# 1NC---Round 6---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).

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles.

Terry J. Hatter, Jr. 90, Judge, US District Court, California Central, “In re Eastport Assoc.,” 114 B.R. 686, Lexis

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### 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---K

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The new progressives and neo-Brandeisian antitrust

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

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

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

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

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

Big Tech is global

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

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

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

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

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

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

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

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

‘Kinder capitalism’ does not work

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

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

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

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

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

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

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

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

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

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

Solutions: Tech for Extinction Rebellion

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

Fortunately, there are some reasonable ways forward.

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

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

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

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

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

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

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

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

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

### 1NC---CP

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

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

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

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

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

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

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

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

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

### 1NC---CP

#### Text: The 50 states, DC, and all relevant territories should implement light handed procompetitive regulation increasing prohibitions on anticompetitive conduct by dominant platforms.

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

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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---CP

#### The United States should only allow the continuation of anticompetitive conduct by dominant platforms under antitrust law only when a team of the Good Judgment Project’s “super-forecasters” has determined that the activity reduces the numerical probability of harm to competition from an unacceptably high level.

\* The Good Judgment Project’s “Super-forecasters” are team members of the Good Judgement Project that have ended in the top 2% of forecasters tournaments, selected by Tetlock’s team.

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

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

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

#### ONLY the counterplan solves the case---the plan can’t keep up with market changes.

AMC 07. Antitrust Modernization Commission. Deborah A. Garza, Chair. Bobby R. Burchfield ,Commissioner. W. Stephen Cannon, Commissioner. Dennis W. Carlton, Commissioner. Makan Delrahim, Commissioner. Jonathan M. Jacobson, Commissioner. Jonathan R. Yarowsky, Vice-Chair. Donald G. Kempf, Jr., Commissioner. Sanford M. Litvack, Commissioner. John H. Shenefield, Commissioner. Debra A. Valentine, Commissioner. John L. Warden, Commissioner. “Report and Recommendations.” https://govinfo.library.unt.edu/amc/report\_recommendation/amc\_final\_report.pdf

To determine whether and when particular forms of business conduct may harm competition requires an understanding of the market circumstances in which they are undertaken. Antitrust agencies and the courts have long looked to economic learning for assistance in understanding market circumstances and the likely competitive effects of particular business conduct.23 Indeed, economics now provides the core foundation for much of antitrust law. Not surprisingly, as economic learning about competition has advanced over the decades, so have the contours of antitrust doctrine.

Antitrust law also must keep pace with developments in the business world. Business practices may change, especially as technological innovation and global economic integration alter the competitive forces at work in particular markets. To protect competition and consumer welfare, antitrust analysis must offer sufficient flexibility to take account of these changes, while maintaining clear and administrable rules of antitrust enforcement.

B. Periodic Assessments of the Antitrust Laws Are Advisable

The antitrust laws in the United States require ongoing evaluation and assessment to ensure they are keeping pace with both economic learning and the ever-changing economy.24 In past decades, various entities have empowered six different commissions to assess how well antitrust law operates to serve consumers. The Antitrust Modernization Commission is the seventh such commission in almost seventy years.25 Prior commissions have made recommendations about both the substance and procedure of antitrust law.

#### Flexibility is key to super forecasting competition policy---the aff locks in policy failure.

Michelle Baddeley 17. Institute for Choice, University of South Australia. Journal of Behavioral Economics for Policy, Vol. 1, No. 1, 27-31, 2017. “Experts in policy land - Insights from behavioral economics on improving experts’ advice for policy-makers”. https://sabeconomics.org/wordpress/wp-content/uploads/JBEP-1-1-4-F.pdf

Whichever side one takes on these political divides, if the modern fashion is to allow subjective, partisan opinions to trump expert advice, what are the likely implications? Is it wise to be so mistrustful of experts? Expert advice is irreplaceable. Scientific experts and academics play a crucial role in developing new findings and insights to help inform policy, with implications across the range of human activity – from health and environmental policy through to competition policy, consumer protection and financial regulation – to name just a few. But to what extent are experts objective and impartial? Is their advice really impartial and unbiased, based around a cool and calculating objective assessment of evidence, after the careful application of robust research methodologies? In practice - uncertainty, insufficient information, unreliable data or flawed analysis can limit the expert’s ability to untangle the truth, and make it difficult for the policy-maker to assess the extent to which expert advice is reliable. Robust statistical methods, careful experimental design and clear hypotheses can guide the expert but impartial advice is also compromised by a range of economic, behavioural and socio-psychological constraints, some of which may be beyond the expert’s conscious control. Heuristics, biases and social influences driving experts can have significant negative consequences for the public, especially if misleading research findings are used to guide public policy.

This paper will explore some of these influences on experts’ judgement. In Section 2, some of problems around information, risk and uncertainty are outlined; in Section 3, key economic and socio-psychological constraints are explored. Policy implications and solutions are suggested in Section 3, focussing on how we can ensure that expert advice is devised and applied in the most robust and objective ways possible.

Information, risk and uncertainty

Risk and uncertainty is an unavoidable problem, especially for the scientific research that backs up expert judgement because it is about investigating novel, poorly understood phenomena. When information is scarce, a situation is profoundly uncertainty, and/or we have had no prior experience of an event or phenomenon, we cannot quantify the risk of one event versus another. Frequency ratios capturing the incidence of similar events in the past are of no use when there have been no similar events in the past. Given uncertainty, it is not possible to tell before the fact whether experts are right or wrong. It is not like we have given them a difficult mathematical problem which we can double check ourselves using a computer or calculator. With scientific research and expert advice – there is no way to know what the truth might be, and that is why we need experts to find it. And we can only judge expert judgements with the benefit of hindsight, if at all. This is a Catch-22: we need expert evidence to judge expert evidence.

An example of how policy-makers confront these problems of uncertainty and poor information affecting expert advice is the work of the Hazardous Substances Advisory Committee (HSAC) – an advisory committee to the UK’s Department for Environment, Food and Rural Affairs. This committee focuses on another complication arising from uncertainty – the difference between a risk and a hazard. Hazards exist, they are there – but if we know where they are, we can avoid them and thereby minimize our risk. The problem comes in knowing what and where the hazards are. Scientific experts on HSAC – including a range of toxicologists, environmental scientists and biochemists, as well as social scientists – assess evidence to help to inform the UK’s regulatory policy with respect to chemicals harmful to the environment and human health. Often a key constraint is that they are asked to provide advice around the likely environmental impacts of hazardous substances such as endocrine disruptors, antiobiotics and nanomaterials – often we do not know too much about these substances and their long-term impacts, especially for innovative technologies such as nanomaterials. HSAC has therefore devised a structure for assessing the quality of evidence when information is scarce and uncertainty is endemic –spanning not only the usual scientific evidence around experiments and field observation, but also including computational modelling and anecdotal evidence (Collins et al. 2016). For experts used to analysing large data sets, the latter would seem like an anathema but when experts are facing fundamental uncertainty the types of evidence they might use must expand accordingly. If we are forced to rely on anecdote, we need to understand what distinguishes good anecdotal evidence from bad anecdotal evidence: anecdotes that are corroborated across a range of sources are more reliable than single anecdotes, for example.

Economic and socio-psychological constraints

The problems of poor information, risk and uncertainty are not about the fallibility of individuals or even differences between individuals – either in terms of their individual differences and characters, and/or their susceptibility to biases and social influences. Once we introduce these additional constraints – which reflect the characters of the experts not the nature of the evidence – the opportunities for mistakes and misleading guidance increase significantly.

Individual differences

Individual differences seem to play a role, including in terms of innate ability to make judgements about uncertain futures. Philip Tetlock conducted a study which showed that, in forecasting uncertain future events, most experts are only just better than an ordinary person guessing at random (Tetlock 2006). In a second study, however – a collaboration with Dan Gardner – he showed that some particular individuals – experts or not – are “super-forecasters” who have a particular aptitude for forecasting (Tetlock and Gardner 2015). What ideal characteristics might enable these super-forecasters to predict so well? In a complex world, we need experts who are able to understand and analyse a wide range of evidence. Do we need experts who can cover a broad range, or experts who know a narrow field very well? Linking to Isaiah Berlin’s distinction between the fox-types who have a wide but relatively superficial knowledge, and the hedgehog-types who have a deep but relatively narrow knowledge, Tetlock (2006) argues that we may prefer to be advised by foxes – who know many little things, can draw on an eclectic range of evidence and are able to improvise relatively easily when evidence shifts. The hedgehogs, who know one area very well and focus on one tradition may be too inclined to impose formulaic and inflexible solutions.

#### Binding forecasting is key to spillover---solves security.

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The greatest barrier to a clearer vision of the future is not philosophical but organizational: the potential of combining scenario planning with probabilistic forecasting means nothing if it is not implemented. On occasion, the intelligence community has used forecasting tournaments to inform its estimates, but that is only a first step. Policymakers and consumers of intelligence are the ones who must understand the importance of forecasts and incorporate them into their decisions. Too often, operational demands—the daily business of organizations, from weighty decisions to the mundane—fix attention on the current moment.

Overcoming the tyranny of the present requires high-level action and broad, sustained effort. Leaders across the U.S. government must cultivate the cognitive habits of top forecasters throughout their organizations, while also institutionalizing the imaginative processes of scenario planners. The country’s prosperity, its security, and, ultimately, its power all depend on policymakers’ ability to envision long-term futures, anticipate short-term developments, and use both projections to inform everything from the budget to grand strategy. Giving the future short shrift only shortchanges the United States.

### 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.

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

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

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

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

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

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

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

## Advantage 1---Platforms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Maintaining U.S. Leverage

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

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

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

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

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

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

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

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

### AT: Tech Leadership

#### U.S. tech leadership is high.

Gad Levanon 20. Forbes manufacturing contributor. “Reports Of US Decline Are Greatly Exaggerated.” 08/27/20. <https://www.forbes.com/sites/gadlevanon/2020/08/27/reports-of-us-decline-are-greatly-exaggerated/?sh=6253227b26f8>

Despite what many suspect is an eroding US global standing, 2020 may be remembered as the year when the US became even more globally dominant economically.

Why? The tech sector’s share of the US economy is much larger than in most countries. And the pandemic-driven recession has greatly accelerated the shift to online activity and digital transformation by businesses and consumers, which would otherwise have taken years. That lead to faster growth in the global demand for technology. In addition, the US is especially dominant in the tech industries that are likely to grow the fastest in the coming years.

Stock prices certainly support this story. The S&P 500 is already above pre-pandemic highs despite the deepest recession in 80 years, and most of the stock prices’ strength comes from tech sector. The companies that have seen the strongest gains since the pandemic focus on online shopping and payments, cloud computing services, cyber security, business related software, social media, online advertisement, and on-demand entertainment content.

Stock prices are volatile and so are a treacherous guide for predicting the future, but there is a plausible explanation for the large tech gains – and why they might last.

[Chart omitted]

There are several objective and subjective reasons for why the US is so successful in technology compared with other countries. It has:

1The best universities, which attract many of the best students from all over the world – most of whom tend to stay in the US after completing their studies

2A large inflow of experienced talent from other countries

3 Unrivaled access to venture capital

4 Fluency in English, the global language in both business-dealing and content

5 An economy big enough to make achieving scale relatively easy

6 Silicon Valley, the home and heart of the tech revolution

7 A culture that welcomes innovation and disruption and strongly encourages entrepreneurial behavior

Given these factors, US tech leadership should continue.

What about the competition? One factor helping the US stand out is the weakness of the European tech sector. The market cap of the largest European tech company, SAP SAP -0.3%, is about one-tenth of Apple AAPL +1.6%’s. In other sophisticated industries like pharmaceuticals, motor vehicles and aircraft, European companies are strong competitors to their US counterparts. Europe’s relative technology weakness is perhaps as unusual as the US strength in the sector, and is only reinforced by the fact that US technology companies are already big players in European economies.

Most of the top tech companies from East Asia – places like Japan, Taiwan and South Korea – are in hardware and semiconductors manufacturing. They are serious competitors in these areas, but these technology sectors are not growing as quickly.

No discussion of the future of technology is complete without China. The Chinese internet companies are huge and growing rapidly, but their ability to expand beyond China and its periphery is questionable. In almost all sophisticated industries, Chinese companies are not yet major players in Western economies. Also, recent events suggest that Western countries will be more cautious in dealing with China, perhaps limiting its expansion. The latest developments with Huawei and TikTok are good examples. In addition, US companies are slowly moving their supply chain elsewhere, further weakening China.

So, the technology sector will perform well in the next several years, benefiting countries that are strong in that area. The US, more than any other country, has a large and successful tech sector that seems to be especially concentrated in the fastest-growing tech industries.

What does this mean for the US economy overall? First, it is important to mention that the boost the US is getting from its tech sector has been larger than what most other advanced economies have gotten for quite a while, and is one of the reasons the US has been growing faster than them in recent years. But now, this trend is likely to accelerate.

Here is some back of the envelope math for the difference between the technology sector’s contribution to GDP growth in the US versus a typical advanced economy: Suppose in the US the tech sector is 12 percent of GDP and is growing at 10 percent a year. In another typical advanced economy the tech sector is 7 percent of GDP and is growing at 5 percent a year. That means that the annual contribution to GDP from the tech sector is 1.2 percent for the US versus 0.35 percent for the other country. That is 0.85 percent faster growth for the US every year. The net effect may be smaller because some of the growth in tech companies come at the expanse of companies from other sectors. But when the average annual GDP growth rate is 1.5-2 percent in advanced economies, even a 0.5 percent a year difference is meaningful.

The gains from the rapid growth in technology would disproportionately go to tech companies’ owners and workers. As most of these are high earners, this trend is likely to increase income inequality. But some of the gains will spread more widely. After all, owners and workers, and the companies themselves, spend a large share of their income in the communities they live and operate in. It will also increase geographic inequalities. Not surprisingly, within the US, areas close to Silicon Valley benefited the most from the technology demand-surge. Between 2013-2018, among the 382 metro areas in the US, San Jose and San Francisco metro areas had the fastest growth in personal income per-capita. During that time, personal income per-capita in the San Jose Metro area rose by 48 percent, more than twice as fast as the national rate (22 percent). The surrounding metro areas, Napa, Santa Rosa-Petaluma, Santa Cruz-Watsonville, Stockton, Vallejo, were all ranked in the top 40. Seattle, another technology Hub, is ranked 13.

All of these data points add up to an enduring strength. Despite concerns about US’s standing in the world, its tech sector may keep it at the forefront of the global economy in the foreseeable future.

### AT: Sanctions

#### Noko nuclearization disproves effectiveness of sanctions

**Iran sanctions fail---empirics, circumvention, and allies.**

Suzanne **Maloney 18**. Deputy Director - Foreign Policy, Brookings; Senior Fellow - Center for Middle East Policy, Energy Security and Climate Initiative; doctorate from the Fletcher School of Law and Diplomacy at Tufts University. “’Sanctions are coming’— but Trump has no achievable end game for Iran.” Brookings. 11/7/2018. https://www.lawfareblog.com/sanctions-are-coming-trump-has-no-achievable-end-game-iran

Tehran has **many tools at its disposal** to manage financial constraints, and **considerable experience** in **enduring epic crises**. After all, the Islamic Republic has faced various forms of economic pressure throughout its 40-year existence, beginning with the disruption caused by the 1979 revolution. The first round of U.S. sanctions were imposed later that year after Iranians seized the U.S. Embassy in Tehran and held its personnel hostage for 15 months. In the decades that followed, the Iranian leadership has had to contend with profound economic constraints—those generated by sanctions as well as a succession of regional conflicts and the recurrent volatility in oil markets.

As a result, Iranian leaders have nearly **perfected the playbook** for surviving tough times by **any means necessary**. The regime’s very survival during the eight-year war with Iraq, when U.S. measures prevented the replenishment of its military equipment, depended on mobilizing domestic production and tapping into alternative supply networks, and both remain essential tools in the arsenal of **I**ran’s **R**evolutionary **G**uard **C**orps. Tehran has developed its own fleet of **supertankers** as a backstop to store excess crude production, and—once the transponders are **deactivated**—to export it semi-covertly. With oil prices hovering near $80 per barrel, **Iran will find buyers** for whatever volumes it can export.

Based on prior experience, Iran has expanded its external crude storage capacity in China and will be doubling down on opportunities to amplify opportunities for non-oil trade with its neighbors. Its officials and businesses are **adept** at various means of **circumventing U.S. measures** that target financial flows, whether that involves working via **front companies**, conducting **barter trade**, funneling crude exports via neighbors, or utilizing or even more **unconventional tender** such as **cryptocurrency**.

All these contrivances will surely enable Tehran to **muddle through** with a combination of **mitigation**, **improvisation**, and **greater institutional capacity** than outside analysts typically presume, just as its leadership has during even more severe episodes of financial constraints and externally-imposed pressure. And today the Islamic Republic benefits from more meaningful international support than at any other point in the past 40 years: a burgeoning if mutually suspicious strategic **partnership with Russia**, the economic and **strategic opportunism of Beijing**, and full-throated (if still operationally impeded) assistance from Europe. All this enables Iranian leaders to **put up a good front** at home and **stiffens its spine in responding to Washington**.

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

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

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

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

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

The killing of Soleimani was different

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

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

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

But could the United States and Iran stumble into war?

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

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

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

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

Retaliation by Iran is not the same as war

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

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

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

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

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

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

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

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

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

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

The stakes are high

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

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

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

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

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

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

### AT: Israel

#### No Israeli strike—they know the barriers are too high

Isenberg 12, adjunct national security fellow – Cato, 2/15/’12

(David, “Israeli Attack on Iran's Nuclear Facilities Easier Said than Done,” Asia Times)

Despite renewed media speculation regarding possible Israeli attacks against Iran's nuclear facilities as early as this spring, scepticism that such a campaign could actually be successfully carried out remains relatively high, raising the question of whether there is more bark than bite to Israeli threats. It cannot expect a repeat of 1981 when the Israeli air force destroyed the Osirak reactor at Al-Tuwaythah, just south of Baghdad. The Iranians are aware of both Israeli capabilities and the U.S.-made precision-guided penetrating munitions in the Israeli inventory. The Iranian program has been dispersed all over the country — estimates range between 12 and more than 20 locations — and the facilities have been built with U.S. and Israeli capabilities in mind and are protected by modern Russian air defence systems. The single most critical element of the Iranian program is thought to be the Natanz facility. The heart of the facility is the centrifuge area, located in an underground, hardened structure. But even if Israel tries to limits the target set, it would still have to attack other facilities besides Natanz. For example, the newer Fordow fuel-enrichment plant near Qom, where Iran has already moved 3.5-percent enriched uranium from Natanz, is built into the side of a mountain and is heavily fortified. There is a uranium conversion plant at Isfahan, a heavy-water facility being constructed at Arak and centrifuge factories outside Tehran. The straight-line distance between Israel and Natanz is almost 1,609 kilometers. Since the countries do not share a common border, Israeli aircraft or missiles must fly through foreign — and hostile — airspace to get to the target. The least risky method of striking Natanz is with Israel's medium- range ballistic missiles, the Jericho II or III. It is believed that the Israeli missiles can reach Natanz. However, to travel that far the missiles will have a limited warhead weight, and it is doubtful that these warheads will be able to penetrate far enough underground to achieve the desired level of destruction. Thus, an attack by the Israeli air force's U.S.-made fighter-bomber aircraft is the most likely option. The Israelis have 25 F-15I and about 100 F-16I jets. The F-15I is capable of carrying four metric tons of fuel in its internal tanks, conformal fuel tanks (CFT), and detachable tanks. This enables it to fly about 4,450 kilometers. With midair refueling, the range can be extended further. The F-15I can carry a very wide range of weapons such as various guided missiles and bombs, as well as iron bombs. All in all, the plane can carry about 10 metric tons of munitions. The F-16I has an extended flight range that reportedly allows Israeli forces to attack targets well within Iran without having to refuel. Use of CFT extends its effective mission range up to 50 percent. The baseline model has a combat radius of 1,370 kilometers with two 907-kilogram bombs and two air-to-air missiles, with 3,936-liter external tanks. Assuming an air attack, the question is how will the aircraft fly from their bases in Israel to a target located 322 kilometers inside Iran? They could go either through Saudi Arabia or Iraq, possibly even using Jordanian airspace as well. Either route is a one-way trip of about 1,931 kilometers. To overfly Saudi Arabia the strike aircraft depart southern Israel, enter Saudi airspace from the Gulf of Aqaba or Jordan, fly 1,287 kilometers of Saudi airspace to the Gulf and then 483 kilometers into Iran. Since the Israeli air force does not operate stealth aircraft, there is a reasonable expectation that at some point the aircraft will be detected over Saudi Arabia. Whether Saudi defences could — or would — be able to stop the Israelis is uncertain. Given Saudi fears over Iran's nuclear program, perhaps they would turn a blind eye and claim ignorance. If they chose to traverse Iranian airspace, the strike aircraft depart southern Israel, cross 483 to 644 kilometers of Saudi airspace or a combination of Jordanian and Saudi airspace, and enter Iraqi airspace as soon as possible, continue across 805 kilometers of Iraq to the Persian Gulf and then on to the target. Entering Iran from Iraqi airspace would be politically delicate. Although U.S. troops are no longer there, traversing Iraqi airspace would not be possible without the knowledge, and most likely the permission, of the United States. The key question is whether Israel's fighter-bombers can conduct this mission without refuelling. Combat radius — the distance an aircraft can fly and return without refueling — is difficult to calculate, and depends on weapons payload, external fuel tanks, mission profile, etc. The best "guesstimate" of the combat radius of the F-15I and F-16I, outfitted with conformal fuel tanks, two external wing tanks and a decent weapons load, is almost 1,609 kilometers. Either of the two possible flight routes above is about 322 kilometers further than that. To make up for the shortfall, the aircraft could be fitted with an additional external fuel tank, but this will require a reduction in the weapons load. Given the accuracy of the weapons in the Israeli inventory, that might not be problematic. However, if the aircraft are detected and intercepted, the pilots will have to jettison the tanks in order to engage their attackers. Dropping the tanks will prevent the aircraft from reaching their target. Air refuelling is a limitation for the Israelis. In recent years Israel has acquired five C-130 and four to seven Boeing 707 tanker aircraft. However, the tankers would have to refuel the fighters in hostile airspace. The 707 is a large unarmed aircraft and would be very vulnerable to air defences. Theoretically, the Israelis could do this, but at great risk of failure. If they decide to attack Natanz, they will have to inflict sufficient damage the first time — they probably will not be able to mount follow-on strikes at other facilities.

### \*AT: Saudi

#### No Saudi prolif.

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

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

## Advantage 2---Conduct

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

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

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

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

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

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

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

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

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

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

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

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

As The Economist has put it,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack. To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge. It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted. More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are: Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals. There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.) No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare. State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliate

on. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war. This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation. The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability. One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild.

This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1 This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often? Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer. The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

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

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

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. **There has never been a catastrophic cyberattack.** To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. 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Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1 This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often? Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer. The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. **Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning**. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

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

#### No economy impact

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

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

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

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

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

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

### AT: Misinformation

#### It’s limited and easily defeated

Philip Ewing 20; Citing Keir Giles, a Russia specialist with the Conflict Studies Research Centre in the United Kingdom and Tim Hwang, director of the Harvard-MIT Ethics and Governance of AI Initiative; 5/7/20; “Why Fake Video, Audio May Not Be As Powerful In Spreading Disinformation As Feared”; NPR; https://www.npr.org/2020/05/07/851689645/why-fake-video-audio-may-not-be-as-powerful-in-spreading-disinformation-as-feare

Sophisticated fake media hasn't emerged as a factor in the disinformation wars in the ways once feared — and two specialists say it may have missed its moment. Deceptive video and audio recordings, often nicknamed “deepfakes,” have been the subject of sustained attention by legislators and technologists, but so far have not been employed to decisive effect, said two panelists at a video conference convened on Wednesday by NATO. One speaker borrowed Sherlock Holmes' reasoning about the significance of something that didn't happen. “We've already passed the stage at which they would have been most effective,” said Keir Giles, a Russia specialist with the Conflict Studies Research Centre in the United Kingdom. “They're the dog that never barked.” The perils of deepfakes in political interference have been discussed too often and many people have become too familiar with them, Giles said during the online discussion, hosted by NATO's Strategic Communications Centre of Excellence. Following all the reports and revelations about election interference in the West since 2016, citizens know too much to be hoodwinked in the way a fake video might once have fooled large numbers of people, he argued: “They no longer have the power to shock.” Tim Hwang, director of the Harvard-MIT Ethics and Governance of AI Initiative, agreed that deepfakes haven't proven as dangerous as once feared, although for different reasons. Hwang argued that users of “active measures” (efforts to sow misinformation and influence public opinion) can be much more effective with cheaper, simpler and just as devious types of fakes — mis-captioning a photo or turning it into a meme, for example. Influence specialists working for Russia and other governments also imitate Americans on Facebook, for another example, worming their way into real Americans' political activities to amplify disagreements or, in some cases, try to persuade people not to vote. Other researchers have suggested this work continues on social networks and has become more difficult to detect. Defense is stronger than attack Hwang also observed that the more deepfakes are made, the better machine learning becomes at detecting them. A very sophisticated, real-looking fake video might still be effective in a political context, he acknowledged — and at a cost to create of around $10,000, it would be easily within the means of a government's active measures specialists. But the risks of attempting a major disruption with such a video may outweigh an adversary's desire to use one. People may be too media literate, as Giles argued, and the technology to detect a fake may mean it can be deflated too swiftly to have an effect, as Hwang said. “I tend to be skeptical these will have a large-scale impact over time,” he said. One technology boss told NPR in an interview last year that years' worth of work on corporate fraud protection systems has given an edge to detecting fake media.” This is not a static field. Obviously, on our end we've performed all sorts of great advances over this year in advancing our technology, but these synthetic voices are advancing at a rapid pace,” said Brett Beranek, head of security business for the technology firm Nuance. “So we need to keep up.” Beranek described how systems developed to detect telephone fraudsters could be applied to verify the speech in a fake clip of video or audio. Corporate clients that rely on telephone voice systems must be wary about people attempting to pose as others with artificial or disguised voices. Beranek's company sells a product that helps to detect them, and that countermeasure also works well in detecting fake audio or video. Machines using neural networks can detect known types of synthetic voices. Nuance also says it can analyze a recording of a real, known voice — say, that of a politician — and then contrast its characteristics against a suspicious recording. Although the world of cybersecurity is often described as one in which attackers generally have an edge over defenders, Beranek said he thought the inverse was true in terms of this kind of fraud detection.” For the technology today, the defense side is significantly ahead of the attack side,” he said. Shaping the battlefield Hwang and Giles acknowledged in the NATO video conference that deepfakes likely will proliferate and become lower in cost to create, perhaps becoming simple enough to make with a smartphone app. One prospective response is the creation of more of what Hwang called “radioactive data” — material earmarked in advance so that it might make a fake easier to detect. If images of a political figure were so tagged beforehand, they could be spotted quickly if they were incorporated by computers into a deceptive video. Also, the sheer popularity of new fakes, if that is what happens, might make them less valuable as a disinformation weapon. More people could become more familiar with them, as well as being detectable by automated systems — plus they may also have no popular medium on which to spread. Big social media platforms already have declared affirmatively that they'll take down deceptive fakes, Hwang observed. “That might make it more difficult for a scenario in which a politically charged fake video goes viral just before Election Day. “Although it might get easier and easier to create deepfakes, a lot of the places where they might spread most effectively, your Facebooks and Twitters of the world, are getting a lot more aggressive about taking them down,” Hwang said. That won't stop them, but it might mean they'll be relegated to sites with too few users to have a major effect, he said. “They'll percolate in these more shady areas.

#### DPT is a statistical artifact---empirical analysis.

Michael **Mousseau 18**. Professor @ UCF, PhD PoliSci @ Binghamton. Conflict Management and Peace Science, “Grasping the scientific evidence: The contractualist peace supersedes the democratic peace”, Vol 35(2) 175-192, SagePub.

A weighty controversy has enveloped the study of international conflict: whether the democratic peace, the observed dearth of militarized conflict between democratic nations, may be spurious and accounted for by institutionalized market ‘‘contractualist’’ economy. I have offered theory and evidence that economic norms, specifically contractualist economy, appear to account for both the explanans (democracy) and the explanandum (peace) in the democratic peace research program (Mousseau, 2009, 2012a, 2013; see also Mousseau et al., 2013a, b). Five studies have responded with several arguments for why we should continue to believe that democracy causes peace (Dafoe, 2011; Dafoe and Russett, 2013; Dafoe et al., 2013; Ray, 2013; Russett, 2010). Resolution of this controversy is fundamental to the study and practice of international relations. The observation of democratic peace is ‘‘the closest thing we have to an empirical law’’ in the study of global politics (Levy, 1988: 662), and carries the profound implication that the spread of democracy will end war. New economic norms theory, on the other hand, yields the contrary implication that universal democracy will not end war. Instead, it is market-oriented development that creates a culture of contracting, and this culture legitimates democracy within nations and causes peace among them. The policy implications could hardly be more divergent: to end war (and support democracy), the contractualist democracies should promote the economies of nations at risk (Krieger and Meierrieks, 2015; Meierrieks, 2012; Mousseau, 2000, 2009, 2012a, 2013; Nieman, 2015). In the literature are five factual claims for why we should continue to believe that democracy causes peace: (1) an assertion that in three of the five studies that overturned the democratic peace (Mousseau, 2013; Mousseau et al., 2013a, b), the insignificance of democracy controlling for contractualist economy is due to the treatment of missing data for contractualist economy (Dafoe et al., 2013, henceforth DOR); (2) a claim of error in the measure for conflict (DOR) that appears in one of the five studies that overturned the democratic peace (Mousseau, 2013); (3) an alleged misinterpretation of an interaction term that appears in one of the five studies (Mousseau, 2009) that overturned the democratic peace, along with in inference of democratic causality from an interaction of democracy with contractualist economy (Dafoe and Russett, 2013; DOR); (4) a claim of reverse causality, of democracy causing contractualist economy (Ray, 2013); and (5) a report of multiple regressions with most said to show democratic significance after controlling for contractualist economy (DOR). This study investigates all five of these factual claims. I begin by addressing the issue of missing data by constructing two entirely new measures for contractualist economy. I then take up possible measurement error in the dependent variable by reporting tests using both my own (Mousseau, 2013) and DOR’s measures for conflict. Next, I disaggregate the data to investigate a causal interaction of democracy with contractualist economy. I then examine the evidence for reverse causality, and scrutinize the competing test models to pinpoint the exact factors that can account for differences in test outcomes. The results are consistent across all tests: there is no credible evidence supporting democracy as a cause of peace. Using DOR’s base model, the impact of democracy is zero regardless of how contractualist economy or interstate conflict is measured. There is no misinterpreted interaction term in any study that has overturned the democratic peace, and the disaggregation of the data yields no support for a causal interaction of democracy with contractualist economy. Ray’s (2013) evidence for reverse causality from democracy to contractualist economy is shown to be based on an erroneous research design. And of DOR’s 120 separate regressions that consider contractualist economy, 116 contain controversial measurement and specification practices; the remaining four are analyses of all (fatal and non-fatal) disputes, where the correlation of democracy with peace is limited to mixedeconomic dyads, those where one state has a contractualist economy and the other does not, a subset that includes only 27% of dyads from 1951 to 2001, including only 50% of democratic dyads. It is further shown that this marginal peace is a statistical artifact since it does not exist among neighbors where everyone has an equal opportunity to fight. The results of this study should not be surprising, as they merely corroborate the present state of knowledge. This is because, while DOR ardently assert that four alleged errors, when corrected, each independently save the democratic peace proposition—multiple imputation, the exclusion of ongoing dispute years, an interaction term, and their alternative measure for contractualist economy—they never actually report any clear-cut evidence in support of their claims. One issue not addressed is Dafoe and Russett’s (2013) challenge to Mousseau et al. (2013a) on the grounds that our reported insignificance of democracy is not significant. Like the four claims of error made by DOR addressed here, Dafoe and Russett (2013) made this charge without supporting it. Mousseau et al. (2013b) then investigated it and showed that it too has no support. This issue appears resolved, as Russett and colleagues (DOR) did not raise it again. Nor have DOR or anyone else disputed the overturning of the democratic peace as reported in Mousseau (2012a), which has not been contested with any assertion, supported or unsupported. The implications of this study are far from trivial: the observation of democratic peace is a statistical artifact, seemingly explained by economic conditions. If scientific knowledge progresses and the field of interstate conflict processes is to abide by the scientific rules of evidence, then we must stop describing democracy as a ‘‘known’’ cause or correlate of peace, and stop tossing in a variable for democracy, willy-nilly, in quantitative analyses of international conflict; the variable to replace it is contractualist economy. If nations want to advance peace abroad, the promotion of democracy will not achieve it: the policy to replace it is the promotion of economic opportunity The economic norms account for how contractualist economy can cause both democracy and peace has been explicated in numerous prior studies and need not be repeated here (Mousseau, 2000, 2009, 2012a, 2013). An abundance of prior studies have also corroborated various novel predictions of the theory in wider domains (Ungerer, 2012), and no one has disputed the multiple reports that contractualist economy is the strongest non-trivial predictor of peace both within (Mousseau, 2012b) and between nations (Mousseau, 2013; see also Nieman, 2015). The only matter in controversy is whether democracy has any observable impact on peace between nations after consideration of contractualist economy. My investigation begins below with the allegation of measurement error.

# 2NC---Round 6---Wake

## 2NC---Regs CP

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

#### “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: Regulatory Capture---1AC Chilson 20

#### Links to the AFF---*expanding the scope of antitrust causes regulatory capture.*

Thibault Schrepel 20, Assistant Professor at Utrecht University School of Law, Associate Researcher at University of Paris 1 Pantheon-Sorbonne and Invited Professor at Sciences Po Paris. ARTICLE: Antitrust Without Romance, 13 NYU J.L. & Liberty 326

Private and Pseudo-State Interests. Antitrust authorities can be captured by various outside groups that lead antitrust employees to please them so as to maximize their own future interest. 59 Public choice theorists have pointed out that special interest groups may capture regulatory authorities. 60 This issue cannot be overlooked and [\*344] a precise risk map should be drawn in this area as antitrust authorities' employees may please these groups for personal benefit, to the detriment of consumers. 61 The importance of this issue is growing as the scope of antitrust authorities is expanding, which increases the risk of regulatory capture by interest groups. 62

See, e.g., Bundeskartellamt prohibits Facebook from combining user data from different sources (Bundeskartellamt, Feb. 7, 2019), archived at https://perma.cc/B9S2-9659. For more on this extension of antitrust authorities' power, see Directive (EU) 2019/1/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2019 O.J. L11 3 (Jan. 14, 2019). For risks this creates in terms of regulatory capture, see Michael E. DeBow, Social Costs of Populist Antitrust: A Public Choice Perspective, 14 Harv. J. L. & Pub. Pol. 205, 220 (1991) (explaining that as the government expands the scope and aims of antitrust enforcement, private parties invest more significant sums in manipulating this greater government intervention in the economy).

### 2NC---AT: Uncertainty---2AC Huddleston 20

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

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

IV. A SOLUTION: CONSUMER FINANCIAL PROTECTION AS AUTHORITY

A. Broadening the Conception of Consumer Harm

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

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

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

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

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

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

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

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

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

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

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

B. UDAAP Authority

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

#### Solves best.

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

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

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

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

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

### 2NC---AT: Authority---2AC Lowe

#### The CFPB has the authority under consumer protection.

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

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

#### 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---Platforms Advantage

### 2NC---AT: Tech Leadership

#### they can’t catch up.

Fred Hu 18, economist and chairman of Primavera Capital Group, 8-22-2018, "The U.S. Is Overly Paranoid About China’S Tech Rise," Washington Post, https://www.washingtonpost.com/news/theworldpost/wp/2018/08/22/us-china-3/?utm\_term=.ed8dd0d27f82

But much of the fear over China’s technological rise is unfounded. Fundamentally, China is like most emerging economies around the world: still trying hard to close the enormous technological gap with advanced economies led by America. China has undoubtedly made more progress than many of its developing peers in that race. Its tech industries have grown at a faster pace and achieved a global scale beyond those of most developing countries. In a broad range of manufacturing sectors — notably consumer electronics, steel, ship building, high-speed rail systems and solar panels — China has established itself as the world’s leading producer. In areas such as consumer Internet and financial technology, it has arguably overtaken even the United States and now leads the rest of the world. Yet China hawks such as Robert Lighthizer and Peter Navarro charge that whatever progress China has made on the tech front is due to the country’s blatant theft of U.S. technology. Considering the enormous investments China has made in science and technology over recent decades, such claims do not hold water. China has devoted vast resources to research and development — $409 billion in 2015 (21 percent of the global total), according to the U.S. National Science Foundation. China’s investment in research and development grew over 20 percent annually between 2000 and 2010 and almost 14 percent from 2010-2015. U.S. research and development hovered around 4 percent over the same period. For a country with an average per capita income a mere one-sixth of America’s, China’s research and development investments reflect a real and sustained national commitment. At the same time, China has vastly expanded and improved STEM education and has one of the largest pools of STEM graduates in the world. The devotion of significant resources to research and development and human capital has in turn enabled China to reap some of the early fruits of innovation. China now tops the world in new patent filings. As the first country to receive more than 1 million patent applications in a single year — a record the World Intellectual Property Organization said reflected “extraordinary” levels of innovation — China accounts for almost 40 percent of the global total and more than that of the United States, Japan and South Korea combined. China has also significantly boosted venture capital investment, which supports the commercialization of emerging technologies. While the United States attracts the most investment worldwide (nearly $70 billion), venture capital investment in China rose from approximately $3 billion in 2013 to $34 billion in 2016, climbing from 5 percent to 27 percent of the global share — the fastest increase of any economy. China’s start-up ecosystem is both vast and vibrant; it has successfully incubated more tech unicorns than any other country except the United States. Too often, U.S. critics claim that Chinese industrial policies like Made in China 2025 are behind the country’s ascendancy in tech. In fact, virtually none of China’s leading tech firms, such as Alibaba, Baidu and Tencent, are state-owned or meaningful beneficiaries of state support. They are all founded and led by smart and risk-taking private entrepreneurs, just like their Silicon Valley brethren. Tellingly, many Chinese tech start-ups have received U.S. venture financing. And Chinese technology companies and venture firms have made significant investments in U.S. start-ups. Sadly, the virtuous two-way venture capital flows are now in jeopardy because of Washington’s growing paranoia about China. As impressive as China’s innovation and progress may be, however, it is premature to declare that China has caught up with the U.S. tech industry. Interventionist government bureaucracy, stodgy state-owned enterprises, a rigid school system and — above all — harsh restrictions on individual freedoms continue to stifle independent thinking and creativity and constrain China from realizing its full innovation potential. While China is well positioned to succeed in “strategic” industries such as semiconductors, pharmaceuticals and commercial aircraft due to its vast pool of engineering talent and the size of its domestic market, so far it has remained a laggard. China has failed to develop an indigenous chip industry despite a state-led drive to do so, with tens of billions spent over the past four decades. Despite its status as the “world’s factory,” making everything from cell phones and laptops to numerous other devices, China continues to import 90 percent of its microchips from foreign countries, predominantly from the United States. That is why the U.S. threat to cut off critical chip supply to ZTE, a Chinese telecom equipment firm, has been dubbed the “Sputnik moment” in China: a sober reminder of China’s continued weaknesses in critical technologies. While China has made spectacular progress on the tech front, the United States remains the undisputed global leader in science and technology. The United States holds most of the world’s leading research universities; it deploys the highest amounts of both public and private funding in research and development; attracts the most venture capital; awards the most advanced degrees; provides the most advanced business, financial and information services and is the largest producer in knowledge-intensive, high-tech sectors, from pharmaceuticals to semiconductors. The fear that China will displace the United States as the global tech superpower is grossly exaggerated. Unfortunately, such paranoia dominates the minds of protectionist U.S. politicians and China hawks and has already amplified a destructive trade war between the world’s two largest economies. For China’s part, its soul-searching is overdue. Beijing should resist the prevalent yet ill-justified self-complacency and triumphalism that contributed to the fear in Washington in the first place, and it should make serious efforts to reform and open its domestic economy. Unless Beijing amends its heavy-handed statist approach to economic development, China’s potential as a leading nation in science and technology could be seriously curtailed.

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

#### Status quo solves sanctions evasion by cryptocurrency

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

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

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

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

Talk, Services or Conspiracy?

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

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

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

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

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

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

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

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

Cryptocurrency in The North Korean Military Intelligence Toolkit

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

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

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

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

More Than Just North Korea

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

This Executive Order states that:

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

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

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

Due Diligence Risks for Domestic Companies

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

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

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

OFAC stressed:

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

## 2NC---Conduct Advantage

### 2NC---AT: Solvency

#### They don’t solve

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

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

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

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

#### 3. In another article, Stucke outlined how dataopolies were also less susceptible to antitrust enforcement. They don’t have an internal link card connecting the plan, which lowers the burden-of-proof on plaintiffs in suits v. two-sided platforms, to effective antitrust enforcement against dataopolies that overwhelms these concerns from their 1AC author.

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

Moreover, data-opolies can persist when their tactics to attain or maintain their dominance avoid antitrust scrutiny. Data-opolies’ anticompetitive conduct may be harder to detect, such as their use of the nowcasting radar to squelch nascent competitive threats, their foreclosing of rivals’ access to data necessary for them to compete, their leveraging of a data-advantage in one market to gain an advantage in another market, or their increasing customers’ switching costs. Moreover, as our book explores, there has been less scrutiny of data-driven mergers by these dominant firms.213 Competition authorities’ price-centric tools for assessing mergers are often ill-equipped for data-driven mergers, where the service is offered for “free” and advertisers are not harmed. Datadriven mergers (such as if Google or Facebook acquired IAC, which controls the online dating platforms Match, Tinder, PlentyOfFish, and OkCupid) often defy the horizontal, vertical, and conglomerate categories used to assess mergers.

# 1NR---Round 6---Wake

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

## FTC DA

### Top Level---2NC

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

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

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

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

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

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

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

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

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

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

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

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

Turns cyber and china war---increases risk of hacks and errors

#### Turns econ

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Turns 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.

### 2ac 1 – aff solves funding

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

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

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

### 2ac 2 – non unique and turn

#### 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 3 regs free up resources

#### 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.

#### “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.

### 2ac 4 antitrust now

#### 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.

#### Plan is different than the xo

Masuda et. al. 21. Funai, Eifert & Mitchell, Ltd. Masuda, Funai, Eifert & Mitchell, Ltd. is a U.S. law firm headquartered in Chicago, Illinois, “The Implications of President Biden's "Executive Order on Promoting Competition in the American Economy" 8.18.21. https://www.masudafunai.com/articles/the-implications-of-president-bidens-executive-order-on-promoting-competition-in-the-american-economy?utm\_source=Mondaq&utm\_medium=syndication&utm\_campaign=LinkedIn-integration

On July 9, 2021, President Joe Biden signed a sweeping executive order titled the “Executive Order on Promoting Competition in the American Economy” (the “Order”), affirming the policy of the Biden administration to “enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.” To achieve this, the Order, among other things, directs regulatory agencies to assert oversight over certain business practices and encourages regulatory agencies to develop and/or strengthen rules. The Order includes 72 initiatives by more than a dozen federal agencies.

The Order specifically cites the areas of “labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.” The scope of this order is broad. On the other hand, the Order itself does not create new regulations or laws, leaving the specific implications of it vague.

#### 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 6 No spillover

#### 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.

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

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

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

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

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

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

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

### 2ac 7 privacy fails

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

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

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

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

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

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

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

#### Legal pushback is wrong

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

Still, the FTC is in the best position to enact some form of privacy regulation — and lawmakers have started piling on the pressure for the agency to act.

Last week, several lawmakers, including a handful on the Senate Commerce Committee, wrote a letter to FTC Chair Lina Khan calling on the commission to write its own data privacy rules. The request came just a few months after the FTC voted to update its rulemaking procedures, making it easier for the agency to issue data rules. The letter also followed President Joe Biden’s nomination of Alvaro Bedoya, a longtime privacy and facial recognition critic, to become the third FTC Democrat.

“In parallel to congressional efforts to create federal privacy laws to give power back to consumers, the Commission should take advantage of every tool in its toolkit to protect consumers’ privacy,” the lawmakers wrote last week.

#### 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”.

#### FTC privacy enforcement is successful---Facebook proves

Mike Swift 9/17/21. Chief Global Digital Risk Correspondent for MLex, award-winning journalist who has been at the forefront of covering data, privacy and cybersecurity regulatory news for nearly a decade, 9/17/21. “Facebook's 'comprehensive' privacy improvements after US FTC order had 'gaps and weaknesses,' independent assessment concludes.” https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/data-privacy-and-security/facebooks-comprehensive-privacy-improvements-after-us-ftc-order-had-gaps-and-weaknesses-independent-assessment-concludes

The initial assessment by global consulting firm Protiviti, covering the six-month period ending in April after the FTC’s privacy order against Facebook took effect, “confirms that the [FTC] Order constituted a watershed moment at Facebook,” leading to “substantial investments” by Facebook in compliance, Facebook’s chief privacy officer for product, Michel Protti, told the FTC in a letter delivering the Protiviti report on July 1.

However, the independent assessor concluded in the executive summary of the 230-page report, completed in late June, that “substantial” shortfalls remained that Facebook must address.

'Substantial additional work'

“The gaps and weaknesses noted within our review demonstrate that substantial additional work is required, and additional investments must be made, in order for the program to mature,” Provititi concluded in the executive summary, which was heavily redacted by Facebook and the FTC before it was released to MLex following a public records request.

Facebook moved too slowly in several specific areas to implement the program, the assessor concluded. “We believe there are significant further opportunities in this area that should be prioritized and accelerated,” Protiviti said. Details of those “opportunities,” which appear to refer to the use of artificial intelligence and other automated technologies, were redacted by Facebook and the FTC

Protiviti said the study was independently done without relying on the assertions of Facebook’s management, and used National Institute of Standards and Technology (NIST) principles as the basis for its evaluation. The consultant concluded that Facebook has put the foundations in place for organizational changes that, for a company with a history of serial privacy violations, may improve that record.

Facebook told the FTC in its July 1 response to the assessor’s report that it is aware it must make more progress and is working to make its new internal Privacy Organization operate as an independent compliance force within the company, even as “Facebook continues to develop a Company-wide ‘risk and controls’ mindset” on privacy.

Perhaps the key change Facebook made was to create an internal Privacy Organization headed by Protti, who reports to Facebook Chief Technology Officer Mike Schroepfer, who reports to CEO Mark Zuckerberg. Protti said in a blog post this year that the Privacy Organization is made up of “dozens of teams, both technical and non-technical, focused solely on privacy and led by some of our most experienced leaders.”

“We believe the overall scope of the program and structure into which the program is organized is logical and appropriately comprehensive. As a result, the key foundational elements necessary for an effective program are now in place, although their maturity and completeness vary,” Protiviti concluded in the summary of its assessment.

Need for standards

The specific “gaps and weaknesses” in Facebook’s evolving privacy program were redacted by Facebook and the FTC in documents released to MLex. However, one problem identified by the assessor was the continuing need for Facebook to “fully establish and mature” independent standards and oversight on privacy.

“In our experience, nearly all effective privacy programs operate according to a model where front-line product teams are responsible for performing day to day control activities that are designed to manage the risk associated with those products,” Protiviti concluded. Further details on that topic were redacted by Facebook and the FTC before the document was released to MLex.

Facebook has hired new members to its Privacy Organization under Protti, with additional hires expected through the end of 2021, but the number of people Facebook hired and plans to continue to hire were redacted from the documents. A Facebook spokesman declined to provide those numbers today.

Facebook views its revamped privacy program as having three lines of defense against misconduct: Its product and business teams are being held more accountable to privacy values in day-to-day work; internal legal and policy teams and the new Privacy Organization set privacy standards and have oversight of product and business teams; and an independent assessor has oversight over the first two levels of defense.

Facebook has long been known as a company that operates under Zuckerberg’s infamous slogan: “Move Fast and Break Things,” a rallying cry that for years was posted in red-lettered signs in Facebook offices around the world. But Protti told the FTC in delivering the initial assessment in July that its order has successfully produced lasting change at Facebook, from the chief executive officer on down.

“Facebook’s completely redesigned and exponentially expanded Privacy Program reflects the degree of change Mr. Zuckerberg envisioned when the order was announced,” Protti told the FTC. “The Program benefits from multiple levels of oversight, governance and accountability, including the independent Privacy Committee [on the board of directors], senior leadership and the Privacy Org.”

#### FTC enforcement is key against algorithmic discrimination.1. Actualizing scrutiny to bias is key.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Fraud crackdowns stop major terror attacks

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

2. TERRORIST FINANCING AND THE INTERNET

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

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

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

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

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

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

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

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

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

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

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

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

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