was the first legislative attempt at a labor exemption from antitrust,202 the Norris-La Guardia Act did not grapple directly with trade regulation in subject matter—even with how trade regulation applies to labor—although it had the effect of modifying its reach. Norris-La Guardia is not an antitrust statute. Instead, it is incorporated into Title 29 (“Labor”) of the United States Code. By contrast, the Clayton Act was conceived and written as an antitrust statute, was incorporated into Title 15, the antitrust and trade regulation section of the Code, and portions of it dealt with matters other than labor.

#### 4. Regs are territorial.

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

Sovereign states have historically enjoyed the prerogative of regulating their own markets when their economic and political policies dictate market intervention. Within the United States, for example, states in the first instance regulate their own land uses, local provision of electricity, or local telephone service. By the same token, the United States generally oversees regulated industries within its own borders, while leaving other sovereign nations to govern theirs. To be sure, federal law often regulates transactions between the United States and foreign countries. Further, international treaties provide for regulation of international trade and transportation, the commercialization of some natural resources, the environmental impact of business activities, and other things with significant extraterritorial spillovers. But by and large we leave other sovereigns to regulate their own markets, particularly those falling within the traditional category of regulated industries, such as public utilities and common carriers.

The conventional literature on regulation recognized the optimal regulatory sovereign as the one whose geographic territory encompassed the regulated firm's service area. Of course, state regulation often yields to federal power under the Supremacy Clause of the United States Constitution. However, in these cases extraterritoriality is not at issue because the federal government's territory encompasses everything contained in the individual states. So, for example, interstate components of electric power generation and transport were traditionally regulated by the federal government, while intrastate components, particularly retail delivery, were regulated by the individual states where the retail customers were located.

Over the last two decades regulated industries in both the United States and elsewhere have been deregulated to one degree or another. What "deregulation" generally means is that certain questions about pricing, new firm entry, or the range of services that a firm can offer, or the construction of additional production or transmission facilities, are no longer supervised by a government agency, at least not as closely. The most extreme examples of deregulation are in transportation markets. For example, under comprehensive Civil Aeronautics Board regulation in the 1970s and earlier the price that an airline set, the schedule it flew, whether it could add or remove a route, and even whether it could bundle air travel with such amenities as hotel rooms or rental cars were subject to comprehensive government supervision. Today the Civil Aeronautics Board no longer exists,' and to one degree or another all these decisions are now up to the firm and the market.

One natural consequence of deregulation has been expanded application of the antitrust laws. As agency command and control becomes less pervasive and an increasing number of market decisions are placed within the firm's discretion, antitrust's general market principles become the regulator of last resort. However, this expansion of antitrust has proceeded in fits and starts, and gone much more smoothly in some markets than in others. Interstate air travel, for example, went rather completely from a regime recognizing widespread antitrust immunity under CAB regulation,2 to one in which carriers are treated as ordinary business enterprises subject to fairly complete antitrust control. 3 By contrast, the road in telecommunications has been much bumpier, with the federal courts currently in complete disarray about the proper role that antitrust should play in bringing competition to local telephone service.4

This change from government agency control to antitrust control is beginning to have one consequence that was not foreseen. While regulatory regimes in the United States could be state, federal, or local, they were for the most part quite strictly territorial. For example, residents of Minneapolis might have their retail electricity regulated intraterritorially by the federal government, the State of Minnesota, or perhaps even the city. But it is unlikely that retail electricity in Minneapolis would be regulated by the State of Illinois or the government of Canada.

The antitrust laws do not exercise the same territorial circumspection. Under traditional ideas about regulatory control it would be almost unthinkable that the United States would attempt to apply its law to a Mexican telephone company's rate structure or customer selection policies; under modern conceptions of antitrust law it is not. The global reach of antitrust extends very far. Actions that occur abroad can be condemned under the Sherman Act if they have an intended, substantial and foreseeable effect on United States commerce. 5 Appellate courts have even approved criminal indictments under United States antitrust law for activity that took place entirely abroad.6

### 2NC---AT: Other Perm

### 2NC---AT: Links to NB

### 2NC---AT: Regulations Fail

#### Their ev is explicitly about Section 5 of the FTC Act---Courts say no and Congress backlashes.

Alison Jones and William E. Kovacic 20. Alison Jones, King’s College London, London, United Kingdom. William E. Kovacic, King’s College London, George Washington University, and United Kingdom Competition and Markets Authority, "Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy". SAGE Journals. 3-20-2020. https://journals.sagepub.com/doi/10.1177/0003603X20912884 https://journals.sagepub.com/doi/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

#### Courts block it---proves the link to the net benefit.

Bryan Koenig 6/29. Senior competition reporter at Law 360. "Is The Consumer Welfare Standard On FTC's Chopping Block?." Law 360. Accessed via Nexis Uni. 6-29-2021. https://www.law360.com/articles/1398386

If Khan does rescind the Section 5 statement in the name of moving beyond the consumer welfare standard however, observers note that it would not be the standard's immediate death knell. Courts have come to rely on the standard, which is not based on statute, for assessing enforcement actions, and the FTC would need to persuade judges to try something new.  
  
"Since existing U.S. case law recognizes the consumer welfare standard, new FTC suits that ignore consumer welfare and competition on the merits would likely fail, leading to a waste of public and private resources," said Alden Abbott, a former FTC general counsel who is now a senior research fellow with George Mason University's Mercatus Center and is also critical of the move.

#### And it causes agency stripping---that decks the FTC.

Alison Jones and William E. Kovacic 20. Alison Jones, King’s College London, London, United Kingdom. William E. Kovacic, King’s College London, George Washington University, and United Kingdom Competition and Markets Authority, "Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy". SAGE Journals. 3-20-2020. https://journals.sagepub.com/doi/10.1177/0003603X20912884 https://journals.sagepub.com/doi/10.1177/0003603X20912884

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

#### 1---CP solves---creates clear standards that foster certainty.

Stigler Committee on Digital Platforms 19. The Steigler Committee is an independent committee of over 30 area experts and scholars tasked with creating a report on the regulation of digital platforms. What follows are the credentials of the report’s main organizers, but a full list of scholars and qualifications can be found at the link listed later in this cite. Luigi Zingales is the Robert C. McCormack Distinguished Service Professor of Entrepreneurship and Finance at the University of Chicago Booth School of Business. Guy Rolnik is a Clinical Associate Professor of Strategic Management at the University of Chicago Booth School of Business. Filippo Maria Lancieri is a fellow at the George J. Stigler Center for the Study of the Economy and the State. "Stigler Committee on Digital Platforms: Final Report." The University of Chicago Booth School of Business. 9-16-2019. https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report

1. The Digital Authority

To be effective, a proposed regulatory regime requires an enforcement body capable of carefully designing and enforcing the relevant regulations. We start therefore with a proposal for Congress to pass legislation creating a Digital Authority with the mandate to develop targeted regulation to achieve the goals described above and subsequently engage in monitoring and enforcement.

We anticipate that this regulator will also be tasked with non-competition digital goals, such as those in the areas of privacy, media, data-use restrictions, and consumer protection. While the antitrust agencies will employ structural interventions to protect competitive markets wherever possible, the focus of this regulator will be on both carrying out remedies for the antitrust authority that require ongoing oversight, and on developing regulations going forward that are a combination of structural safeguards, such as unbundling or separation, with limited behavioral interventions in areas where traditional antitrust tools are insufficient. Other jurisdictions that are assessing competition in digital platforms all propose some form of regulation.[[2]](#footnote-2) Having forward-looking regulations in place will increase business certainty about what conduct is permitted and how enforcement actions are likely to proceed. Ideally, this predictability and clarity will encourage companies to comply with the law, thus requiring fewer government resources for enforcement.

The DA legislation will require Congress to define the scope of regulatory power. The definition must include digital businesses that facilitate transactions of any kind (including the sale of advertising). It should have clear and broad authority over digital business models in order to prevent firms subject to regulation from evading its oversight.

#### 2---The aff is worse.

A. Douglas Melamed & Nicolas Petit 19. Professor of the Practice of Law at Stanford Law School. \*\*Joint Chair in Competition Law at the European University Institute in the Department of Law and at the Robert Schuman Center for Advanced Studies. "The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets." Review of Industrial Organization. 2-11-2019. https://link.springer.com/article/10.1007/s11151-019-09688-4#Sec13

5 Competitive Process, “No Fault” Antitrust, and Conduct‑Based Rules

Many of the critics of CW have in mind an alternative to the CW standard for antitrust policy: “protection of competition” or the “competitive process” (Khan 2017; Wu 2018). The words themselves to do not necessarily imply a departure from the CW standard because, as was explained above, both of the key elements of existing US antitrust law—anticompetitive conduct, and increased market power—are focused on harm to the competitive process. The courts have recognized this connection as well.

The critics are often unclear about the concrete elements of antitrust liability that would operationalize a “protection of competition” policy in relation to platformbased firms, but their remedy proposals enable us to draw inferences about their preferred antitrust doctrine. The core idea seems to be the removal of one of the three elements of a violation of antitrust law: bad conduct, market power, and a causal link between them. There are two variants to this idea:

Some CW critics want to decrease the importance of the “bad conduct” element, so as to migrate towards a more “no fault” antitrust intervention on the basis of a showing of a situation of “structural dominance” (Khan 2017). Others would retain the conduct requirement and dispense with the market power screen. Both proposals are unsound.

5.1 No‑Fault Antitrust for Platforms

Some critics of CW display sympathy for a “no fault” antitrust or something very close to this (Khan 2017; Woodcock 2017). In this alternative framework, the bad conduct requirement that is necessary to establish antitrust liability—in Section 1 cases, concerted action; in Section 2 cases, exclusionary conduct—is either removed or marginalized (for example, through greater reliance on incipiency theories in antitrust doctrine or the concept of “special responsibility” of dominant firms that is used in the EU). Instead, a market power screen of some sort would be used to identify a position of “structural dominance” that provides the basis for antitrust intervention. In effect, these critics seem to be saying, the law should give less deference to efficiency and should focus more on rivalry.

The normative idea is that society is better off when more than one platform, and/or related upstream and downstream businesses, operate in a market. When this condition is not met, the concentrated structure of the platform market creates anticompetitive conflicts of interests and perverse behavioral incentives, such as discrimination and leveraging (Khan 2017). The promotion of inter- and intra-platform rivalry would require the imposition of positive obligations—e.g., must-carry requirements, mandatory API sharing, data portability measures—on platformbased firms. It might also require heightened M&A restrictions and possible divestitures that are aimed at eliminating structural dominance.

A no-fault antitrust law would almost certainly inflict static welfare losses on society. To start, breaking up platforms horizontally would likely reduce productive efficiencies, require replication of fixed costs not fully utilized and thereby increase average total costs, and reduce the benefits of network effects on the various sides of the platform. Moreover, when improperly executed—which is a non-trivial possibility—a platform break-up might give rise to negative network externalities, transaction costs, and excessive platform fragmentation.

To capture this intuition, we invite readers to travel back to the world of Internet search before 2000, when users searched web pages through multiple platforms and then had to compare search results. The upshot was lost time for users and costly campaigns for advertisers.

Breaking up vertically integrated companies or those providing complements could also reduce static efficiency.

Productive efficiency could be harmed by diseconomies of scope and lost spillovers. And allocative inefficiency might result from the increased potential for double marginalization, which would lead to increased prices and reduced output. Similar but perhaps less substantial welfare losses would result from conduct restrictions that limited the ability of platforms to take full advantage of whatever efficiencies are created by their size and scope.

A no-fault antitrust law would also have dynamic costs: By reducing the rewards to “skill, foresight and industry”, as the court put it in Alcoa, the law would reduce the incentives for and thus the likely investment in such productive endeavors. And by offering the prospect of antitrust intervention to assist rivals and complementors, no-fault antitrust law could reduce their incentives to innovate and otherwise compete vigorously in order to flourish without such aid. Such a law would also require on-going industry monitoring. If, for example, there are strong network effects in a market, there are likely to be recurring monopolies as markets tip to one rival or another.

On the other hand, no-fault antitrust law could promote economic welfare by reducing the deadweight loss that results from enduring market power and by facilitating the entry of rivals and complementors and thus inducing investment in such rivals. Whether no-fault antitrust law would on balance increase or decrease welfare is an empirical question, and the answer might differ depending on the industry or even the specific company. In the platform world, for example, Amazon seems to have large fixed costs (for example, those related to its fulfillment infrastructure), while platforms such as Facebook and Google have relatively lower fixed costs and higher variable costs (for example, those that are related to labor-intensive content moderation); but the latter probably provide greater network efficiencies.

U.S. antitrust law takes a clear stand on this issue: No antitrust violation is found, and no antitrust remedy is warranted, unless the defendant has engaged in anticompetitive conduct: conduct that does not increase efficiency but does tend to increase market power by coordinating the conduct of competitors or weakening or excluding competitors. The stand seems to reflect both a normative judgment—if you play by the rules, you can enjoy the fruits of success—and a crude empirical judgment that the welfare costs of no-fault intervention exceed the benefits as a general matter and trying to carve out the exceptional case would be too difficult or costly.

The CW standard does not require antitrust law to be based on either that normative judgment or that empirical judgment. Certainly, those have not been the premises of EU competition law, at least until recently. Several leading EU cases declared that dominant firms are under a “special responsibility” that was often understood, for example, to imply access and nondiscrimination obligations. Even today, EU competition law guidelines make clear that stricter standards apply where inaction would leave only a single firm in the relevant market. The idea is that preserving access by outsiders, small firms, and less efficient upstarts, and ensuring that some competitors remain in the market, would promote welfare over the long run (Fox 2008a, b).

The EU seems to be moving away from this kind of no-fault competition law, not because the CW standard compels such a move but for other, more pragmatic reasons that arise from the difficulty of determining when and how to intervene in a nofault system. How should the law define threshold levels of platform monopoly that warrant antitrust intervention? How should it account for the welfare costs of intervention? Are some markets or firms too valuable or too innovative for government intervention, even if concentrated or powerful? Are some remedies too disruptive and costly? The CW critics that sympathize with a migration of antitrust towards a no-fault approach have not addressed these questions. Absent satisfactory answers to them, no-fault antitrust—or anything close to it—would likely be a recipe for arbitrary and welfare-reducing government regulation.

There is another problem with no-fault antitrust law that suggests that it would have—at best—an uneasy relationship with U.S. antitrust law, although the unease has little to do with the CW standard itself: U.S. antitrust law proscribes certain kinds of conduct and otherwise leaves parties free to compete in the marketplace. In effect, it punishes and seeks to deter what it regards as bad conduct. If one imagines a continuum with proscriptive law enforcement at one end and prescriptive regulation on the other, antitrust law is on the law enforcement side. The law enforcement approach reflects both a normative judgment about the limited role of the State and specific, antitrust judgments: that competition is better than regulation; that markets (policed by rules of fair play) know better than central planners; and that proscriptive rules promote business compliance, legal certainty, and economic activity. If antitrust intervention is based on market conditions rather than specific bad conduct, it becomes a kind of regulation and to that extent departs from a core premise of U.S. antitrust law.

#### 3---Antitrust authorities will share expertise with regulators.

FTC 06. “Creating Constructive Relationships Between Competition Policy and Sectoral Regulators: Submission of the United States”. (Paper presented at the Latin American Competition Forum Fourth Annual Meeting, San Salvador, 2006). https://web.archive.org/web/20070910185812/http://www.iadb.org/europe/files/news\_and\_events/2006/LACF2006/SesI\_USA\_EN.pdf

The relationships between sectoral regulators in the United States and the two federal antitrust authorities, the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”), have evolved over the past 30 years. Prior to the 1970s, the regulators and the agencies interacted with each other relatively infrequently. At that time, the antitrust agencies began to engage in competition advocacy, through which they attempted to explain how various regulatory policies impacted competition and consumer welfare and the potential benefits of deregulation. As understanding of the economics of regulation has grown, federal sectoral regulators today increasingly embrace the goals of competition policy and tend to share a common set of policy objectives with the antitrust agencies. While differences remain in the case of some regulators, the competition agencies and sectoral regulators today increasingly coordinate and cooperate with each other, sharing industry and market expertise

### 2NC---AT: Extraterritoriality

#### 2--- US leadership means regs are sufficient but new agency also solves

Graham Webster & Justin Sherman 10/28/21. Research Scholar at the Stanford University Cyber Policy Center and Editor in Chief of the Stanford DigiChina Project. \*\*Nonresident Fellow at the Atlantic Council’s Cyber Statecraft Initiative. "The Fall and Rise of Techno-Globalism." Foreign Affairs. 10-28-2021. https://www.foreignaffairs.com/articles/world/2021-10-28/fall-and-rise-techno-globalism

SALVAGING THE GLOBAL

A better approach would recognize from the outset that the Internet and the development of technology are invariably global and cannot be easily fractured between competing political blocs. Dividing the Internet at the infrastructure level into two or more independent networks would mean duplicating entire highly complex supply chains, which would be extremely costly, carbon-inefficient, and impractical, if even possible in the first place. Such fissures would also not prevent innovations or indeed threats—including malicious attacks and natural disasters—from crossing political divides.

A stark technological divide is not just unrealistic but also undesirable. Embracing a trend toward politically delineated technological ecosystems will undermine the open ethos that fuels and benefits freer societies—and bolster the top-down, controlling ethos favored by repressive regimes. And if rivals are less interdependent, they have less incentive to refrain from crippling attacks on each other’s critical infrastructures.

Only a renewed and pragmatic embrace of techno-globalism will offer comprehensive solutions to the real problems of technological governance. Policymakers must adopt a global vision that avoids the folly of believing that technical systems and industrial supply chains can be totally walled off from countries such as China. They should develop solutions that recognize the value and inevitability of international connection. Moreover, as home to many of the companies and individuals that most influence the experience of the Internet around the world, the United States has a special role it cannot ignore. Firms such as Google and Facebook shape how rights to privacy and free expression are protected—or abused—and their motivations cannot be assumed to be virtuous, nor their stewardship of online communities ethical, simply because they reside in the United States. Cyber-utopians once dreamed of liberation spreading from an Ethernet cable; now Washington must ensure that its companies don’t spread exploitation and insecurity instead.

Responsible techno-globalism starts at home. The U.S. Congress must pass a comprehensive federal data privacy law to protect Americans from the overreach of technology companies and to demonstrate a commitment to democratic governance in the Internet age. U.S. thinkers and policymakers should take a global view in analyzing the human rights and security implications of surveillance technology produced in both democratic and authoritarian contexts. Officials must seek ways to enjoy the maximum benefits of open scientific exchange and cooperation while protecting important national security interests, for instance by narrowly targeting security-related areas for special scrutiny but actively reaffirming openness in other fields, including for students and researchers with connections to countries of concern such as China.

This urgent domestic work can form a platform for positive international efforts. With a new State Department bureau dedicated to cybersecurity and digital policy issues, the U.S. government should consult and cooperate with other democracies that are experiencing technology-related challenges and social eruptions. It may not always be easy to find consensus. The United States and the European Union, for instance, have long been at loggerheads over data governance, despite their many shared interests and values. But efforts to piece together an international, democratic, rights-respecting coalition on technology governance will fail before they get off the ground if they do not acknowledge—in assessing the challenges and shaping the solutions—that such a project is inherently a global one.

### 2NC---AT: Regulatory Capture

### 2NC---AT: Size Matters

#### The counterplan just does the remedies of the aff---antitrust enforcement is too slow

Stigler Committee on Digital Platforms 19. The Steigler Committee is an independent committee of over 30 area experts and scholars tasked with creating a report on the regulation of digital platforms. What follows are the credentials of the report’s main organizers, but a full list of scholars and qualifications can be found at the link listed later in this cite. Luigi Zingales is the Robert C. McCormack Distinguished Service Professor of Entrepreneurship and Finance at the University of Chicago Booth School of Business. Guy Rolnik is a Clinical Associate Professor of Strategic Management at the University of Chicago Booth School of Business. Filippo Maria Lancieri is a fellow at the George J. Stigler Center for the Study of the Economy and the State. "Stigler Committee on Digital Platforms: Final Report." The University of Chicago Booth School of Business. 9-16-2019. https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report

However, because technology platforms present the enforcement challenges detailed above, even effective enforcement may not be enough to generate competitive digital markets in a timely fashion. Therefore, the report suggests that Congress should consider creating a specialist regulator, the Digital Authority. The regulator could be tasked with creating general conditions conducive to competition. The committee also suggests separating out some types of regulation that will apply to virtually all market participants while other regulation will apply only to companies with bottleneck power. “Bottleneck power” describes a situation where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly.

The Digital Authority could routinely collect data on digital transactions and interactions, with an emphasis on data from businesses with bottleneck power. These data – made public to the extent possible – would allow policy makers and researchers to assess the performance of the sector. The DA could have a mandate to create “light touch” behavioral nudges when they will make markets more competitive. An example of a regulation that would enhance competition is data portability. The DA could set up rules that allow users to easily port their data from one service provider to another and monitor compliance. The DA may also promote open standards in such areas as micro-payments and digital identities. Should Congress request it, the DA could oversee a mandate for interoperability in any market where market power has become entrenched and threatens long term harm to competition. The Report also suggests that the DA could carry out a parallel merger review that would be set up to incorporate necessary antitrust reforms and modern standards.

Some regulations could apply only to firms that meet the DA’s definition for bottleneck power. Because the cost of false negatives is high and there is uncertainty, the public interest requires the DA to take a more interventionist approach in these settings. The DA could have merger review authority over even the smallest transactions involving digital businesses with bottleneck power because nascent competition against these entities is very valuable for consumers. Non-discrimination rules could protect against a complement that is a potential competitor of the platform itself, or one that operates only on the platform as a rival provider of content.

When a company has been found liable for violating the antitrust laws, part of the current process is that antitrust authority devises a remedy to restore the lost competition. Data sharing, full protocol interoperability, non-discrimination requirements, and the unbundling of content from a platform are all tools that the regulator, in conjunction with the antitrust authority, could apply and monitor over time in order to restore competitive markets.

#### Independent remedy imposition worked in the past

Jeff Bercovici, 19. San Francisco bureau chief of Inc. Previously held senior editorial positions at Forbes, AOL, and Radar. "Why Breaking Up Big Tech Won't Fix the Real Problem With Silicon Valley," Inc. June 2019. https://www.inc.com/magazine/201906/jeff-bercovici/tech-regulation-break-up-big-companies-monopoly-facebook-amazon-elizabeth-warren.html

Across many popular product categories, from batteries to baby food, the retail behemoth quietly discon­tinued aggressive promotions for its private-label brands, which compete with--and in truth are often near-clones of--independent merchants' products. It was an uncharacteristic retreat for a company that generally loves nothing more than using every weapon in its substantial arsenal to annihilate its rivals. Call it the Elizabeth Warren effect. Amid growing public wariness of the biggest tech companies and their outsize role in our economy and public life, the Democratic presidential candidate is far from the only politician in her party demanding stiffer regulation. Even President Trump has blasted Amazon as a "no-tax monopoly," and his Federal Trade Commission is spinning up a tech task force "to ensure consumers benefit from free and fair competition." Still, it's Warren's proposal to break up Google, Apple, Amazon, and Facebook--on the grounds that "they have hurt small businesses and stifled innovation"--that has captured imaginations and newspaper headlines. In Mountain View and Menlo Park, they're suddenly sweating through their hoodies. Hence Amazon's about-face. "They're trying to get out in front of the issue and defuse any regulatory solution," says economist Hal Singer of Georgetown University and Economists Incorporated. To Singer, whose work has influenced policy proposals from senators including Mark Warner and Al Franken, it was a hopeful sign. Another came from Facebook CEO Mark Zuckerberg, who, after years of lobbying against government oversight, recently called for **legislators to establish ground rules for "harmful content"** so companies like his don't have to figure them out on their own. Concessions like these suggest **we can keep the digital giants from squelching competitors without resorting to extreme measures**. That's good, because there are plenty of reasons to be skeptical about the idea of breaking up big tech. For one thing, such **trustbusting doesn't address the real problem**: platform owners abusing their absolute dominion over what have become, for many, indispensable venues for doing business. "When you're dealing with natural monopolies, you have to take away their ability to exploit their control over a marketplace," says Barry Lynn of the Open Markets Institute. Splitting off Amazon's e-commerce operation from its cloud services division wouldn't do much to help merchants on the former who see themselves as victims of the company's self-dealing, or enterprise software startups on the latter who suspect Amazon is using their data to copy their products. Amazon controls 85 percent of U.S. e-commerce sales for the categories of arts and crafts/party supplies, and 83 percent of U.S. e-commerce sales for the category of household essentials. Preventing dominant incumbents from buying up newcomers--another favored fix--might create more competition, but it also might depress startup formation, since founders often see acquisition as their most reliable exit strategy. **Antitrust is full of** such **question marks**, and the academic literature underpinning the case for trust-busting is riddled with inconsistency, says Geoffrey Manne of the International Center for Law & Economics. "The evidence is weak," he says. "Noticing there's an increase in concentration and asserting it correlates with some outcome you're worried about doesn't mean there's a causal relationship." Even those who generally agree with Warren's diagnosis of the problem see her call for breakups as more rallying cry than policy prescription. "You have to get everything down to a bumper sticker," says Singer. This may focus minds on the matter, but it distracts from **competing remedies**--which are straightforward, historically validated, and politically plausible. One is **enforced nondiscrimination**. This is essentially a legal framework preventing platform owners like Google and Amazon from using their control to advantage their own interests, by, say, favoring their own offerings. The principle that a company whose network represents an essential public service has an obligation not to discriminate is a principle with deep roots in American law, dating back to the establishment of railroad and telegraph lines. "The only network monopolies we've not applied these rules to are the platform monopolies," says Lynn, "because they've spent a hell of a lot of money to ensure it wouldn't happen." (Lynn and his team were with the think tank New America until, he contends, Google, a major funder, pressured its leadership to cut ties with him. Google has denied this.) Indeed, the tech giants have already endorsed the principle of nondiscrimination. They've lobbied the FCC on behalf of so-called net neutrality rules that prevented internet service providers from offering faster connectivity to companies willing to pay more. Nondiscrimination has been a useful tool in regulating the cable television industry, and Amazon's willingness to back down on promoting its own goods at the expense of outside sellers suggests the tech giants can live--and continue to innovate--when that becomes the norm. "Yes, their profits will be lower than in a world where they're free to discriminate with impunity," says Singer, "but not materially lower." His idea: **federal legislation establishing a nonpartisan "net tribunal" that would adjudicate claims of digital self-dealing**. Breaking up big tech companies is the nuclear option: Possessing the option provides useful leverage. But if you're in a position that requires you to seriously consider using it, something has gone badly wrong. Why not try fixing what's broken before pushing the button?

#### Separate agency can solve

Freeman ‘19—(legislative attorney, research analyst at the CRS). Freeman, Wilson C, and Jay B Sykes. 2019. “Antitrust and ‘Big Tech.’” Congressional Research Service, September, 39. <https://fas.org/sgp/crs/misc/R45910.pdf>.

Sector-Specific Regulation

As discussed, academic commentators have argued that certain digital markets possess structural characteristics that advantage large incumbent firms.247 In some cases, dominant firms in these markets can enhance such entry barriers by making it difficult for consumers to “multi-home” or use complementary products offered by competitors, and courts evaluating challenges to these product-design choices hesitate to hold companies liable under existing antitrust doctrine.248 Moreover, vertically integrated technology monopolists do not face general nondiscrimination rules requiring them to deal evenhandedly with rivals in adjacent markets.249 Some analysts have accordingly argued that large technology platforms require **sector-specific regulations** to address these competition concerns. These proposed regulations include “data mobility” rules giving consumers greater ability to control their data and move it to competing platforms, “interoperability” standards requiring companies to minimize technical impediments to the use of complementary products, and nondiscrimination requirements prohibiting vertically integrated technology monopolists from discriminating against rivals who use their platforms.250 Congress could legislate such requirements, direct an existing federal agency to develop them through rulemaking, or **create a new agency tasked with regulating the technology industry**. A number of lawmakers and academics have also argued that the infrastructure-like features of certain digital services justify separation regimes prohibiting monopolists that provide those services from entering adjacent markets.251 Such separation regimes are not without precedent. Historically, Congress and federal regulators have imposed a variety of structural prohibitions limiting the lines of business in which certain categories of firms—including railroads, banks, television networks, and telecommunications companies—can engage. 252 Commentators have justified these separation regimes on the grounds that they eliminate conflicts of interest that lead companies in key infrastructure-like sectors to discriminate against their vertical rivals.253 While the nondiscrimination requirements discussed above represent one means of addressing this concern, categorical separation rules are an alternative to such requirements that may prove easier to administer. In March 2019, Senator Elizabeth Warren proposed one type of separation regime for dominant technology companies, arguing that large “platform utilities”—including “online marketplaces,” “exchanges,” and “platforms for connecting third parties”—should be prohibited from owing companies that participate on their platforms.254 The Chairman of the House Antitrust Subcommittee has also expressed support for similar separation requirements.255 Congress may also be interested in broader separation regimes prohibiting dominant technology platforms from entering other types of markets. Specifically, many lawmakers have expressed concern about Facebook’s announcement that it intends to develop a new cryptocurrency.256 These worries have generated a legislative proposal to prevent any large technology platform from entering the financial industry, with Members on the House Financial Services Committee circulating draft legislation titled the **Keep Big Tech Out of Finance Act**.257 This draft bill would prohibit “large platform utilities” from (1) affiliating with financial institutions, or (2) establishing, maintaining, or operating digital assets intended to be “widely used as a medium of exchange, store or value, or any other similar function.” 258

### 2NC---AT: Theory

#### 1. Clash, research depth, and holistic advocacy. It’s the core controversy in antitrust research which makes it predictable OR aff choice solves their offense.

Erasmus School of Economics ND. The Erasmus Center for Economic and Financial Governance is an international multidisciplinary network of leading researchers and societal stakeholders initiated by researchers from Erasmus School of Economics and Erasmus School of Law. ECEFG conducts interdisciplinary research (law, economics and political science) and contributes to current debates in public and in academia on issues relating to European and global economic and financial governance. "Competition Policy." Erasmus Center for Economic and Financial Governance. https://www.eur.nl/en/ese/affiliated/ecefg/research/competition-policy

Competition Policy Research in this field consists of two broad areas. The first area – Theory and Implementation of Competition Law and Policy – refers to fundamental and applied research into topics that are traditionally seen as the core of competition policy. The second area – Scope of Competition Law and Policy – refers to all research on the effect and desirability of including new considerations in competition law and policy in order to address the challenges of our time, such as the increasing power of big tech firms, or global warming. Theory and Implementation of Competition Policy This covers for instance collusion, abuse of dominance, mergers, market regulation and state aid. Some examples of research topics are: the practices firms can use to engage in collusion and its welfare consequences; the practices firms can use to abuse a dominant position and its welfare consequences; which practices can be considered proof of such activities; how to regulate access to a market; how to properly assess the effects of a particular practice or merger; the practices, by which the state and public authorities distort competition such as subisidies and tax measures the interpretation and application of EU and national competition law by Competition Authorities and Courts and the extent to which they achieve the goals of competition policy Scope of Competition Policy The effectiveness of European competition law and policy in combination with rapid technological changes have raised questions about its proper scope. Which policy objectives can and should be pursued by means of competition law and policy, and which should be delegated to other legal fields and policies? Some examples of specific research questions include: Can and should competition law be used to protect the privacy of consumers on the internet? Information gathered by firms can be used to increase their own profits. How does this affect consumers, and what does this depend on? Can and should competition law deal with market power derived from information gathering? For instance, should the big five tech giants be forced to divest activities? Should competition policy also include considerations of economic inequality or environmental effects? Can competition law remain effective if it is used for more than safeguarding fair competition?

## 2NC---Cap K

## 2NC---Dynamism

### 2NC---Offense

#### Antitrust threatens to morph into economy-wide national policy.

Geoffrey A. Manne 18, President and Founder International Center for Law & Economics, “Why US Antitrust Law Should Not Emulate European Competition Policy,” ICLE, A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 12/19/18, https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf

A. The European approach to Facebook and Google as cautionary tale

The question of whether technology platforms should be regulated (and why) is a contentious one. But whatever the political, economic, or social rationale impelling regulation, it remains a crucial question whether antitrust — or competition policy implemented through other laws — is the proper regulatory lever. Despite many claims that European authorities, through their competition laws, have adopted a “better” approach toward regulating technology platforms, these claims are generally based on an a priori preference for the outcome — not on a careful assessment of the underlying legal interpretation and its broader implications.

Indeed, Europe’s recent (and ongoing) experience with applying antitrust to both Facebook and Google presents a cautionary tale, not a model. As these examples show, moving towards a more open-ended enforcement of antitrust law (potentially converging with EU competition law) entails significant risks.

1. Facebook

The German Bundeskartellamt’s (Federal Cartel Office, or “FCO”) ongoing Facebook investigation, for which an infringement decision is said to be in the pipeline,28 is a stark case of the unprincipled extension of antitrust to attempt to reach a politically favored result. Indeed, in contrast to the European Commission — which at least often mentions economic analysis in its decisions — the FCO did not include any economic analysis or an attempt to gauge the actual effects of the complained-of conduct on users in its preliminary assessment. The FCO’s investigation thus bears all the traits of consumer protection enforcement (which, in Europe at least, tends to rely upon bright-line rules and little analysis of effects) rather than competition scrutiny (which nominally entails at least some inquiry into to the economic effect of firms’ conduct). The crux of the case concerns Facebook’s collection of users’ personal data outside its site — data that is then merged with Facebook’s user profiles.29 The German competition agency asserts in its preliminary assessment that Facebook (which it “assumes… is dominant”) is “abusing this dominant position by making the use of its social network conditional on its being allowed to limitlessly amass every kind of data generated by using third-party websites and merge it with the user’s Facebook account.” 30 Note that the allegation on its face is not that Facebook forecloses other sites from amassing this external data, nor that its data collection amounts to anticompetitive harm (e.g., supracompetitive prices) to consumers. Rather, its allegation is that Facebook’s terms of service authorizing this data collection are simply not good for consumers, regardless of their acceptance of the terms, and thus constitute an abuse of dominance. “In the authority’s assessment, consumers must be given more control… and Facebook needs to provide [consumers] with suitable options to effectively limit this collection of data.” 31 The German competition authority is thus attempting to use its antitrust authority to impose on consumers (and Facebook) its idiosyncratic political preferences, in this case with regard to privacy. But turning voluntary contract terms that are not, in and of themselves, anticompetitive into an antitrust violation requires a remarkable and unprecedented sleight of hand. To begin with, the FCO asserts that this data — data collected from outside of Facebook — is “essential” for other social networks to compete with Facebook. But, despite asserting that its assessment is not based on how Facebook uses internal data collected from users’ interactions with Facebook directly, the FCO appears to convert this external data into an essentiality by condemning Facebook’s superior ability to combine it with its own internal data: Facebook has superior access to the personal data of its users and other competitionrelevant data. Because social networks are data-driven products, access to such data is an essential factor for competition in the market. The data are relevant for both[] the product design and the possibility to monetise the service. If other companies lack access to comparable data resources, this can be an additional barrier to market entry.32 The effect of this is to condemn Facebook’s success — and even, perhaps, to end up demanding that Facebook share its internal data — without saying so outright. The reference to “comparable data resources” is an unmistakable nod to the essential facilities doctrine, which can require access to a firm’s competition-relevant inputs where comparable inputs cannot be obtained elsewhere. Here the FCO appears to be asserting that competitors’ effective use of external data is thwarted if they do not have comparable internal data with which to combine it. But, of course, Facebook has this data only as a result of its success in bringing users to its platform. And it would be the height of unmoored antitrust enforcement to demand that other social networks, which do not operate through Facebook (in contrast, say, to advertisers, who do reach consumers via Facebook), must have access to Facebook’s internal data simply to give them a leg up in competing with a more successful rival. And yet, that is precisely what the authority seems to be suggesting — just indirectly by purporting to rest its claim on access to external data (which, like Facebook, competing social networks certainly do try to use). Of course, lack of access to a successful company’s resources is a form of barrier to entry in every case where a challenger wishes to enter a market where existing firms are long established. The same argument that the FCO makes with respect to Facebook and data could be applied to any firm that has a strong reputation, significant brand value, substantial customer loyalty, or even large real estate holdings or an established line of credit with a bank. For antitrust to require competitor access to these resources would be to undermine completely the competitive market forces that antitrust is supposed to support. And yet the FCO does not — and cannot — distinguish these valuable types of capital from that of access to a large pool of self-generated consumer data. The FCO also alleges that Facebook’s “exploitative business terms”33 constitute an antitrust violation because “[t]he damage for the users lies in a loss of control: they are no longer able to control how their personal data are used.” 34 But the allegedly exploitative nature of this loss of control is a function of European data protection laws, not antitrust law. The FCO appears to convert the alleged data protection law violation into an antitrust offence because, [a]ccording to the authority’s preliminary assessment, when operating this business model Facebook, as a dominant company, must consider that its users cannot switch to other social networks. Participation in Facebook’s network is conditional on registration and unrestricted approval of its terms of service. Users are given the choice of either accepting the “whole package” or doing without the service.35 But because of the essentiality of Facebook’s internal data, this choice is alleged to be a false one. And thus consumers “have no option to avoid the merging of their data” 36 — a violation, the FCO asserts, of data protection law. In this way the FCO uses data protection law as a foothold to build a convoluted antitrust case that really amounts to nothing more than the condemnation of Facebook’s size and success.

This is exactly the sort of uneasy merging of general social policy and the tools of competition policy that is so corrosive to the rule of law. Using the language of antitrust, the FCO is basically making a case that Facebook should be subject to competition law penalties for possessing more data than the FCO thinks is appropriate. Perhaps there are violations under other laws — data security or privacy laws, e.g. — but nothing in the FCO’s discussion of its preliminary assessment suggests anything recognizable in the economic literature as an abuse of dominance.

The FCO’s approach would dramatically expand the scope of German (and possibly European) competition law. As some commentators have observed, any dominant company that infringes any legal obligation aimed at protecting consumers — regardless of whether the violation actually results from the absence of competition, results in cognizable anticompetitive effects, or extends the company’s dominance — could be found to infringe competition law.37

Although particularly egregious here, the FCO’s efforts to reach beyond the limited constraints of competition law are not new. Starting in 2017, the FCO has been progressively urging for expansion of its powers into a broader consumer protection set of tools.38 Thus, even if it is unsuccessful in building its case under the current state of the law, the FCO is laying the foundations for convincing the German legislature why it needs vast new powers to combine consumer protection and competition into a single regulatory authority. Notably, even the US Federal Trade Commission (FTC) — which has both consumer protection and competition mandates — treats these missions separately, and regards competition cases to arise only under competition law, and not from the violation of specific consumer protection rules.

The implications of this approach are obvious. If competition law is unconstrained on its own terms — that is, it unmoored from a set of subject-specific constraints imposed by courts and legislatures — it threatens to become a large, sprawling, economy-wide set of regulations that resembles more closely a national industrial policy. The merits or demerits of actually having an economywide industrial policy aside, it is unquestionably a bastardization of antitrust law to facilitate the imposition of policies from law and regulation outside of competition policy, in ways that of necessity will promote other polices at the very expense of competition.

And, although this is a German case, its antecedents in the prevailing orthodoxy of EU law are not hard to recognize. Though the Commission frequently makes noises about conducting an economic analysis, as I discuss below, the EU’s competition process is, at root, a political one. As such, a tremendous amount of leeway is afforded to EU competition regulators. This makes sense, on its own terms: the Commission is, after all, a policy-making body directly responsive to the policy preferences of the President of the European Commission.39 While the Commission may sometimes cite to economics in its decisions, it fundamentally structures its activities in a way that affords it a large degree of policy-making discretion.

The Bundeskartellamt’s action, although specific to Germany, makes (unfortunate) sense against this backdrop. Where, unlike in the US, antitrust enforcement is viewed as a political function of the state, regulators administering competition policy can surely be relied upon to turn it into a general regulatory apparatus, as much as possible. While this is precisely what some advocates seem to want for US antitrust, doing so entails enormous risk and the potential agglomeration of massive political power outside of our democratically elected branch of government.

#### The plan is an abrupt interference in business confidence.

Alden F. Abbott 21. J.D. from Harvard Law School and M.A. in Economics from Georgetown University, “Competition Policy Challenges for a New U.S. Administration: Is The Past Prologue?”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [12] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [13] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [14] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [15] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [16] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

## 2NC---Dependency Trap

### 2NC---Extraterritoriality

#### Takes out solvency---Emory = Blue

1AC Pachnou ’17 [Ms. Despina, Organization for Economic Co-operation and Development, “DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE” https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf]

5. The Agencies’ Cooperation with Foreign Jurisdictions on Remedies

18. Achieving effective remedies often entails cooperation with foreign jurisdictions. Such cooperation may allow the U.S. agencies to secure relief that sufficiently protects U.S. competition and consumers without applying the remedy to conduct or assets outside the United States. When an extraterritorial remedy is necessary to address harm or threatened harm to U.S. commerce and consumers, cooperation helps to minimize the risk of conflict with obligations of foreign laws or foreign remedial orders.35 Cooperation and coordination on remedies can be efficient for enforcers and the parties under investigation, especially given that over 130 jurisdictions have antitrust laws and over 80 require pre-merger notification. Cooperation may result in a remedies package that addresses competition concerns in multiple jurisdictions.36 The Agencies work closely with competition enforcers in other jurisdictions on cases under common review, including to help foster convergence and consistent remedy determinations.37

6. U.S. Case Examples

19. To the extent that the Agencies rely on extraterritorial remedies, they do so in both merger and conduct cases, although they arise most frequently in the merger context. In all cases, the Agencies seek remedies that are appropriately tailored and that do not apply extraterritorially unless necessary to address the harm or threatened harm to U.S. commerce or consumers.

### 1NC---AT: Wong/Digital Divide

#### Their “digital divide” impact is about authoritarian blocks not access---plan can’t solve incentives for China to make a separate internet.

Wong ’20 [Johnson; Graduate School of Public and International Affairs @ UOttowa; “Digital Divide: Geotechnology, Politics and the International System”; <https://ruor.uottawa.ca/bitstream/10393/41017/1/WONG%2C%20Johnson%2020205.pdf>; AS]

Governing cyberspace

This fundamental difference in understanding how 5G technological innovation as a tool of the state reflected in cultural norms is at the crux of the digital divide in the international system. The principles that guide ICANN which seek a “multi-stakeholder, community-based and consensus-driven approach” to the governance of the Internet, is anathema to the harmonious and strong central state championed by autocrats and their allies. The liberal governance model of technological innovation based on pluralism, freedom and consensus, are linked to Western democracy which in turn challenges the legitimacy of the authoritarian rule of the state. To maintain their political power, and unable to escape the trappings of technological modernity, China, Russia and other authoritarians will be determined to build a separate “other”-net to compete with the Western version, and in some cases, surpass it. Muller argues,

The proclaimed differences are in interpretation and implementation, with China emphasizing the issue of priorities and progressive realization and rejecting the liberal model not as such, but the notion that it is the only model. In one respect, this reflects the indeterminacy and generality of the rhetoric of the ‘international community’. However, it also raises the question of the nature of the international community. In some liberal views, all roads lead to liberal democracy along more or less western models. However, a truly pluralist international society which accommodates cultural diversity and accepts the principle of self-determination, would accept that countries can also take a different development path, as emphasized by China (Muller, 2015, 236).

While modern liberal democracies seek to accommodate diverse perspectives and build a plural political order, geopolitical interests based on nationalistic factors continue to dominate the discourse (Sidorenko, 2015, 1260). Even within liberal governments themselves, various data protection laws are becoming a point of contention between countries, with the European Union taking a more teleological vision about its universal development model and placing its model above geopolitical power politics and nationalism, to encompass a historical imperative that they believe should be replicated around the world (Browning, 2016, 110). The irony is that a liberal system that values and respects plurality should accept equal but alternative value systems as legitimate (Muller, 2015, 219).

Digital sovereignty and the primacy of alliances

The three drivers mentioned above, 5G standardization, strategic economic dependency, and competing normative values, are transforming the international system and will result in a digital divide. Globalization continues to increase socio-economic transactions between states, and the growth of cyberspace has created economic value from consumer data. Various state operators compete with each other for consumer dollars while, at the same time, the need to cooperate to connect their networks with each other – using internationally recognized protocols – is creating tension between the public good of a seamless system, and the private interests of operators and the state (O’Hara and Hall, 2020, 10). Controversies related to 5G standard-setting by companies that are supposed to be impartial are contributing to a difficult process for all major players involved. Huawei, the leading Chinese operator that is participating on the 5G standard-setting consortium, has been repeatedly accused of being under the influence of the central Chinese state party. This poses a challenge in the existing liberal model of standardsetting for, if Huawei succeeds in its efforts to control the technical standards of 5G, will secure for the Chinese state a much bigger stake (and control) of the 5G patent licensing system. Once standards have been set and essential patents defined, companies must build to the agreed standards and pay royalties to patent licensees as required (Triolo, 2018, 10). These are supposed to be separate – and most importantly, independent – processes, but there is little doubt among the international 5G and telecommunications community that the Chinese state is directing Huawei in order to obtain a substantial stake in the upcoming technological transition in order to secure its political and economic ambitions. It is important to note that once standards are set, governments and companies will be compelled to follow them or risk being non-interoperable with the rest of the world. In some cases, this is the strategic vision for China: By controlling the vast majority of 5G licensing patents and creating networked systems that only work with Chinese-branded equipment, it will be able to project its digital power abroad and force compliance. Without access to Chinese equipment, and a licensee payment system that is indebted to a Chinese state-backed company, antagonistic states will quickly become isolated and find themselves cut off. Sidorenko argues that, “The world is becoming more unified, but not safer; traditional regional conflicts are escalating into geopolitical conflicts ushered by the phenomena of globalization and all the changes and nuances it brings to the economic, political, socio-cultural and spiritual spheres” (Sidorenko, 2015, 1261).

The relativity by which actors are able to influence the political discourse and debate state sovereignty has never before been so uncertain, with the digital world becoming the new arena for states to challenge existing norms, values and economic systems of the past. The digital realm offers a different variation of sovereignty challengers that include the dynamics of nonstate actors, such as private companies, civil society, non-governmental organizations, and even individuals, to question the legitimacy of the state and its relationship to external actors and those within the state (Timmers, 2019, 12; Adonis, 2019, 268). The fundamental challenge and struggle for states to maintain their independence in this space relies upon the extent to which state control of the technological tools, systems and structures are within their influence, and the extent to which they are able to maintain the independence of their national security networks without being isolated from the rest of the world.

Therefore, to achieve this global network based on common standards and shared values, an alliance of liked-minded partners is needed to buttress this digital divide. Timmers says, “Like-mindedness is based on shared values, whether these pertain to the individual (such as respect for privacy and autonomy) or to economy (liberal market economy) or to society and democracy (independent judiciary, freedom of expression, free elections) or to international relations (respect for the system of sovereign states and multilateralism). A wide range of governance tools can be mobilized for supervision, decision-making, and certification” (Timmers, 2019, 15). In the context of the digital divide, countries allied with authoritarian regimes will align their 5G technical standards, find commonalities in terms of political structure, and seek to share in the economic union driven by the divide. Alliances – especially historical alliances – will play a key role in accelerating this digital divide through collaboration between liked-minded states on both sides of the gap. The alliance between cooperating states will not just be an alliance of authoritarians – rather, it will be based on a common set of values and norms shared by the people and state government. These norms and values, as previously mentioned, will originate primarily from common values about the role of the state, its obligations to its peoples, and the extent that it is seen as legitimate by its citizens. Even in democracies, it is feasible for a country to ally itself with China if it finds that it shares more in common with the CCP than the US.

#### Its about divide between great powers not developing countries

Wong ’20 [Johnson; Graduate School of Public and International Affairs @ UOttowa; “Digital Divide: Geotechnology, Politics and the International System”; <https://ruor.uottawa.ca/bitstream/10393/41017/1/WONG%2C%20Johnson%2020205.pdf>; AS]

Thus, this paper will examine how geotechnology will underpin and accelerate a digital divide between the great powers which will fundamentally alter the international system. The first section of this paper will describe the key drivers of this disruption from a technological, economic and cultural perspective. The first part will broadly explain what is 5G and the importance of this technology within the paradigm of great power politics; then, there will be an analysis of key economic sources of conflict, particularly the central role of China in the global manufacturing supply chain; the last part will take a comparative view of values as they relate to the development of technology, and how culture contributes to the divide between liberal democracies and authoritarian states. The second section of this paper will examine how these drivers impact the notion of sovereignty, and how global alliances will accelerate the bifurcation of global systems, including technological standards and the Internet itself. The final section of the paper will describe this emerging international system and how the digital divide could manifest, raise important criticisms of this analysis, and answer the question as to whether this future is inevitable.

#### Wong concludes its inevitable.

Wong ’20 [Johnson; Graduate School of Public and International Affairs @ UOttowa; “Digital Divide: Geotechnology, Politics and the International System”; <https://ruor.uottawa.ca/bitstream/10393/41017/1/WONG%2C%20Johnson%2020205.pdf>; AS]

Despite the power of institutions and the strength of international organizations to resolve conflicts, the digital divide brought on by technology, economic self-interest, and centuries of culture, will necessarily disrupt the existing international system. Even within Western liberal democratic countries, there continues to be significant systemic confrontations as long-running grievances remain unresolved, such as historical racial divisions, the surge in right-wing populism, and a growing inequality gap. Internationally, there is a shift in the character and ability of international institutions themselves to resolve disputes through existing mechanisms, such as the ABM treaty, the CFE treaty, and the INF treaty. These are a few examples of the breakdown of existing international constructs (Hall, 2019, 4). At the same time, China will continue to offer, in partnership with its Russian and other Eurasian allies, an alternative political model that will emphasize the values and qualities which are important to those societies: social stability, economic prosperity, and national strength. Zhao summarizes this argument “In the final analysis, there is a choice between a Confucius capitalist China that is trying to integrate with a socially and ecologically unsustainable planetary capitalist order and a renewed socialist China that is leading a post-capitalist and post-consumerist, sustainable developmental path as part and parcel of an alternative globalization” (Zhao, 2013, 27). The separation between capitalism and political liberalism is an intentional strategy meant to demonstrate that state governance can be effective without political change. The Chinese model will also emphasize regional strength while avoiding ideas about global tyranny so long as the US continues to be portrayed as an international bully and troublemaker that acts with impunity. On the character about the Internet itself, the seeds of doubt had already been made in various forums: “At the Forum of Independent Local and Regional Media in 2014, Putin labeled the Internet ‘a special CIA project’, adding that the United States wanted to retain their monopoly over it” (Budnitsky and Jia, 2018, 607). The digital divide will become another point of division to separate the global community this century, and as a means for authoritarians to consolidate power. While military conflict may be avoidable, cyberconflict and the use of hybrid warfare – involving careful coordination between state and non-state actors – may take place more often as state forces engage online in efforts to upset the new status quo. The benefits of technology, such as 5G and beyond, may also challenge trends and perspectives about values and culture on both sides as societies and the role of technology to support individual, corporate or state interests evolve.

---DARTMOUTH’S CARD ENDS---

Despite the conviction I have about the inevitably of an impending digital divide, it also raises the question as to whether this re-ordering of the international system is a permanent feature or is merely a phase in the development cycle of states. The Western liberal economic order has lasted more than a half-century and brought some of the greatest economic prosperity and positive humanism to the world, all without a catastrophic global war. Is it then possible that in spite of a competing cyber-alliance, states can find common ground and avert a disastrous global conflict? While history does not provide many examples of peaceful transitions of power within the international system, we are living in unprecedented times.

### 1NC---AT: Inequality Collapses LIO

#### Economic hardship doesn’t cause nativism---other alt causes outweigh.

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WHAT CAUSES NATIVISM?

Studies conflict on the causes of nativist sentiment—many people struggle to define nativism and many conflate nativism and populism, making root causes even harder to disentangle. Yet the most rigorous research seems to find that economic status plays only a minor role. Most researchers agree that living in poverty, being working class or unemployed, or fearing economic loss do not automatically lead to support for nativist policies.48

Which factors, then, best explain support for nativist politicians and policies? On this point, existing research is conflicted. Some studies suggest that nativism is driven by large demographic changes or, alternatively, by changes that happen rapidly, even if they are smaller.49 Another body of research makes the case that the fear of demographic change is a more powerful predictor of nativist attitudes, rather than the extent or rapidity of the change itself.50 Some evidence suggests that voters are more likely to be nativist if they believe that their social, political, or economic status has declined relative to others.51 There does seem to be some emerging consensus that, in white-majority democracies, white voters are more likely to support nativist politicians if they perceive that their privileged position is eroding.52

It also appears that political leaders play a key role in mobilizing nativist sentiment by appealing to voters’ nostalgia for an era in which their privileges were more secure or to their fears of a decline in their social or economic position.53

Politicians can mobilize nativist sentiment in various ways, but a common strategy is to make nonmajority population groups the scapegoats for a perceived decline in living conditions, regardless of the reality. For instance, politicians might associate Muslims with terrorism, link Latinos to criminality, or connect minorities such as Roma or African-Americans to abuses of the social safety net. This gives majority population groups the opportunity to blame a rigged system for their grievances and to then point the finger at groups who are allegedly benefitting from the rigging.

### 2NC---LIO D

## 2NC---Systemic Risk

### 2NC---Solvency

#### 5---EMPs---Emory = Blue

1AC Weiss ’19 [Matthew and Martin; May 29; National Sales Director at United Medical Instruments, UMI and Research assistant at the American Jewish University; Neurosurgeon at UCLA-Olive View Medical Center; Energy, Sustainability, and Society, “An assessment of threats to the American power grid,” vol. 9]

Consequences of a sustained power outage

The EMP Commission states “Should significant parts of the electrical power infrastructure be lost for any substantial period of time, the Commission believes that the consequences are likely to be catastrophic, and many people will die for the lack of the basic elements necessary to sustain life in dense urban and suburban communities.” [67].

Space constraints preclude discussion on how the loss of the grid would render synthesis and distribution of oil and gas inoperative. Telecommunications would collapse, as would finance and banking. Virtually all technology, infrastructure, and services require electricity.

An EMP attack that collapses the electric power grid will collapse the water infrastructure—the delivery and purification of water and the removal and treatment of wastewater and sewage. Outbreaks that would result from the failure of these systems include cholera. It is problematic if fuel will be available to boil water. Lack of water will cause death in 3 to 4 days [68].

Food production would also collapse. Crops and livestock require water delivered by electronically powered pumps. Tractors, harvesters, and other farm equipment run on petroleum products supplied by an infrastructure (pumps, pipelines) that require electricity. The plants that make fertilizer, insecticides, and feed also require electricity. Gas pumps that fuel the trucks that distribute food require electricity. Food processing requires electricity.

In 1900, nearly 40% of the population lived on farms. That percentage is now less than 2% [69]. It is through technology that 2% of the population can feed the other 98% [68]. The acreage under cultivation today is only 6% more than in 1900, yet productivity has increased 50 fold [69].

As stated by Dr. Lowell L Wood in Congressional testimony:

“If we were no longer able to fuel our agricultural machine in the country, the food production of the country would simply stop, because we do not have the horses and mules that used to tow agricultural gear around in the 1880s and 1890s”. “So the situation would be exceedingly adverse if both electricity and the fuel that electricity moves around the country……… stayed away for a substantial period of time, we would miss the harvest, and we would starve the following winter” [70].

People can live for 1–2 months without food, but after 5 days, they have difficulty thinking and at 2 weeks they are incapacitated [68]. There is typically a 30-day perishable food supply at regional warehouses but most would be destroyed with the loss of refrigeration [69]. The EMP Commission has suggested food be stockpiled for a possible EMP event.

A prescription for failure

Even if all the recommendations of the Congressional EMP Commission were implemented, there is no guarantee that the grid will not sustain a prolonged collapse. There should therefore be contingency plans for such a failure.

There is also another consideration. The foundational pillars of prior American nuclear defense policy, in today’s climate, are of uncertain validity. Mutual assured destruction is the Maginot line of the 21st century. Nonproliferation will prove difficult to resurrect.

The consequences of a widespread nuclear attack have been positioned to the public as massive deaths from blast effects, and then further lingering deaths from the effects of radiation. We suspect there will be no electricity, and there will be no electricity for a very long time.

There should be an actionable plan in anticipation of a possible prolonged collapse of the grid—a retro-structure and a skill set to provide a framework for survival. Our sense is there is no plan.

### 2NC---Attacks D

#### Data shows a tendency toward restraint

Valeriano & Maness 18 Brandon Valeriano, PhD, Chair of Armed Politics at the Marine Corps University, Cyber Security Senior Fellow at the Atlantic Council, & Ryan Maness, an American cybersecurity expert, Defense Analysis Professor at Naval Postgraduate School. [How We Stopped Worrying about Cyber Doom and Started Collecting Data, Politics and Governance, 6(2), Cogitatio Press]//BPS

6. Expanding Cyber Security Data Our team has been coding cyber incident data since 2010 and serves as a unique example of how the process of collecting cyber security data and evidence can be done. Our first peer reviewed published work appeared in 2014 in Journal of Peace Research (Valeriano & Maness, 2014). In this article we note that cyber conflict is much more restrained than generally understood by popular discourse. Threat inflation is ripe in cyber security, and the real use of cyber tools seems to be to enhance the power of strong states. The data that Valeriano and Maness (2014, 2015) have built challenges the cyber revolution perspective and does so with the tools of social science, and is a necessary turn given the general tone of the debate. We first determine that a viable data collection method in light of limited resources was to focus on states that are committed interstate rivals (Diehl & Goertz, 2001). This allows us to focus on those actors with an intense history of recent hostilities that should be the most likely users of cyber technology on the battlefield (Maness & Valeriano, 2018). In our research (Maness & Valeriano, 2016; Maness, Valeriano, & Jensen, 2017; Valeriano & Maness, 2014, 2015), we have been able to marshal a massive amount of evidence that is useful in dissecting the actual trends on the cyber battlefield in a geopolitical context. We demonstrate that while cyber-attacks are increasing in frequency, they are limited in severity, are directly connected to traditional territorial disagreements, and mostly take the shape of espionage and low-level disruptive campaigns rather than outright warfare. Given this data-based perspective, we question the dynamics of the cyber security debate and offer a countering theory where states are restrained from using more malicious cyber actions due to the limited nature of the weapons, the possibly of blowback, the connection between the digital world and civilian infrastructure, and the reality that any cyber weapon launched can be replicated and used right back against the attacker. Given all of these perspectives gleamed from the data, we must moderate our views about the transformation that is offered by cyber strategists who stress a more revolutionist tone (Lango, 2016).

# 1NR---Round 2---Wake

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## FTC DA

### 1NR---Impact

#### **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.

#### It’s an existential threat

Mara Hvistendahl 19 – correspondent with Science magazine, 3/28/19. “Can we stop AI outsmarting humanity?” <https://www.theguardian.com/technology/2019/mar/28/can-we-stop-robots-outsmarting-humanity-artificial-intelligence-singularity>

Existential risks – or X-risks, as Tallinn calls them – are threats to humanity’s survival. In addition to AI, the 20-odd researchers at CSER study climate change, nuclear war and bioweapons. But, to Tallinn, those other disciplines “are really just gateway drugs”. Concern about more widely accepted threats, such as climate change, might draw people in. The horror of superintelligent machines taking over the world, he hopes, will convince them to stay. He was visiting Cambridge for a conference because he wants the academic community to take AI safety more seriously.

At Jesus College, our dining companions were a random assortment of conference-goers, including a woman from Hong Kong who was studying robotics and a British man who graduated from Cambridge in the 1960s. The older man asked everybody at the table where they attended university. (Tallinn’s answer, Estonia’s University of Tartu, did not impress him.) He then tried to steer the conversation toward the news. Tallinn looked at him blankly. “I am not interested in near-term risks,” he said.

Tallinn changed the topic to the threat of superintelligence. When not talking to other programmers, he defaults to metaphors, and he ran through his suite of them: advanced AI can dispose of us as swiftly as humans chop down trees. Superintelligence is to us what we are to gorillas.

An AI would need a body to take over, the older man said. Without some kind of physical casing, how could it possibly gain physical control?

Tallinn had another metaphor ready: “Put me in a basement with an internet connection, and I could do a lot of damage,” he said. Then he took a bite of risotto.

Every AI, whether it’s a Roomba or one of its potential world-dominating descendants, is driven by outcomes. Programmers assign these goals, along with a series of rules on how to pursue them. Advanced AI wouldn’t necessarily need to be given the goal of world domination in order to achieve it – it could just be accidental. And the history of computer programming is rife with small errors that sparked catastrophes. In 2010, for example, when a trader with the mutual-fund company Waddell & Reed sold thousands of futures contracts, the firm’s software left out a key variable from the algorithm that helped execute the trade. The result was the trillion-dollar US “flash crash”.

The researchers Tallinn funds believe that if the reward structure of a superhuman AI is not properly programmed, even benign objectives could have insidious ends. One well-known example, laid out by the Oxford University philosopher Nick Bostrom in his book Superintelligence, is a fictional agent directed to make as many paperclips as possible. The AI might decide that the atoms in human bodies would be better put to use as raw material.

Tallinn’s views have their share of detractors, even among the community of people concerned with AI safety. Some object that it is too early to worry about restricting superintelligent AI when we don’t yet understand it. Others say that focusing on rogue technological actors diverts attention from the most urgent problems facing the field, like the fact that the majority of algorithms are designed by white men, or based on data biased toward them. “We’re in danger of building a world that we don’t want to live in if we don’t address those challenges in the near term,” said Terah Lyons, executive director of the Partnership on AI, a technology industry consortium focused on AI safety and other issues. (Several of the institutes Tallinn backs are members.) But, she added, some of the near-term challenges facing researchers, such as weeding out algorithmic bias, are precursors to ones that humanity might see with super-intelligent AI.

Tallinn isn’t so convinced. He counters that superintelligent AI brings unique threats. Ultimately, he hopes that the AI community might follow the lead of the anti-nuclear movement in the 1940s. In the wake of the bombings of Hiroshima and Nagasaki, scientists banded together to try to limit further nuclear testing. “The Manhattan Project scientists could have said: ‘Look, we are doing innovation here, and innovation is always good, so let’s just plunge ahead,’” he told me. “But they were more responsible than that.”

#### Turns case---

#### 1---Cyber---rogue algorithms increase the likelihood of data mining and attacks---that allows gaps which enable infiltration.

#### 2---LIO---algorithmic bias shreds democracy

Karl Manheim\* and Lyric Kaplan\*\*, 19 – \*Professor of Law, Loyola Law School, and \*\*Associate in Privacy & Data Security Group, Frankfurt Kurnit Klein & Selz. “Artificial Intelligence: Risks to Privacy and Democracy.” 21 Yale J.L. & Tech. 106. https://yjolt.org/sites/default/files/21\_yale\_j.l.\_tech.\_106\_0.pdf

This article explores present and predicted dangers that AI poses to core democratic principles of privacy, autonomy, equality, the po- litical process, and the rule of law. Some of these dangers predate the advent of AI, such as covert manipulation of consumer and voter preferences, but are made all the more effective with the vast pro- cessing power that AI provides. More concerning, however, are AI’s sui generis risks. These include, for instance, AI’s ability to generate comprehensive behavioral profiles from diverse datasets and to re- identify anonymized data. These expose our most intimate personal details to advertisers, governments, and strangers. The biggest dan- gers here are from social media, which rely on AI to fuel their growth and revenue models. Other novel features that have gener- ated controversy include “algorithmic bias” and “unexplained AI.” The former describes AI’s tendency to amplify social biases, but covertly and with the pretense of objectivity. The latter describes AI’s lack of transparency. AI results are often based on reasoning and processing that are unknown and unknowable to humans. The opacity of AI “black box” decision-making14 is the antithesis of democratic self-governance and due process in that they preclude AI outputs from being tested against constitutional norms.

We do not underestimate the productive benefits of AI, and its inev- itable trajectory, but feel it necessary to highlight its risks as well. This is not a vision of a dystopian future, as found in many dire warnings about artificial intelligence. Humans may not be at risk as a species, but we are surely at risk in terms of our democratic institutions and values.

#### 3---Societal Collapse---algorithmic bias ensures mass inequality—that’s Klabajab

#### 4---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

### 2ac 1

#### 1. This is our brink argument---the FTC’s managing its caseload, but only barely---the aff is a bolt from the blue, unplanned expansion of antitrust enforcement that forces tradeoff with privacy.

LEAH NYLEN 9/29/21. POLITICO's antitrust reporter. “Lina Khan’s big tech crackdown is drawing blowback. It may succeed anyway.” https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581

Despite all the friction, Khan’s admirers say the agency is finally back on the right track.

“The FTC is pushing as hard as they can right now, which is what we have needed for so long,” said Charlotte Slaiman, competition policy director for the advocacy group Public Knowledge, during POLITICO’s Tech Summit this month. She added: “I expect great things from the FTC.”

#### 2. Current enforcement is streamlined to enable focus on algorithmic bias.

Jeffrey J. Amato and Jay R. Wexler 9/28/21. “United States: FTC Ramps Up Tech Investigations, Reduces Investigators' Hurdles.” https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1115450/ftc-ramps-up-tech-investigations-reduces-investigators39-hurdles

At its September 14, 2021 open meeting, the Federal Trade Commission (FTC) announced the passage of eight "omnibus" resolutions by a 3-2 party-line vote to authorize quicker investigations into prioritized issues. The resolutions allow staff attorneys to use compulsory process demands, which are usually issued as civil investigative demands or subpoenas, with approval from only one commissioner. Previously, agency staff were expected to receive approval from the full commission prior to issuing demands for information from companies. The resolutions aim to facilitate investigations into: unlawful conduct directed at veterans and service members; unlawful conduct directed at children; bias in algorithms and biometrics enabling discriminatory practices; dark patterns and deceptive online conduct that lure users into making unwanted purchases; repair restrictions that allegedly harm competitors and consumers; abuse of intellectual property; common directors and officers and common ownership; and monopolization offenses.

#### 3. Deadlock prevents antitrust enforcement

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

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

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

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

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

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

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

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

#### 5. Other enforcement is all talk

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

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

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

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

#### 6. No major new cases

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

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

### ---AT: Mergers

#### Broad merger review is streamlined now to preserve resources

Noah Brumfield 10/29/21. Allen & Overy LLP partner based in Washington, D.C. and Silicon Valley. “Antitrust in focus - October 2021.” https://www.jdsupra.com/legalnews/antitrust-in-focus-october-2021-5946092/

The U.S. Federal Trade Commission (FTC) has recently announced a string of important changes to its merger control policies and practice. Some, such as the use of “warning letters” we reported in last month’s edition, are in response to an expected “record-setting year” of merger filings which the FTC claims are straining U.S. agency resources. Others suggest that the FTC intends to take a more aggressive approach to merger control enforcement under the Biden administration.

This month, merging parties should be aware of two key developments.

Expanded information requests for in-depth reviews

The FTC has identified a number of changes which, according to its announcement, will streamline its in-depth (“second request”) merger review process while also ensuring more rigorous analysis. Some changes are intended to align FTC practices with those of the Department of Justice (DOJ). Others are more significant, and fit with new Chair Lina Khan’s push to expand the framework for assessing transactions beyond traditional merger control standards. For merging parties, it is likely that the measures will make complying with in-depth FTC merger reviews more difficult, unpredictable, and time-consuming.

#### No increase in merger enforcement.

Laurence Bary et al. 10/28/21. Antitrust lawyer in the Paris office of Dechert, with Mike Cowie, James A. Fishkin, Clemens Graf York von Wartenburg, Dennis S. Schmelzer and Delphine Strohl. “DAMITT Q3 2021: Where’s the Wave? No Uptick Yet in Significant Merger Enforcement Activity.” https://www.lexology.com/library/detail.aspx?g=42eaa9f3-e4f6-48d7-8680-29c7216a7f1f

Dechert has yet to see an increase in concluded significant U.S. merger investigations despite a surge in merger filings that began in the fall of 2020. Instead, we continue to see a decrease in concluded significant merger investigations year-to-date compared to this point in 2019 and 2020.

The average duration of significant merger investigations remains around 12 months, with significant variations below and above the average.

The Federal Trade Commission did not file a single complaint or consent decree in the third quarter, which may suggest that it is taking longer for consent decrees to be finalized under the new administration.

### 2ac 2

#### No other moves are beind made..

T.J. York 10/22/21. Received his degree in political science from the University of Southern California. He has experience working for elected officials and in campaign research. He is interested in the effects of politics in the tech sector “Federal Trade Commission Will Likely Not Be Able to Implement Competition Rules, Panelists Say.” https://broadbandbreakfast.com/2021/10/federal-trade-commission-will-likely-not-be-able-to-implement-competition-rules-panelists-say/

The Federal Trade Commission’s attempts to use rulemaking authority to issue antitrust policy governing technology companies will be struck down in federal courts, said panelists participating in a TechFreedom event on Thursday.

Recently formed conservative majorities on the Supreme Court and other panels have expressed opposition to the idea that the FTC possesses such rulemaking authority, these panelists said.

Hence, unlike past supreme courts, they current bench is likely to strike down FTC-issued binding rules.

Panelists highlighted former President Donald Trump appointees Brett Kavanaugh and Neil Gorsuch as justices who have opposed legal reasoning often used to permit FTC rulemaking.

Indeed, some panelists said early 20th Century legislation governing the FTC makes the case that the agency was created as an investigative body rather than a regulatory one.

Peter Wallison, senior fellow emeritus at the American Enterprise Institute, said that between five and six Supreme Court justices would ultimately vote to weaken precedents that allow for FTC rulemaking.

#### 8. Agency’s streamlining current enforcement in order to balance its priorities

FTC 9/14/21. Media Contact Peter Kaplan. “FTC Streamlines Consumer Protection and Competition Investigations in Eight Key Enforcement Areas to Enable Higher Caseload.” https://www.ftc.gov/news-events/press-releases/2021/09/ftc-streamlines-investigations-in-eight-enforcement-areas

At the joint recommendation from its Bureau of Consumer Protection and Bureau of Competition, the Federal Trade Commission voted to approve and make public a series of resolutions that will enable agency staff to efficiently and expeditiously investigate conduct in core FTC priority areas over the next ten years.

The Bureaus recommended that the Commission authorize eight new compulsory process resolutions in these essential areas: (1) Acts or Practices Affecting United States Armed Forces Service Members and Veterans; (2) Acts or Practices Affecting Children; (3) Bias in Algorithms and Biometrics; (4) Deceptive and Manipulative Conduct on the Internet; and (5) Repair Restrictions. (6) Abuse of Intellectual Property; (7) Common Directors and Officers and Common Ownership; and (8) Monopolization Offenses.

“These resolutions enable the FTC to take swift action against a whole host of illegal conduct in important areas of concern to the Commission,” said Holly Vedova, Acting Director of the Bureau of Competition. She noted that, “Companies engaging in conduct implicated by these resolutions should be forewarned: the FTC looks forward to aggressively using these resolutions and will not hesitate to take action against illegal conduct to the fullest extent possible under the law.”

“Harmful practices – especially those targeting children, veterans, and marginalized communities – will not be tolerated by this Commission,” said Samuel Levine, Acting Director of the Bureau of Consumer Protection. “Today’s resolutions ensure our staff can rapidly respond to allegations of abuse and fight fraud without delay.”

Specifically, the resolutions approved by a Commission vote of 3-2 will allow:

Service members and Veterans: harmful business practices directed at service members and veterans are a source of significant public concern, and, now, FTC staff will be able to expeditiously investigate any allegations in this important area.

Children under 18: harmful conduct directed at children under 18 has been a source of significant public concern, now, FTC staff will similarly be able to expeditiously investigate any allegations in this important area.

Algorithmic and Biometric Bias: allows staff to investigate allegations of bias in algorithms and biometrics. Algorithmic bias was the subject of a recent FTC blog.

Deceptive and Manipulative Conduct on the Internet: this omnibus expands a previous omnibus resolution on deceptive practices, which expired on Aug. 1. The existing resolution, has enabled the FTC to develop investigations and bring cases in a variety of areas including day trading services, tech support scams, the BOTS Act, payment processing, and the deceptive marketing of goods and services online, including pandemic-related goods like fake Clorox products and face masks. In addition to the areas covered by the existing resolution, this expanded version covers the “manipulation of user interfaces,” including but not limited to dark patterns, also the subject of a recent FTC workshop.

Repair Restrictions: enhances the FTC’s ongoing investigations into restrictions on repair and builds on the FTC’s recent Policy Statement on Right to Repair. It would cover a wide range of anti-consumer and anti-competitive abuses and facilitate staff’s impending investigation of violations of the Magnuson Moss Warranty Act’s anti-tying provisions.

Abuse of Intellectual Property: allows staff to investigate abuses of intellectual property rights. Conduct involving abuse of intellectual property rights has been a source of much anticompetitive and deceptive conduct in many different areas, including pharmaceuticals, technology and gasoline refining, and this omnibus will allow staff to expeditiously investigate allegations in this area.

Common Director and Officers and Common Ownership: facilitates investigations of both ownership stakes in competing companies that may be anticompetitive as well as interlocking directorates that may violate Section 8 of the Clayton Act, 15 U.S.C. § 19. Interlocking directorates and common ownership continue to raise significant competitive concerns.

Monopolistic Practices: Market power abuses by tech companies and other large companies are rightly a source of bipartisan concern. This omnibus will allow staff to more expeditiously investigate market power abuses by dominant firms that are precluding businesses and entrepreneurs from being able to compete, particularly in digital markets.

Compulsory process refers to the issuance of demands for documents and testimony, through the use of civil investigative demands and subpoenas. The FTC Act authorizes the Commission to use compulsory process in its investigations. Compulsory process requires the recipient to produce information, and these orders are enforceable by courts. Civil investigative demands and subpoenas are assigned to a Commissioner for review and authorization by the FTC’s Office of Secretary, typically on a rotating basis or according to availability. The Commission has routinely adopted compulsory process resolutions on a wide range of topics. The resolutions announced today will broaden the ability for FTC investigators and prosecutors to obtain evidence in critical investigations on key areas where the FTC’s work can make the most impact. Each omnibus covers investigations into competition or consumer protection conduct violations under the FTC Act.

Streamlining and improving efficiency at the agency is vitally important given the increased volume of investigatory work created by the surge in merger filings. Having already doubled between 2010 and 2020, the number of mergers filed with the antitrust authorities this year hit a record-setting pace of 2,067 acquisitions for the first seven months alone. With these resolutions in place, the FTC can better utilize its limited resources and move forward in earnest to quickly investigate potential misconduct. The Bureaus are now authorized to take steps to ensure that any compulsory process orders are enforceable.

#### 9. FTC’s scaling back new obligations---but there’s no margin for error

Leah Nylen & Betsy Woodruff Swan 21. Staff writers at POLITICO, 7/6/21. “FTC staffers told to back out of public appearances.” https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386

Less than a week into Lina Khan’s tenure as Federal Trade Commission chair, her chief of staff ordered the agency’s staff to cancel all public appearances, according to internal agency emails viewed by POLITICO.

In a June 22 email to more than two dozen of the FTC’s top staffers, Khan’s chief of staff, Jen Howard, announced a “moratorium on public events and press outreach.”

“For the time being I am putting a moratorium on staff participating in external events,” Howard wrote. The message was sent to the head of the FTC’s major offices, including those who oversee all of the agency’s economics, antitrust lawyers and consumer protection attorneys.

In a follow-up message two days later, Howard said that any staff who were scheduled for public events should cancel those appearances.

“I want to make clear that for any situations where staff are currently scheduled to do a public event and thus need to contact event organizers to withdraw their participation, the message they should convey is that they are sorry they can no longer participate due to pressing matters at the FTC,” she wrote.

An FTC spokesperson confirmed that the agency has called off all staff public appearances for the time being.

"The FTC is severely under-resourced and in the midst of a massive surge in merger filings. This is an all-hands-on-deck moment,” Howard said in a statement to POLITICO. “So the agency pushed pause on public speaking events that aren't focused on educating consumers to ensure staff time is being used to maximum benefit and productivity. The American public needs this agency solving problems, not speaking on panels."

The FTC, which enforces antitrust and consumer protection laws, has about 1,100 staffers, fewer employees than the agency had at the beginning of the Reagan administration. Only about 40 of the agency's lawyers are devoted to privacy and data security issues, the agency's former chair told Congress in 2019, in contrast to the United Kingdom, which has an agency of roughly 500 employees focused on privacy.

As recently as December, the FTC was discussing steps to deal with a possible cash shortage including freezing pay and cutting back on the number of lawsuits the agency files.

Since taking over three weeks ago, Khan has swiftly begun advancing her priorities, holding the FTC’s first open meeting in decades last week. In her opening comment, Khan pledged to provide transparency for the agency’s work and host open meetings “on a regular basis.”

### 2ac 3 and 4

#### “Quick look” doctrine solves rule of reason costs.

Alan J. Meese 16. Ball Professor of Law, William & Mary Law School. “In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look.” Faculty Publications. 1803. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2842&context=facpubs

It is perhaps no surprise, then, that enforcement agencies, courts, and scholars have all proposed what they characterize as a middle ground between per se condemnation on the one hand, and full-blown rule of reason scrutiny on the other.98 Proponents of the middle ground approach seek to improve upon traditional section 1 analysis, which many unflatteringly characterize as “dichoto- mous” or “bipolar.”99 In particular, these scholars, jurists, and enforcement officials advocate a third category of section 1 analysis reserved for restraints that, though not unlawful per se, are inherently suspect.100 Whether dubbed “quick look,”101 the “truncated rule of reason,”102 or “stepwise analysis,”103 this alternative seeks to reduce the cost and increase the accuracy of the analysis for those restraints that escape per se condemnation but nonetheless pose a signifi- cant risk of competitive harm.

Although first employed by the Federal Trade Commission (FTC), several courts of appeals have endorsed the approach, and the Supreme Court has agreed, albeit in dicta.104 The Department of Justice has, in joint guidelines with the FTC, also endorsed this methodology.105 Numerous leading antitrust scholars have as well, although there is disagreement about how to apply the approach.106

#### The alternatives to the rule of reason are worse

Donald M. Remy et al. 21. National Collegiate Athletic Association Chief Operating Officer and Chief Legal Officer, with Jeffrey A. Mishkin, Karen Hoffman Lent, Skadden, Arps, Slate, Meagher & Flom LLP; Beth A. Wilkinson, Rakesh N. Kilaru, Wilkinson Stekloff LLP; Seth P. Waxman, Counsel of Record, Leon B. Greenfield, Daniel S. Volchok, David M. Lehn, Derek A. Woodman, Ruth E. Vinson, Spencer L. Todd, Wilmer Cutler Pickering, Hale and Dorr LLP. “Brief for Petitioner,” NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner, v. Shawne ALSTON, et al., Respondents, 2021 WL 408325, Westlaw

b. By requiring the NCAA to show that “each type of challenged rule” is procompetitive, Pet. App. 39a--and invalidating each type as to which that showing supposedly was not made--the courts below also effectively imposed a requirement that a restraint be the least restrictive way of achieving the procompetitive benefits. Antitrust law, however, does not require businesses to use “the least ... restrictive provision that [they] could have.” Continental T.V, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 n.29 (1977). As its name suggests, the rule of reason requires only that an agreement be “reasonably necessary,” United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380 (1967) (subsequent history omitted), or “fairly necessary,” Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 406 (1911) (subsequent history omitted), to achieve a procompetitive benefit.

Unlike the Ninth Circuit, other courts have followed this Court’s precedent, holding that courts “should [not] calibrate degrees of reasonable necessity” such that the “lawfulness of conduct turns upon judgments of degrees of efficiency.” Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 227-228 (D.C. Cir. 1986); see also id. at 229 n.11. One circuit, for example, holds that “[i]n a rule of reason case, the test is not whether the defendant deployed the least restrictive \*42 alternative” but “whether the restriction actually implemented is ‘fairly necessary’ ” to achieve the procompetitive objective. American Motor, 521 F.2d at 1248; quoted in part in Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979). Another similarly holds that businesses need not “adopt the least restrictive means of stopping [competitors] from selling abroad, but merely means reasonably suited to that purpose.” Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853, 860 (1st Cir. 1982). A leading antitrust commentator has made the same point in regard to the NCAA’s amateurism rules, stating that “[m]etering’ small deviations [in amateurism] is not an appropriate antitrust function.” Hovenkamp, Antitrust Balancing, 12 N.Y.U. J.L. & Bus. 369, 377 (2016).

What these authorities recognize is that a “ ‘no less restrictive alternative’ test ... would place an undue burden on the ordinary conduct of business,” with joint ventures exposed to litigation (including treble damages) based on nothing more than “the imaginations of lawyers” in “conjur[ing] up” some marginally less-restrictive alternative. American Motor, 521 F.2d at 1249. And because a “skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements,” Areeda & Hovenkamp, 11 Antitrust Law ¶1913b (5th ed. 2020), a least-restrictive standard would open the floodgates to antitrust litigation against the NCAA, other sports leagues, and joint ventures more generally, “interfer[ing] with the legitimate objectives at issue without ... adding that much to competition.” Areeda & Hovenkamp, 7 Antitrust Law ¶1505b; see also ABA Antitrust Section, Monograph No. 23, The Rule of Reason 123 (1999) (a least-restrictive test would “plac[e] the courts in the awkward position of routinely second-guessing \*43 business decisions”). It would also put antitrust courts in the role of “central planners” that this Court has warned they are “ill-suited” to perform, Trinko, 540 U.S. at 408.

#### Rulemaking requires immense time and resources .

Christopher A. Cole et al. 21. Partner @ Crowell Moring, with Jacob Canter, Raija Horstman, and Helen Osun, 4/27/21. “The Supreme Court Limits FTC’s §13(b) Powers.” https://www.crowell.com/NewsEvents/AlertsNewsletters/all/The-Supreme-Court-Limits-FTCs-13b-Powers

In the meantime, one immediate change we may see is an uptick in FTC rulemaking in an effort to allow it to speed the administrative litigation process and expand the scope of monetary relief in both consumer protection and competition cases. However, that will not be a quick or easy process. While the FTC has well-articulated UDAP rulemaking authority, it is a time-consuming process, with meaningful procedural hurdles, and any final rules can be challenged in federal court. The FTC’s authority to promulgate competition rules is more controversial. The agency has used that authority only once in its history and has not tested that authority again for decades. We will also be watching to see how courts apply this decision to existing consent judgments, contested judgments, and ongoing proceedings. It seems unlikely that there would be any challenge to a prior settlement with the FTC, as those settlements usually involve reciprocal waivers of claims and defenses. However, prior judgments may be open to reconsideration.

#### Rulemaking still costs the FTC.

William C. MacLeod 20. Chairs Kelly, Drye’s antitrust and competition practice, served as a director of the FTC’s Bureau of Consumer Protection and as the Chair of the ABA Antitrust Law Section, 7/13/20. Podcast interview, “Deep Dive Episode 120 – FTC Rulemaking: Underutilized Tool or National Nanny Renewed?” https://regproject.org/podcast/deep-dive-ep-120/

I see some of the same potential in the rule that Commissioner Phillips talked about, the Made in America Rule that the Commission is now proposing. However, in each one of these, we need to remember that there is a cost. As a matter of fact, the Commission recently reported to Congress that if Congress wants the Commission to be adopting a bunch of rules, the Commission had better receive the resources to write those rules, let alone to enforce them.

#### Rulemaking gets challenged in court.

Julie O’Neill 21. Partner @ Morrison Foerster, 5/13/21. “FTC & Privacy: Will the FTC’s Rulemaking Push Result in New Privacy Rules?” <https://www.mofo.com/resources/insights/210512-ftc-privacy-rulemaking.html>

The FTC’s foray into rulemaking could lead to a period of uncertainty and legal challenges in those areas touched by a new agency rule. There is likely to be significant debate over the scope of the FTC’s authority, the particulars of the rulemaking process, the substance of any proposed rules, and, when tested in court, the extent of Chevron deference to which the agency is entitled.

#### That independently drains resources.

FTC 21. Peter Kaplan, Office of Public Affairs, 4/27/21. “FTC Asks Congress to Pass Legislation Reviving the Agency’s Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring.” https://www.ftc.gov/news-events/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencys-authority

Testifying on behalf of the Commission, Acting FTC Chairwoman Rebecca Kelly Slaughter told the Subcommittee that legislation such as H.R. 2668, introduced last week, is urgently needed in light of an April 22 ruling by the U.S. Supreme Court that eliminated the FTC’s longstanding authority under Section 13(b) of the FTC Act to recover money for harmed consumers, as well as other recent court rulings that have jeopardized the FTC’s ability to enjoin illegal conduct in federal court.

“These recent decisions have significantly limited the Commission’s primary and most effective tool for providing refunds to harmed consumers, and, if Congress does not act promptly, the FTC will be far less effective in its ability to protect consumers and execute its law enforcement mission,” the testimony states.

Over the past four decades, the Commission has relied on Section 13(b) to secure billions of dollars in relief for consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, among many others, according to the testimony.

More recently, in the wake of the pandemic, the FTC has used Section 13(b) to take action against entities operating COVID-related scams, the testimony notes. Section 13(b) enforcement cases have resulted in the return of billions of dollars to consumers targeted by a wide variety of illegal scams and anticompetitive practices, including $11.2 billion in refunds to consumers during just the past five years.

Beginning in the 1980s, seven of the twelve courts of appeals, relying on longstanding Supreme Court precedent, interpreted the language in Section 13(b) to authorize district courts to award the full panoply of equitable remedies necessary to provide complete relief for consumers, including disgorgement and restitution of money, according to the testimony. For decades, no court held to the contrary. In 1994, Congress ratified its intent to enable the FTC to obtain monetary remedies when it expanded the venues available for FTC enforcement cases, strengthening the Commission’s ability to bring redress cases. Nevertheless, a drastic shift in judicial decisions over recent years culminated in last week’s Supreme Court ruling that section 13(b) does not authorize returning money to harmed consumers.

The testimony also notes two other recent decisions in Third Circuit that have hampered the Commission’s longstanding ability to protect consumers by enjoining defendants from resuming their unlawful activities when the conduct has stopped but there is a reasonable likelihood that the defendants will resume their unlawful activities in the future. In one case, the Third Circuit held that the FTC can bring enforcement actions under Section 13(b) only when a violation is either ongoing or “impending” at the time the suit is filed. In another ruling, the court held that the FTC cannot sue under Section 13(b) unless conduct is imminent or ongoing.

The testimony notes that Facebook, Inc. has cited these decisions in its motion to dismiss the FTC’s current antitrust complaint against the company, arguing that Section 13(b) bars the federal court suit.

These decisions also limit the FTC’s ability to settle cases efficiently, the testimony states. Targets of FTC investigations now routinely argue that they are immune from suit in federal court because they are no longer violating the law, despite a likelihood of re-occurrence, and they make these arguments even when they stopped violating the law only after learning that the FTC was investigating them.

### 2ac 5

#### 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.

#### 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.

#### 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.

#### 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.

### 2AC 6

### 2ac 7

#### 2. Privacy is the focus now.

Bryan Koenig 10/4/21. “FTC Split Over 'Integrating' Data Privacy And Competition.” https://www.law360.com/articles/1427875/ftc-split-over-integrating-data-privacy-and-competition

According to the report, the FTC has been trying to target "the most egregious and substantial privacy and security abuses," with an eye toward mandating that consumers implicated in privacy violations and data breaches be notified and getting financial compensation for injured consumers, including through partnering with other agencies with the power to impose monetary penalties. The FTC further said it plans to increase its focus on dominant digital platform data practices and expand its understanding of how algorithms implicate both competition and consumer protection.

All four of the FTC's current commissioners expressed at least some support Friday for going after privacy and data security violations. A particularly common theme was the call for more funding from Congress.

#### 3. Most of the FTC’s limited resources are targeted toward privacy.

Jessica Rich et al. 10/3/21. Former director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection, OF Counsel at Kelley Drye, with Laura Riposo VanDruff, Alysa Z. Hutnik & William C. MacLeod. “FTC Chair Khan’s Vision for Privacy – and Some Dissents.” https://www.adlawaccess.com/2021/10/articles/ftc-chair-khans-vision-for-privacy-competition-and-big-tech-and-some-dissents/

Last week, we wrote about FTC Chair Khan’s memo describing her plans to transform the FTC’s approach to its work. This week, she followed up with a no-less-ambitious statement laying out her vision for data privacy and security, which she appended to an agency Report to Congress on Privacy and Security (“report”). Together, these documents outline a remarkably far-reaching plan to tackle today’s data privacy and security challenges. As noted in the dissents, however, some of the stated goals may exceed the bounds of the FTC’s current legal authority.

Privacy/Competition Focus on Tech

First, Khan’s statement reiterates her commitment to address privacy through a “cross-disciplinary” approach that uses the tools of competition law, not just consumer protection law, to address privacy harms. She states that “concentrated control over data has enabled dominant firms to capture markets and erect entry barriers while commercial surveillance has allowed firms to identify and thwart emerging competitive threats,” resulting in reduced privacy.

To address these concerns, as outlined further in the report, the agency intends to focus “most” of its limited resources against the “data practices of dominant digital platforms,” including through additional compliance reviews and order modifications and enforcement, “as necessary,” against, for example, Facebook, Google, Microsoft, Twitter, and Uber.

### 2ac 8

#### 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.

#### Settlements prove FTC success in algorithm enforcement

Natasha Lomas 21. Senior reporter for TechCrunch, 1/12/21. “FTC settlement with Ever orders data and AIs deleted after facial recognition pivot.” https://techcrunch.com/2021/01/12/ftc-settlement-with-ever-orders-data-and-ais-deleted-after-facial-recognition-pivot/

The maker of a defunct cloud photo storage app that pivoted to selling facial recognition services has been ordered to delete user data and any algorithms trained on it, under the terms of an FTC settlement.

The regulator investigated complaints the Ever app — which gained earlier notoriety for using dark patterns to spam users’ contacts — had applied facial recognition to users’ photographs without properly informing them what it was doing with their selfies.

Under the proposed settlement, Ever must delete photos and videos of users who deactivated their accounts and also delete all face embeddings (i.e. data related to facial features which can be used for facial recognition purposes) that it derived from photos of users who did not give express consent to such a use.

Moreover, it must delete any facial recognition models or algorithms developed with users’ photos or videos.

This full suite of deletion requirements — not just data but anything derived from it and trained off of it — is causing great excitement in legal and tech policy circles,

with experts suggesting it could have implications for other facial recognition software trained on data that wasn’t lawfully processed.

Or, to put it another way, tech giants that surreptitiously harvest data to train AIs could find their algorithms in hot water with the US regulator.

The quick background here is that the Ever app shut down last August, claiming it had been squeezed out of the market by increased competition from tech giants like Apple and Google.

However the move followed an investigation by NBC News — which in 2019 reported that app maker Everalbum had pivoted to selling facial recognition services to private companies, law enforcement and the military (using the brand name Paravision) — apparently repurposing people’s family snaps to train face reading AIs.

NBC reported Ever had only added a “brief reference” to the new use in its privacy policy after journalists contacted it to ask questions about the pivot in April of that year.

In a press release yesterday, reported earlier by The Verge, the FTC announced the proposed settlement with Ever received unanimous backing from commissioners.

One commissioner, Rohit Chopra, issued a standalone statement in which he warns that current gen facial recognition technology is “fundamentally flawed and reinforces harmful biases”, saying he supports “efforts to enact moratoria or otherwise severely restrict its use”.

“Until such time, it is critical that the FTC meaningfully enforce existing law to deprive wrongdoers of technologies they build through unlawful collection of Americans’ facial images and likenesses,” he adds.

Chopra’s statement highlights the fact that commissioners have previously voted to allow data protection law violators to retain algorithms and technologies that “derive much of their value from ill-gotten data”, as he puts it — flagging an earlier settlement with Google and YouTube under which the tech giant was allowed to retain algorithms and other technologies “enhanced by illegally obtained data on children”.

And he dubs the Ever decision “an important course correction”.

#### The FTC has filled the gaps in past privacy cases

Siri Bulusu 21. Reporter, Bloomberg Law, 8/20/21. “Facebook Haunted by Privacy Issues as FTC Ups Antitrust Case (1).” https://news.bloomberglaw.com/antitrust/facebook-haunted-by-privacy-issues-as-ftc-boosts-antitrust-case

The 2018 Cambridge Analytica data scandal and other specific examples of Facebook Inc.'s market power put the FTC’s once-tossed case against the social media giant on firmer ground, attorneys say.

The Federal Trade Commission, which filed an amended complaint Thursday, doubled down on its allegations that Facebook committed antitrust violations when it acquired WhatsApp and Instagram.

Increased advertising prices and a decadelong list of privacy violations are proof that Facebook is so settled in its top spot among social media companies that it can harm its users without losing them, the agency said.

The FTC’s addition of extra detail and specific examples is meant to plug the holes that caused Judge James Boasberg of the U.S. District Court for the District of Columbia to dismiss the agency’s original complaint in June.

“The FTC has filled in whatever gaps the judge thought were there and demonstrated that there are substantial facts that Facebook has market power,” said attorney David A. Balto, who previously served in the FTC and the Justice Department’s Antitrust Division.

The move has antitrust attorneys watching the case closely, as the FTC’s success or failure has implications for private litigation in both the antitrust and privacy arenas.

#### U.S. key lead on AI innovation.

AFP 21. Agence France Presse, 1/25. “US leads world on artificial intelligence but China is catching up: study.” https://www.scmp.com/news/china/science/article/3119115/us-leads-world-artificial-intelligence-china-catching-study

The United States is leading rivals in development and use of artificial intelligence while China is rising quickly and the European Union is lagging, a research report showed on Monday.

The study by the Information Technology and Innovation Foundation assessed AI using 30 separate metrics including human talent, research activity, commercial development and investment in hardware and software.

The US leads, with an overall score of 44.6 points on a 100-point scale, followed by China with 32 and the European Union with 23.3, the report based on 2020 data found.

The researchers found the US leading in key areas such as investment in start-ups and research and development funding.

But China has made strides in several areas and last year had more of the world’s 500 most powerful supercomputers than any other nation – 214, compared with 113 for the US and 91 for the EU.

“The Chinese government has made AI a top priority and the results are showing,” said Daniel Castro, director of the think tank’s data innovation centre and lead author of the report.

“The United States and European Union need to pay attention to what China is doing and respond, because nations that lead in the development and use of AI will shape its future and significantly improve their economic competitiveness, while those that fall behind risk losing competitiveness in key industries.”

The EU lagged notably in venture capital and private equity funding, while faring better in terms of research papers published.

The report found China published 24,929 AI research papers in 2018, the latest year for which data was available, to 20,418 for the European Union and 16,233 for the US.

But it said that “average US research quality is still higher than that of China and the European Union”.

The survey also concluded that the US “is still the world leader in designing chips for AI systems”.

#### FTC’s updated moves bolster privacy suits

Siri Bulusu 21. Reporter, Bloomberg Law, 8/20/21. “Facebook Haunted by Privacy Issues as FTC Ups Antitrust Case (1).” https://news.bloomberglaw.com/antitrust/facebook-haunted-by-privacy-issues-as-ftc-boosts-antitrust-case

Pending Litigation

The additional detail provided by the FTC is a boon for private litigants, as the government’s evidence is expected to bolster both antitrust and privacy lawsuits against Facebook, attorneys said.

“You could see some privacy lawsuits already out there try to make use of this case and reference the government’s statements about privacy,” Sirota said.

Existing class actions in California and Pennsylvania allege that Facebook harmed users by concealing the way it harvested and sold their data.

“You could see plaintiffs try to leverage connections between their case and the FTC’s complaint to show the government is alleging there are privacy problems that have a competitive dimension,” Sirota said.

Digital advertisers also could see an advantage from the FTC’s new evidence. In a series of lawsuits, they allege that Facebook conspired with Alphabet Inc.'s Google to rig advertising prices.

“The FTC did a decent job explaining why some of the other online networks can’t compete at the same level as Facebook—and they focused on Snap Chat as the only other viable competitor in what is a narrow market,” said Zarema A. Jaramillo of Lowenstein Sandler LLP.

1. See [https://www.gov.uk/government/speeches/pm-speech-opening-london-tech-week-10-june-2019.](https://www.gov.uk/government/speeches/pm-speech-opening-london-tech-week-10-june-2019) [↑](#footnote-ref-1)
2. *See, e.g.*, Australian Competition (2018): 13-14; Crémer (2019): 8-10; Furman (2019): 60-61. 211 Furman (2019): 41. [↑](#footnote-ref-2)