# Round 2---Harvard 21

## 1NC

### Off

DPA CP

#### As per the Defense Production Act, the United States should only allow the combination of platforms and commerce for platforms in the private sector under its antitrust laws when necessary.

#### Solves and competes---the CP is a regulation, not a prohibition.

James Broaddus 50. Judge on the Kansas City Court of Appeals, Missouri; Westlaw. “City of Meadville v. Caselman”. 2-6-1950. 240 Mo. App. 1220. https://casetext.com/case/city-of-meadville-v-caselman-1

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

#### The plan undermines the DPA---the CP preserves it.

Michael H. Cecire & Heidi M. Peters 20. \*Analyst in Intergovernmental Relations and Economic Development Policy. \*\*Analyst in US Defense Acquisition Policy. “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress”. 3-2-2020. <https://www.everycrsreport.com/reports/R43767.html>

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

Special Preference for Small Businesses

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

Definitions of Key Terms in the DPA

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

Industrial Base Assessments

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

Voluntary Agreements

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

The authority to establish a voluntary agreement has been delegated to the head of any federal department or agency otherwise delegated authority under any other part of E.O. 13603.106 Thus, the authority could be potentially used by a large group of federal departments and agencies. Use of these voluntary agreements is tracked by the Secretary of Homeland Security,107 who is tasked under E.O. 13603 with issuing regulations that are required by law on the "standards and procedures by which voluntary agreements and plans of action may be developed and carried out."108 The Federal Emergency Management Agency (FEMA), which at the time was an independent agency and tasked with these responsibilities under the DPA, issued regulations in 1981 to fulfill this requirement.109 FEMA is now a part of DHS, and those regulations remain in effect. The Maritime Administration (MARAD) of the U.S. Department of Transportation manages the only currently established voluntary agreements in the federal government, the Voluntary Intermodal Sealift Agreement (commonly referred to as "VISA") and the Voluntary Tanker Agreement. These programs are maintained in partnership with the U.S. Transportation Command of DOD, and have been established to ensure that the maritime industry can respond to the rapid mobilization, deployment, and transportation requirements of DOD. Voluntary participants from the maritime industry are solicited to join the agreements annually.110 Nucleus Executive Reserve Title VII of the DPA authorizes the President to establish a volunteer body of industry executives, the "Nucleus Executive Reserve," or more frequently called the National Defense Executive Reserve (NDER).111 The NDER would be a pool of individuals with recognized expertise from various segments of the private sector and from government (except full-time federal employees). These individuals would be brought together for training in executive positions within the federal government in the event of an emergency that requires their employment. The historic concept of the NDER has been used as a means of improving the war mobilization and productivity of industries.112 The head of any governmental department or agency may establish a unit of the NDER and train its members.113 No NDER unit is currently active, though the statute and E.O. 13603 still provide for this possibility. Units may be activated only when the Secretary of Homeland Security declares in writing that "an emergency affecting the national defense exists and that the activation of the unit is necessary to carry out the emergency program functions of the agency."114 Authorization of Appropriations, as amended by P.L. 113-72 Appropriations for the purpose of the DPA are authorized by Section 711 of Title VII.115 Prior to the P.L. 113-172, "such sums as necessary" were authorized to be appropriated. This has been replaced by a specific authorization for an appropriation of $133 million per fiscal year and each fiscal year thereafter, starting in FY2015, to carry out the provisions and purposes of the Defense Production Act.116 Table 1 shows that the annual average appropriation to the DPA Fund between FY2010 and FY2019 was $109.1 million,117 with a high of $223.5 million in FY2013 and a low of $34.3 million in FY2011. Monies in the DPA Fund are available until expended, so annual appropriations may carry over from year to year if not expended. Recently, the only regular annual appropriation for the purposes of the DPA has been made in the DOD appropriations bill, though appropriations could be made in other bills directly to the DPA Fund (or transferred from other appropriations). Committee on Foreign Investment in the United States118 The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign investment in the economy. It reviews foreign investment transactions to determine if (1) they threaten to impair U.S. national security; (2) the foreign investor is controlled by a foreign government; or (3) the transaction could affect homeland security or would result in control of any critical infrastructure that could impair the national security. The President has the authority to block proposed or pending foreign investment transactions that threaten to impair the national security. CFIUS initially was created and operated through a series of Executive Orders.119 In 1988, Congress passed the "Exon-Florio" amendment to the DPA, granting the President authority to review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such actions.120 This amendment codified the CFIUS review process due in large part to concerns over acquisitions of U.S. defense-related firms by Japanese investors. In 2007, amid growing concerns over the proposed foreign purchase of commercial operations of six U.S. ports, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49) to create CFIUS in statute. On August 13, 2018, President Trump signed into law new rules governing national security reviews of foreign investment, known as the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-235).121 FIRRMA amends several aspects of the CFIUS review process under Section 721 of the DPA.122 Notably, it expands the scope of transactions that fall under CFIUS' jurisdiction. It maintains core components of the current CFIUS process for evaluating proposed or pending investments in U.S. firms, but increases the allowable time for reviews and investigations. Upon receiving written notification of a proposed acquisition, merger, or takeover of a U.S. firm by a foreign investor, the CFIUS process can proceed potentially through three steps: (1) a 45-day national security review; (2) a 45-day maximum national security investigation (with an option for a 15-day extension for "extraordinary circumstances"); and (3) a 15-day maximum Presidential determination. The President can exercise his authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he finds that (1) "credible evidence" exists that the foreign investor might take action that threatens to impair the national security; and (2) no other laws provide adequate and appropriate authority for the President to protect national security. FIRRMA shifts the filing requirement for foreign investors from voluntary to mandatory in certain cases, and provides a two-track method for reviewing certain investment transactions. Other changes mandated by FIRRMA would provide more resources for CFIUS, add new reporting requirements, and reform export controls. Termination of the Act Title VII of the DPA also includes a "sunset" clause for the majority of the DPA authorities. All DPA authorities in Titles I, III, and VII have a termination date, with the exception of four sections.123 As explained in Section 717 of the DPA, the sections that are exempt from termination are 50 U.S.C. §4514, Section 104 of the DPA that prohibits both the imposition of wage or price controls without prior congressional authorization and the mandatory compliance of any private person to assist in the production of chemical or biological warfare capabilities; 50 U.S.C. §4557, Section 707 of the DPA that grants persons limited immunity from liability for complying with DPA-authorized regulations; 50 U.S.C. §4558, Section 708 of the DPA that provides for the establishment of voluntary agreements; and 50 U.S.C. §4565, Section 721 of the DPA, the so-called Exon-Florio Amendment, that gives the President and CFIUS review authority over certain corporate acquisition activities. P.L. 115-232 extended the termination date of Section 717 from September 30, 2019, to September 30, 2025. In addition, Section 717(c) provides that any termination of sections of the DPA "shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act" prior to its termination. This means, for instance, that prioritized contracts or Section 303 projects created with DPA authorities prior to September 30, 2025, would still be executed until completion even if the DPA is not reauthorized. Similarly, the statute specifies that the authority to investigate, subpoena, and otherwise collect information necessary to administer the provisions of the act, as provided by Section 705 of the DPA, will not expire until two years after the termination of the DPA.124 For a chronology of all laws reauthorizing the DPA since inception, see Table A-4. Defense Production Act Committee The Defense Production Act Committee (DPAC) is an interagency body originally established by the 2009 reauthorization of the DPA.125 Originally, the DPAC was created to advise the President on the effective use of the full scope of authorities of the DPA. Now, the law requires DPAC to be centrally focused on the priorities and allocations authorities of Title I of the DPA. The statute assigns membership in the DPAC to the head of each federal agency delegated DPA authorities, as well as the Chairperson of the Council of Economic Advisors. A full list of the members of the DPAC is included in E.O. 13603.126 As stipulated in law, the Chairperson of the DPAC is to be the "head of the agency to which the President has delegated primary responsibility for government-wide coordination of the authorities in this Act."127 As currently established in E.O. 13603 delegations, the Secretary of Homeland Security is the chair-designate, but the language of the law could allow the President to appoint another Secretary with revision to the E.O.128 The Chairperson of the DPAC is also required to appoint one full-time employee of the federal government to coordinate all the activities of the DPAC. Congress has exempted the DPAC from the requirements of the Federal Advisory Committee Act.129 The DPAC has annual reporting requirements relating to the Title I priority and allocation authority, and is also required to include updated copies of Title I-related rules in its report. The annual report also contains, among other items, a "description of the contingency planning ... for events that might require the use of the priorities and allocations authorities" and "recommendations for legislative actions, as appropriate, to support the effective use" of the Title I authorities.130 The DPAC report is provided to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services. Impact of Offsets Report Offsets are industrial compensation practices that foreign governments or companies require of U.S. firms as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act (22 U.S.C. §2751, et seq.) and the International Traffic in Arms Regulations (22 C.F.R. §§120-130). In the defense trade, such industrial compensation can include mandatory co-production, licensed production, subcontractor production, technology transfer, and foreign investment. The Secretary of Commerce is required by law to prepare and to transmit to the appropriate congressional committees an annual report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade. Specifically, the report discusses "offsets" in the government or commercial sales of defense materials.131

Considerations for Congress

Enhance Oversight

Expand Reporting or Notification Requirements

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

Enforce and Revise Rulemaking Requirements

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

Broaden Committee Oversight Jurisdiction

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

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

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

Amending the Defense Production Act of 1950

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

#### The DPA is key to pandemic response.

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

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

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

#### Pandemics cause extinction.

Dennis Pamlin & Stuart Armstrong 15. \*Executive Project Manager, Global Risks, Global Challenges Foundation. \*\*James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford. “12 Risks that threaten human civilisation: The case for a new risk category”. Global Challenges Foundation. February 2015. <https://www.researchgate.net/publication/291086909_12_Risks_that_threaten_human_civilisation_The_case_for_a_new_risk_category>

Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261

These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic.

Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267

There are other grounds for suspecting that such a high-impact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme.

Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275

Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade).

Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics).

### Off

FTC DA

#### The FTC is 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.

#### The plan drains finite FTC resources and personnel.

Tara L. Reinhart, et al. 21. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

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

#### That trades off with 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 causes 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.”

### Off

Regs CP

#### The United States federal government should:

#### - Maintain the current scope of its core antitrust laws and announce its intent to do so.

#### - Adopt the principle of separating platforms from commerce for platforms in the private sector through non-antitrust regulations.

#### - Strongly incentivize other countries to adopt this policy.

#### - Require large technology companies to share their data with smaller companies and startups.

#### - Prevent artificial self-promotion of platforms.

#### - Establish stricter privacy guidelines and establish a national baseline for compliance.

#### - Substantially increase funding allocated to social insurance programs, increase investment in green infrastructure and public universities, and increase the minimum wage.

#### - Develop an offensive and defensive strategy to address digital authoritarianism as per Yayboke and Brannen.

#### - Substantially increase investment in internet infrastructure in low-income areas and skills and capital financing.

#### - Establish free public Wi-Fi.

#### - Invest in global efforts to increase internet access, increase broadband service, and promote managerial technology training.

#### Solves and competes---only the FTC and the DOJ enforce antitrust laws.

Michael Kades 19. Director for markets and competition policy at the Washington Center for Equitable Growth. “The state of U.S. federal antitrust enforcement”. Washington Center for Equitable Growth. 9-17-2019. https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true

Discussion about the current U.S. antitrust enforcement regime has been less systematic. Critics have pointed to where they believe federal enforcers have dropped the ball, such as the failure to challenge specific merger transactions or to attack the business practices of certain technology platforms. Defenders of the two federal agencies in charge of enforcement—the U.S. Department of Justice’s Antitrust Division and the Federal Trade Commission—have pointed to the areas where the agencies have been aggressive (such as the Department of Justice’s case against American Express Co.) or tenacious (such as the FTC’s enforcement agenda against hospital mergers).

#### Regulation solves innovation and induces competition---antitrust fails.

Jacob Beaupre 20, Currently Associate Attorney at the Hunt Law Group, Formerly Judicial Extern in the United States Court of Appeals for the Seventh Circuit, J.D. Candidate at the University of DePaul College of Law, 2020, Big Is Not Always Bad: The Misuse of Antitrust Law to Break Up Big Tech Companies, 18 DePaul Business & Commercial Law Journal, Winter 2020, Nexis Uni

iii. Regulation, not Antitrust

Regulating the tech giants would be more in line with the goals outlined by those who are concerned about the influence of Big Tech. Opponents of Big Tech cite fears of data privacy, the spread of misinformation, and data misuse. Much of Big Tech's opposition comes from fears about data concerns. Roughly half of Americans do not trust the government or social media sites to protect their data. Because of these increasing concerns, companies like Apple already expect to be regulated by the government. However, the FTC does not have much enforcement power in the protection of online privacy. Internet companies have disputed the FTC's authority to regulate data privacy practices. To solve this problem the FTC has requested [\*45] Congress create internet privacy and security laws. Regulating Big Tech would be a more narrowly-tailored way to deal with the power and size of tech companies.

As of now, there is only a "patchwork" of existing regulations that apply to issues like data use and privacy. To give consumers the information and transparency they want, the U.S. Congress should draft legislation outlining what can and cannot be done with consumers' data. Legislation should clearly outline consent, access, portability of information, and erasure of personal information. Additionally, policymakers should look to the European Union's General Data Protection Regulations ("GDPR") or the California Consumer Privacy Act. The GDPR protects all personal online data, regardless of who collects it or how it is processed. Under the GDPR, companies are required to notify users of a data breach within 72 hours of discovering a data breach and companies must request user consent in a clear and accessible way. Additionally, the GDPR allows users to stop third party access or to delete their data. The GDPR imposes a fine of up to 4 percent of annual global revenue for noncompliance. Regulations, like the GDPR, could serve as a template to give consumers greater control over their data.

The GDPR is not the only law regulating the tech industry and reforming data privacy. The California Consumer Privacy Act, which will take effect on January 1, 2020, will likely transform data privacy law. Once enacted, California will have the strictest data privacy laws in the nation. The Act will apply to companies serving California residents, which is impactful due to California's economic presence and large population. Due to California's economic impact and large population, almost all companies will ultimately serve California residents. The law not only compels companies to disclose data collection [\*46] in their privacy policies, but also to company users on request. The Act also allows users to delete their data and to "opt out" of having their data sold. Additionally, it is illegal for companies to discriminate against consumers for exercising their privacy rights under the Act. The Act is primarily geared toward consumers as it governs consumer privacy rights and disclosures made to consumers. These protections only apply to California residents, but few companies are "likely to devote the resources necessary to provide the Act's opt-out options to a user visiting a Web site from an IP address in California, while providing a Web site without those features to residents of the other 49 states." As written, the law has expansive consumer protections, which could soon become the model that other states and the federal government follow.

Policymakers could consider other measures to regulate Big Tech without breaking up Big Tech. For instance, policymakers could mandate that Big Tech companies share their data with smaller tech companies. Amassing data is the key to innovation and Big Tech companies maintain their competitive advantage from the vast amount of data they possess. To increase competition, Professor Viktor Mayer-Schonberger, a professor of internet governance at the Oxford Internet Institute, advocates that large tech companies be mandated to share anonymized data with less powerful competitors. Doing so would allow start-ups to have more of an opportunity to succeed because innovation tends to require access to more data. This would prevent the drawbacks that breaking up a tech company like Google would create. Reducing the amount of data a company can use reduces anyone's ability to use the data collected and prevent innovation. Breaking up a company like Google could make its services less reliable because sharing data between a service like Google Search and Google Maps creates reliability and improves consumer [\*47] services. Further, Big Tech could be regulated by preventing Big Tech from favoring their own platforms and services. Hal Singer, a senior fellow at the George Washington Institute of Public Policy, argues that companies like Google defeat competitors by their services special treatment, even when they are not as good as a competitor's. To prevent this problem, Singer proposes regulating tech companies like cable companies by preventing tech companies from using its platform to "artificially give a leg up to [its] own affiliated properties." Smaller companies could then bring complaints to a neutral arbiter. This could help alleviate one of the biggest concern that small businesses will not have power to take on companies like Google and Facebook.

There are ways of regulating Big Tech without requiring the drastic steps of a break-up. Regulatory measures could alleviate some concerns that antitrust advocates have. Additionally, stricter privacy laws would give consumers' protection they seek, as well as simplify compliance by establishing a national baseline.

IV. Conclusion

The big four technology companies should not be broken up under antitrust law. Antitrust law has an uneasy fit with internet-based businesses because is difficult to discern how to judge when an internet company has become a monopoly since the internet is so vast, changes so quickly, and has many sectors to it. The internet's nature is disruptive and because of the pace of technological change, it is important that antitrust policy take into account how breaking up an internet company may have negative effects on the American economy and on the development of technology.

Businesses who create the best products and do the most research should not be interfered with so long as the companies are not stifling competition and are not monopolies under the legal definitions. Certainly, antitrust law could be applied if Google hypothetically bought Facebook, Netflix, and Twitter since Google would control an outsized market share and would have an intent to monopolize the internet. But this is not what is occurring at this juncture. The big four technology companies record profits and are indisputably large and powerful [\*48] corporations. Nevertheless, antitrust law should not be applied because the whims of the populist mob do not like tech companies' size and influence.

It is rational to worry about Big Tech's outsized influence on the American economy. However, simply targeting the big four tech companies because of their record earnings and increasing size is counter to the intent of the antitrust acts. If those feel that these companies have too much unchecked power, policymakers and officials should consider regulatory action. There are good and well-reasoned arguments for regulating these tech giants given the recent string of controversies regarding data privacy, but antitrust law is not the avenue to check tech giants' power. The antitrust laws cannot be used simply to satisfy the populist furor over corporate earnings and power, as the antitrust acts only apply if a company is stifling or intending to stifle competition and innovation. Regulatory actions or new legislation policing data use and privacy, cybersecurity, foreign interference in elections, and other issues are a better fit than simply breaking up an entire large business.

Right now, consumers are receiving great benefits because of the big four tech companies' dominance. Consumers have a near limited array of options on the internet and there is no shortage of innovation. With new issues arising as a result from changing pace of technology and the economy, the American legal system should let the market run its course, albeit with some regulation on the industry, unless these tech giants begin to take drastic steps to monopolize and engage in predatory behavior. The populism behind these arguments to break up the tech giants is not grounded in antitrust law nor the policy behind it.

#### The counterplan solves innovation and slow growth by stimulating productivity.

Andres Vinelli & Christian E. Weller 21. “The Path to Higher, More Inclusive Economic Growth and Good Jobs.” <https://www.americanprogress.org/issues/economy/reports/2021/04/27/498794/path-higher-inclusive-economic-growth-good-jobs/>.

Relief efforts, such as President Biden’s American Rescue Plan, primarily support the demand side of the economy. The federal funds going to households, businesses, and state and local governments are desperately needed to support all parts of the economy that are struggling from an unprecedented onslaught on their financial health. These payments are an important first step to lift the economy back up to its previous levels, reducing unemployment, stabilizing economic growth, and improving financial stability. More is needed, though, to return the economy to much faster growth and build a sustainable economy that works for everybody. The goal is to raise economic capacity by emphasizing the economy’s supply side. Faster productivity growth, and thus faster economic growth, will create even more opportunities for employment and wage gains. It will also make it easier to address the country’s looming challenges of massive economic inequality, climate change, lackluster caregiving support, and crumbling public health and other infrastructure, to name a few. The ARP already includes some measures, such as financial support for higher education, that would have positive supply-side effects. Importantly, public policies can break the interconnected trends of high inequality, widespread insecurity, and low investment that underlie low productivity growth. First, policies can reduce income inequality by strengthening workers’ wages and benefits. Second, a number of policies can substantially reduce income uncertainty and volatility for households. Most notably, social insurance programs, such as unemployment insurance, health insurance, and Social Security, are critical tools to give working families some peace of mind. Third, more federal funding for research and development, a green infrastructure, and more support for education—all purviews of the public sector—can lift up productivity growth. All three types of policies will boost productivity growth. Higher incomes due to increased pay and better benefits, such as paid family and medical leave, make it less likely that workers leave an employer. Less turnover boosts workers’ on-the-job experience and their productivity, while more income stability reduces financial, psychological, and health stress for workers. This makes it easier for workers to concentrate on their work since they are typically worrying less about how to pay their bills. Less income uncertainty also makes it easier for workers to plan for, save for, and invest in their own future—for example, by moving to a new location when better opportunities arise, starting a business, or supporting their children’s education. All of these steps mean that households will have more skills and be able to better use those skills, thereby increasing productivity across the economy. Moreover, large-scale public investments will create new technologies for companies and reduce the financial risks associated with new ventures. In the end, businesses and people will be better positioned to use scarce resources.

#### The counterplan solves digital authoritarianism by combining and offensive and defensive approach.

Erol Yayboke & Sam Brannen 21. Deputy director and a senior fellow with the Project on Prosperity and Development (PPD) at the Center for Strategic and International Studies (CSIS). Leads the Risk and Foresight Group at CSIS and is a senior fellow in the International Security Program. “Promote and Build: A Strategic Approach to Digital Authoritarianism.” <https://www.csis.org/analysis/promote-and-build-strategic-approach-digital-authoritarianism>.

It is important for any coalition of democratic allies to play defense and offense at the same time: to promote resilience to digital authoritarian threats while building an affirmative alternative that diminishes the influence of authoritarian actors over time. U.S. executive-branch and congressional policymakers should view digital authoritarianism as a real threat to democratic and human rights principles at home and abroad. Tactical reactions to individual threats will not be enough; a more strategic and coordinated approach was urgently needed a decade ago, and now such an approach is long overdue. A strategic approach to digital authoritarianism should reflect the four challenges presented above, marrying tactical solutions with strategic framing. Much as the challenges themselves are overlapping, the components of a strategy should be seen as mutually reinforcing, not mutually exclusive. Promote resilience to digital authoritarianism by strengthening democracy and human rights at home Promote resilience at home. Regardless of who wins the 2020 presidential election, democratic and human rights principles promoted globally are equally relevant at home. In addition to building resilience to offensive digital tools deployed against the United States, as presented above, U.S. political leaders must focus on strengthening trust in domestic institutions. This should involve rejecting and criticizing all foreign intervention in U.S. elections, strongly supporting the right to vote in free and fair elections, resisting the urge to create or promulgate conspiracies and misinformation, committing to peaceful transitions of power, avoiding praise of authoritarians, rebuilding trust in core democratic institutions (such as a free press), and much more. For U.S. efforts to have any effect in countering digital authoritarianism abroad, it must lead by example. It is hard to imagine a successful strategic response to digital authoritarianism abroad if the United States fails to strengthen its own democracy at home. Promote democratic and human rights principles in and around authoritarian-led states via free and secure communication over a free and secure internet Promote free online expression and secure communication. Incorporate democracy, human rights, and governance experts into cybersecurity-focused efforts to counter digital authoritarianism, primarily to ensure that these responses maintain Internet freedom and do not infringe upon human rights. Strengthen policies around encryption to focus on protection of rights and safety everywhere, but especially in countries (such as Belarus) at risk of sliding further into authoritarian rule. Fund and utilize the U.S. Agency for International Development (USAID) Digital Ecosystem Fund, which is designed “to make targeted investments to achieve a vision of open, inclusive, and secure digital ecosystems that can also withstand aggressively pursued authoritarian interference.” Expand the Digital Connectivity and Cybersecurity Partnership (DCCP) a­­nd affiliated DCCP Interagency Working Group—co-chaired by USAID and the Department of State, launched in 2018, and intended to build capacity to address digital authoritarianism—beyond just the Indo-Pacific region to everywhere digital authoritarian threats exist, also incorporating advice and expertise from outside government. Promote a free and secure internet. Support the execution of USAID’s 2020–2024 Digital Strategy, using its “guiding practices” as the baseline for developing an affirmative, strategic, and principles-based approach to digital authoritarianism. Support the call in the 2018 National Cyber Strategy for the United States to “stand firm on its principles to protect and promote an open, interoperable, reliable, and secure Internet.” Be mindful and wary of efforts to create a bifurcated Internet with strong state control over censorship and access, supporting organizations such as the Freedom Online Coalition and other efforts to advance Internet openness and freedom. Avoid erecting expansive digital walls. While banning individual corporations (such as Huawei) and applications (such as TikTok and WeChat) may be deemed necessary for national security reasons, this power should be reserved for use based on specific national security threats rather than to over-extend censorship, which could be used as examples and excuses by China and other advocates of a more fragmented—and centrally controlled—Internet. Overall, the effort should be to advance principles or norms, not specific companies or nationalities. Counter digital authoritarianism at home and abroad not only with tactical defenses, but with resilience rooted in affirmative alternative visions, norms, and principles Build tactical resilience. Invest in tactical public and private countermeasures to digital tools of repression and disruption, including explainable algorithms, AI, and privacy-preserving machine learning. Facilitate greater cooperation and transparency by social media platforms and streamline information sharing between social media platforms, government, and outside researchers.

#### Multilateral development is key to solve digital authoritarianism.

Erol Yayboke & Sam Brannen 21. Deputy director and a senior fellow with the Project on Prosperity and Development (PPD) at the Center for Strategic and International Studies (CSIS). Leads the Risk and Foresight Group at CSIS and is a senior fellow in the International Security Program. “Promote and Build: A Strategic Approach to Digital Authoritarianism.” <https://www.csis.org/analysis/promote-and-build-strategic-approach-digital-authoritarianism>.

Build affirmative alternatives to digital authoritarianism, especially for countries currently forced to decide between growth and stability with authoritarian strings attached or no growth and stability Build an affirmative alternative. Issue a presidential policy directive within the first 100 days of the new U.S. administration that prioritizes advancing democracy globally and places the protection of democratic and human rights principles squarely in the national interest of the United States. Create a U.S. government strategy on democracy centered around developing an affirmative vision for U.S. efforts to strengthen democracy abroad. This vision should be grounded in broadly agreed-upon principles (i.e., bipartisan and inclusive of civil society and private sector considerations) that outline what it is we are trying to protect from authoritarianism, digital or otherwise. It should reflect lessons learned from newer democracies such as Estonia and Taiwan, which were born in the digital age. The strategy should also call for the close interagency coordination of responses to digital authoritarianism and should be mutually reinforcing with the administration’s National Cyber Strategy. Create an interagency body based out of the White House—to be housed in the National Security Council (NSC) or in the form of a policy coordination committee—with the power to coordinate a whole-of-government response to digital authoritarianism as part of this broader strategy on democracy. The interagency body should be led by a senior director on the NSC (such as the senior director for democracy, human rights, and international organizations) with the power to counter digital authoritarianism. Bolster the ability of relevant experts at the Department of State and USAID to comprehend the links between their long-standing work on democracy, human rights, and governance and the modern threats posed by digital authoritarianism. Field-based personnel in particular must be able to assess and (ideally) respond to these threats as they present themselves abroad. Enable an affirmative alternative to Chinese digital infrastructure, even if it requires congressional approval and government intervention to do so; asking partners and allies to simply reject Chinese digital infrastructure (such as that offered by Huawei or ZTE) is not a compelling enough strategy. The United States should enable alternatives by investing in innovation within its own private sector technology and digital infrastructure firms—and those in like-minded countries—and, subsequently, by expanding their global market access through strategic use of development finance. Convene a global conversation (for example, at the 2021 Group of Seven and/or 2020 Group of Twenty meetings) on how a post–Covid-19 global economy can address the fundamental inequities of the pre–Covid-19 global economy, coupling this more inclusive vision with an affirmative alternative approach to digital authoritarianism. Build stronger multilateral coalitions. Explore creating a private sector–led coalition to counter digital authoritarianism, similar to how the Global Internet Forum to Counter Terrorism unites technology companies around stopping terrorist utilization of their platforms. Promote the development and utilization of clearer multilateral frameworks and norms for using AI and protecting human rights. Avoid divergence with European allies, Japan, and other like-minded countries on digital authoritarianism. Leverage the Group of Seven and other multilateral forums to unite behind a common set of democratic and human rights principles, focusing efforts on building affirmative alternatives to digital authoritarianism (such as on digital infrastructure) in addition to coordinating tactical responses. Drive innovation and greater digital literacy in multilateral institutions, many of which are yet to catch up to today’s digital realities, much less digital authoritarian threats. A good example of how this can be done is the Innovation Cell within the UN Department of Political and Peacebuilding Affairs, designed to support the broader department to “understand and explore, pilot, and scale new technologies, tools, and practices in conflict prevention, mediation and peacebuilding.” Collaborate with U.S. private industry to ensure continued active participation and representation of U.S. and democratic interests in all relevant international technology standards-setting bodies, including but not limited to the UN’s International Telecommunication Union (ITU), the World Trade Organization, and the World Internet Conference. Use all available political capital to promote democratic and human rights principles and counter efforts to change standards in ways that increase opportunities for digital authoritarianism, as is the case with recent Chinese efforts at the ITU to fragment the Internet. The United States and its allies need to be actively engaged in the leadership campaign and election processes of these organizations, for example when the election for ITU secretary-general, currently a Chinese national, takes place in 2022.

#### Internet access outweighs and solves the dependency trap---their author.

Thembalethu Buthelezi & James Hodge 21. Thembalethu Buthelezi is Principal Economist at the Economic Research Bureau of the Competition Commission of South Africa. James Hodge is Chief Economist at the Economic Research Bureau of the Competition Commission of South Africa. “Chapter IV: Competition Policy in the Digital Economy: the South African Perspective” in Competition and Consumer Protection Policies for Inclusive Development in the Digital Era. <https://unctad.org/system/files/official-document/ditccplp2021d2_en_0.pdf>

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

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

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

#### Skills and capital financing is key also solves dependency trap---their author.

Thembalethu Buthelezi & James Hodge 21. Thembalethu Buthelezi is Principal Economist at the Economic Research Bureau of the Competition Commission of South Africa. James Hodge is Chief Economist at the Economic Research Bureau of the Competition Commission of South Africa. “Chapter IV: Competition Policy in the Digital Economy: the South African Perspective” in Competition and Consumer Protection Policies for Inclusive Development in the Digital Era. <https://unctad.org/system/files/official-document/ditccplp2021d2_en_0.pdf>

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

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

### Off

Japan DA

#### The plan is applied extraterritorially---that offends Japan.

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).

Today few of us are sympathetic with the view that the common law exists apart from and somehow transcends the jurisdiction of the courts that make it. Nevertheless, there is a powerful sense in which the rules of antitrust law are regarded as "natural," while explicitly regulatory rules are considered to be purely local, territorial, or political. This view is given considerable support by a powerful neoclassical economic model that views markets as natural, in the sense that they exist separate and apart from state policy making. 32

Within this model antitrust law is a kind of background umpire that does not make first instance choices about price, quantity, quality, new entry and the like, but that does limit the anticompetitive exercise of market power. Antitrust operates as a kind of "macro" version of contract law. The common law of contracts is designed to facilitate and protect the utility of individual private bargains; antitrust is designed to do much the same thing, but for markets as a whole. Under this conception a well defined set of antitrust principles always operates in the background, so to speak, permitting private bargaining to proceed without interference in the great majority of instances, but intervening when competitive processes go awry. Further, widespread agreement exists both inside and outside the United States on a set of core principles pertaining to such things as naked price fixing, market division agreements, and the like. Within this core, problems of extraterritoriality have largely been limited to the technical ones of devising appropriate jurisdictional rules and remedies.

In contrast, the power to regulate is different. Under the traditional view of regulation the power to set price, quantity, quality, or the right to enter a market emanates in the first instance from the government. Further, although there is widespread economic agreement on fundamental principles, regulatory design is much more specific to the sovereign-more likely to reflect the demographics, industrial or employment base, or politics of the particular state imposing the regulation.

For example, nearly all of the 50 states of the United States have an antitrust law. With relatively few exceptions, however, the substantive coverage of these antitrust laws is the same, and mimics federal law. Many states have court decisions or even legislative enactments stating that federal antitrust law should govern the interpretation of that particular state's antitrust law as well. 33 The result is that the coverage of state antitrust law is remarkably similar from one state to the next. But one can hardly say the same thing about each state's regulation of land use, power generation and distribution, taxicabs, liquor pricing, and the like. Whatever homogeneity regulatory theory might produce, the politics of regulation virtually guarantees jurisdiction-specific outcomes.

But homogeneity in antitrust policy also begins to break down when antitrust law moves beyond its fundamental neoclassical concern with cartels or well-defined exclusionary practices, and into areas where its role is more controversial or marginal. This is often the case when the antitrust laws are applied in recently deregulated markets. For example, a common antitrust problem that arises in deregulated industries falls under the general rubric of unilateral refusals to deal. In order to encourage competition, newly deregulated firms may be forced to share their facilities, information, intellectual property, or other assets with new rivals. Devising reasonable "nonregulatory" rules governing refusals to deal in such markets has always extended the antitrust laws to the margin of their competence.

Increasingly, American courts seem willing to apply antitrust law to markets regulated by foreign nations under circumstances where regulatory laws themselves would never reach. For example, neither Congress nor a state legislature would very likely attempt to regulate the customer service or information provision practices of a foreign national's telephone company. But both federal and state courts have done precisely that under the guise of antitrust enforcement.3 4

Antitrust policy makes this thinkable as a result of the confluence of two sets of doctrines. First is the expansive reach of our antitrust laws to practices that have a substantial effect on United States commerce. Second is the very narrow conception of comity that applies in antitrust cases.

As a general matter, comity concerns in the international conflict of laws requires the court to consider the competing interests of domestic and foreign sovereigns. 35 After a half century of debate over the meaning of comity in international Sherman Act adjudication, the Supreme Court gave the doctrine an extraordinarily narrow meaning in the Hartford Fire case.36 That case involved an alleged insurance boycott in which Lloyd's of London participated as reinsurer. Lloyd's conduct-agreeing with some United States insurers not to write reinsurance policies for other United States insurers who wanted to write policies with broader coverage-was neither forbidden nor compelled by British law. To the defendant's claim of comity the Supreme Court replied that the provisions of the Sherman Act governing jurisdiction over transactions in foreign commerce were mandatory. As a result, a federal court could not simply decline jurisdiction on the basis of some general balancing of interests. 37 Rather, "comity" permits a federal court to decline jurisdiction only when there was a "conflict" between the law of the foreign sovereign and United States law. Further, "conflict" was defined not under choice of law principles, but more absolutely, as occurring only when the foreign law compelled the conduct at issue. 38

Perhaps significantly, the activity of the London reinsurers was very likely reachable under United States antitrust law even under ordinary interest analysis principles. British law was found by the Supreme Court to be indifferent to what the London reinsurers were doing. Further, what they were doing was agreeing not to insure against liability for particular toxic pollution risks in the United States, and risk of liability is of course measured in relation to the physical environment and legal regime in which the injury occurs. 39 As a result, the London reinsurers were selling a product especially targeted for United States markets and allegedly participating in a boycott designed to keep broader coverage insurance policies out of that market.

But Hartford Fire's definition of comity is significantly problematic under deregulation. To the extent a foreign sovereign deregulates a public utility or common carrier, that firm enjoys greater discretion to make its own decisions. As a result, considerations of comity may no longer preclude a Sherman Act suit. What makes this especially problematic is the way that the Sherman Act has been used in the United States as a kind of replacement for the regulatory agency. Under comprehensive agency regulation a filed tariff plus regulatory oversight would have governed numerous acts by regulated firms, including pricing, entry into new markets, interconnection obligations and other duties to deal.40 Government relaxation of regulatory restrictions has given firms some discretion over these things but in the process has substituted the antitrust courts as governmental supervisor. In some situations this causes little difficulty because regulation may have been misapplied to a competitively structured industry to begin with.41 In other situations, such as long-distance telecommunication, a competitive environment has developed because of changes in technology, and topto-bottom price and product regulation is no longer necessary.42

But in a third class of situations the application of the antitrust laws is much more "regulatory" and more difficult to defend. These are the cases where unilateral conduct of the kind that was historically supervised by the regulatory agency now comes under antitrust jurisdiction. For example, under the essential facility doctrine a federal court of general jurisdiction may be asked to apply antitrust law to determine the scope of a formerly regulated firm's duty to interconnect with rivals. The circuit courts have applied the doctrine frequently in the telecommunications industry,43 but also to railroads" and natural gas pipelines.4 5 Problematically, supervising interconnection requirements involves the court in highly technical questions about the scope of the duty to deal and perhaps even about the price at which the deal must be made. In these cases we have not really "deregulated" at all; rather, we have simply substituted regulation by a government agency for regulation by a court, often through the highly inefficient and uncertain process of a jury trial. To do that in a purely domestic situation is ill-advised enough, but to do it abroad by taking advantage of the expansive jurisdictional reach of the Sherman Act is completely unjustified.

IV. Extraterritorial antitrust and foreign deregulation

As expansive as the regulatory power asserted by the United States sometimes becomes, it does not generally interfere directly into foreign governments' regulation of their own highly regulated industries. But to a large extent modem antitrust has inherited the regulatory attitude expressed by the Western Union decision discussed above. For several reasons, the idea that the United States Antitrust laws are jurisdictionally exceptional can produce overreaching that is offensive to foreign prerogatives. First, the United States antitrust laws are extremely general and make no distinction between ordinary competitive firms and public utilities or common carriers; the same rules purport to apply to all business firms. Second, the jurisdictional language of the antitrust laws is both mandatory and general to the same extent-that is, the "affecting foreign commerce" language of the basic Sherman Act and the export commerce language of the Foreign Trade Antitrust Improvement Act 6 do not distinguish between regulated and ordinary competitive firms. And third, the limiting doctrines of international law-namely Act of State, foreign sovereign compulsion, foreign sovereign immunity, and comity-do not distinguish among types of firms or types of antitrust complaints. They apply equally to both price fixing, which is at the core of antitrust concern, and to the essential facility doctrine, which lies at or outside its margin.

#### It ends the alliance.

Takaaki Kojima 02. Fellow, Weatherhead Center for International Affairs, 2001-2002. “International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy”. https://datascience.iq.harvard.edu/files/fellows/files/kojima.pdf

We are witnessing increasingly widespread and penetrating economic globalization today. As a result of trade liberalization, import restrictions or regulations on trade and investment have decreased substantially, and trans-border business activities face less barrier. At the same time, the role of trans-border business activities, especially those by so-called multinational or global enterprises, have become increasingly important and even dominant in some sectors.

As far as the territorial scope of business activities are concerned, state borders are more or less diminishing to become almost borderless; as for legal regimes, however, sovereign states retain in principle exclusive jurisdiction over their territories and nationals under international law. Business activities are regulated by the domestic laws of sovereign states or by international agreements concluded among sovereign states. The pertinent question is how to coordinate “borderless” business activities within the existing legal regimes governed by sovereign states. In the field of trade law, the measures of each state are restricted by international agreements, in particular under the GATT/WTO regime. In the field of competition law, such an international regime is lacking and the domestic laws of each state regulate private restraints of trade in the relevant markets.

Serious jurisdictional conflicts have transpired in the last several decades between the United States and other states over the so-called extraterritorial application of U.S. antitrust laws on anticompetitive conducts abroad. This problem has also caused diplomatic frictions between the United States and other states, as it concerns state sovereignty. In this essay, the author will review the historical development of international conflicts caused by the extraterritorial application of competition law and attempt to examine the options available to circumvent or solve these conflicts. The main focus will be U.S. antitrust law and its relation with other jurisdictions, mainly the European Union and Japan, considering the grave implications to competition law and policy as well as to the world economy. 2

II. Extraterritorial Application of U.S. Antitrust Laws

Problems concerning the extraterritorial application of U.S. antitrust laws have been discussed in many publications. Of the U.S. antitrust laws, the Sherman Act applies to “commerce … with foreign nations ” (Section 1) without qualifying provisions concerning its territorial scope as “within the United States” (Section 2) or “in any section of the country” (Section 3) as specified in the Clayton Act. In the past, U.S. courts interpreting the Sherman Act of 1890 and other antitrust laws commonly followed the traditional territorial principle with regard to its jurisdictional reach. In the American Banana case (213 U.S. 347 (1909)), where all the acts complained of were committed outside the territory of the United States, including the defendant’s alleged inducements of the Costa Rican government to monopolize the banana trade, the U.S. Supreme Court dismissed the complaint on the ground, inter alia, that acts committed outside of the United States are not governed by the Sherman Act. In this case, the territorial principle in the classic sense was applied.

In later decisions such as the American Tobacco case (221 U.S. 106 (1911)) and the Sisal case (274 U.S. 268 (1927)), jurisdiction was exercised over the defendants on the ground that although the agreements in question were concluded by foreigners outside the United States, jurisdiction was limited to what was performed and intended to be performed within the territory of the United States. In these cases, the territorial principle was applied more flexibly, but it has been observed that this application cannot be argued other than as a sensible and reasonable deployment of the objective territorial theory. 3

An entirely different approach was taken in the Alcoa case (148 F.2d. 416 (1944)), in which foreign companies outside the United States had concluded the agreements. The Court of Appeal for the Second Circuit held it settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders. It went on further to state that the agreements, although made abroad, were unlawful if they were intended to affect imports and did affect them.

This theory of the intended effect (the effects doctrine) elaborated in the Alcoa case was criticized by many as an excess of jurisdiction under public international law. For instance, R.Y. Jennings noted that “in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners provided only that the agreement was intended to have repercussions upon American imports or exports,” 4 while F.A. Mann argued that “the type of effect within the meaning of the Alcoa ruling has nothing in common with the effect which by virtue of established principles of international jurisdiction confers that right of regulation.” 5 Neverthele ss, since the Alcoa case, U.S. courts have continued to follow the new jurisdictional formula of the effects doctrine.

In response to excessive application of U.S. antitrust laws, especially with respect to courts’ orders to produce documents such as subpoena duces tecum located abroad, a considerable number of states have issued diplomatic protests. Australia, France, the United Kingdom, the Netherlands, and New Zealand have even enacted blocking legislation. 6 The protesting states maintain that taking evidence abroad, including an order to produce documents, is an exercise of extraterritorial enforcement of jurisdiction that, under international law, requires the consent of the state where the evidence is located. The United Kingdom has been one of the strongest opponents to U.S. claims of extraterritorial jurisdiction. The U.K. government stated for instance that “HM Government considers that in the present state of international law there is no basis for the extension of one country’s antitrust jurisdiction to activities outside of that country of the foreign national.” 7 The Protection of Trading Interest law was enacted in 1980, which provides to extensively thwart the extraterritorial application of U.S. antitrust laws. The U.K. government invoked the provisions in the Laker Airways case (1983 W.L.R. 413) in 1983.

Having faced the antagonistic reactions of other states, U.S. courts began to show some restraint in assuming extraterritorial jurisdiction. In the Timberlane case (549 F.2d. 9 th Cir. (1976)), the court concluded that it had jurisdiction over alleged anticompetitive conducts in Honduras but refrained from asserting extraterritorial jurisdiction after having applied three tests: first, whether the challenged conduct had had some effect on the commerce of the United States; second, whether the conduct in question imposed a burden on U.S. commerce; and third, whether the complaint’s interests of and links to the United States were sufficiently strong vis-à-vis those of other nations to justify an assertion of extraterritorial authority. The Foreign Trade Antitrust Improvements Act enacted in 1976 applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce, The U.S. enforcement agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), have adopted this jurisdictional rule of reason formula since the Enforcement Guidelines for International Operations of 1988. However, divergent views exist as to whether the third test of balancing the interests of other states is a rule of international law or just a comity. 8 Furthermore, not all U.S. courts have consistently applied the test of balancing interests. 9

In 1993, the Supreme Court decision in the Hartford Fire Insurance case (113 S. Ct. 2891 (1993)) reaffirmed the effects doctrine, stating that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. The Court then took a restrictive view on the test of balancing interests, stating that the only substantial question is whether there is a true conflict between domestic and foreign law, and held that no such conflict seemed to exist because British law did not require defendants to act in a manner prohibited by U.S. law. 10

Japan maintains the territorial principle and rejects the effects doctrine, stating that the effects doctrine cannot be regarded as an established rule of international law. In the view of the Government of Japan, the extraterritorial application of U.S. domestic laws (including U.S. antitrust laws) based on the effects doctrine is not allowed under general international law. 11 In the Nippon Paper case, where a Japanese company was prosecuted under the Sherman Act, the Japanese government submitted a brief of amicus curiae where it stated, inter alia, that the extraterritorial application of the Sherman Act to a conduct of a Japanese company engaged in business in Japan is unlawful under international law. 12 Nonetheless, the U.S. Supreme Court affirmed the Court of Appeal decision, which assumed the extraterritorial application of the Sherman Act to a criminal case for the first time (118 S. Ct. 685 (1998)).

#### The alliance solves extinction.

Richard Armitage 16. \*\*United States Deputy Secretary of State. \*\*John Hamre, president and CEO of CSIS. \*\*Ryozo Kato, Japanese lawyer and career diplomat who served as the Japanese Ambassador to the United States from 2001 to 2008. “The U.S.-Japan Alliance to 2030 Power and Principle.” Report of the Commission on the Future of the Alliance. 2/29/2016. https://www.spf.org/topics/finalreportfinal.pdf

The U.S.-Japan Alliance has helped to provide security and prosperity to the Asia-Pacific region and the broader international community for more than half a century. The Alliance enabled the United States and Japan to prevail in the Cold War, based on the principles of deterrence, democratic values, and free market dynamism. Today, the U.S.-Japan Alliance is as strong as it has been at any time during its existence. The Commission believes the Alliance will need **all of its current strength** and more, since the international security environment over the next 15 years will be as **challenging** and **uncertain** as any the **U**nited **S**tates and Japan have faced. In addition to challenges from a rising **China** and aggrieved **Russia**, the **U**nited **S**tates and Japan both have vital interests in the **Middle East**, which is an increasingly unstable and violent region. **Global challenges** such as **terrorism**, **nuclear proliferation**, and **climate change** will also require wise policy and firm action. One central characteristic of this emerging strategic dynamic will be intensified competition for power and influence across ideological, economic, and security spheres between liberal democracies on the one hand and ambitious or aggrieved authoritarian regimes on the other. The Commission believes that this competition need not—and in fact is unlikely to—result in war. Moreover, there are many areas in which countries from across the ideological spectrum can and will increase mutual cooperation, including macroeconomic coordination, countering violent Islamic extremism, responding to climate change, and reversing nuclear proliferation by states such as North Korea. Nevertheless, there remain fundamental questions about international norms where **leading democracies** like the **U**nited **S**tates and Japan will hold starkly different views from more authoritarian states. These include: the rights of citizens to choose their own governments; the rights of minorities within nations; the independent role of the judiciary and the press; the role of the private sector in the economy; freedom of navigation and flight in international sea and air space; and freedom of the Internet. In Asia, the **U**nited **S**tates and Japan will have to **shape the strategic environment** by encouraging responsible Chinese behavior and imposing costs for destabilizing activities. To that end, the **U**nited **S**tates and Japan will have to build up their own power, and use it wisely and firmly, to **preserve a world order** that favors both allies’ shared values. The United States and Japan have taken a number of very important actions in the recent past to strengthen the Alliance. These include Japan’s issuance of its first national security strategy, establishment of a National Security Council (NSC) and an associated permanent staff organization, increases in the defense budget, and passage of security legislation authorizing closer cooperation with the United States. The United States has stated an intention to rebalance U.S. strategic attention and military forces towards the Asia-Pacific region. Both countries have concluded updated bilateral Defense Guidelines for closer security cooperation and have reached an agreement for wider and deeper economic cooperation through the Trans-Pacific Partnership (TPP). These achievements provide a solid foundation for the continued actions that the Commission recommends in this report. The **U**nited **S**tates and Japan have unmatched strengths for the competitive environment they will face. Together the two allies account for 28 percent of the world’s gross domestic product (GDP) and 43 percent of the world’s wealth. The economies of both countries use and produce the highest levels of technology, and have the **r**esearch and **d**evelopment systems to stay at the cutting edge of discovery and innovation. Their citizenries are well educated, hardworking, and innovative. Their armed forces are among the world’s most advanced and are well led and trained. Their values of freedom and democracy have a universal appeal that has been repeatedly demonstrated in all parts of the world and particularly in Asia. The U.S.-Japan Alliance has endured for 60 years and adapted to meet an array of new internal and external challenges. The Commission believes that the United States and Japan must develop a shared vision of the world both nations seek in the next 15 years. Democracies need a vision to inspire their own citizens and to synchronize the efforts of their governments and private organizations. As partners in an increasingly interconnected and competitive world, the United States and Japan must also offer a vision that will gain the support of other countries. The Commission proposes the following vision for the U.S.-Japan Alliance: The United States and Japan seek a world in 2030 in which all nations are secure, peaceful, prosperous, and free. Working to build this world, the United States and Japan will make national contributions that reflect each nation’s respective capabilities, legal obligations, and traditions, but will always remain united on shared goals. The United States and Japan are global powers with global responsibilities, but their Alliance will continue to focus as it always has on the peace and prosperity of the Asia-Pacific region. Peace and Security: The United States and Japan will work together to:  preserve peace and stability in the Asia-Pacific region based on the Mutual Security Treaty through bilateral efforts to maintain a favorable balance of power and to deter and, if necessary, to defeat armed aggression and attempts at coercion against their own interests, and those of their allies and friends;  defend and preserve the existing order based on established international rules and norms;  seek peaceful, negotiated resolution of issues between nations, free from military force or coercion;  support multilateral organizations in developing solutions to global challenges; and  lead and participate in international actions against state and non-state actors that use terrorist tactics and criminal actions or otherwise threaten the safety of their citizens and those of their allies and friends. Prosperity: The United States and Japan will work together to:  support the unimpeded international flow of investment, goods, and services to raise the prosperity of all nations, especially those at lower levels of development;  provide assistance both through international organizations and directly to developing nations to improve all the aspects of economic development and governance, private sector competence, and human capacity, including women’s empowerment;  strengthen existing institutions such as the World Bank and International Monetary Fund that provide development assistance and seek to promote principles of good governance; and  play leading roles in reducing environmental threats to the health, and potentially the safety, of their own citizens and others around the world. Freedom: The United States and Japan will work together to:  support advancement of the principles expressed in the United Nations (UN) Universal Declaration of Human Rights;  ensure the observance of these principles in their own countries;  speak out and take clear public stands in the support of those principles; and  work over the long term, and when opportunities arise in the short term, to advance those principles in authoritarian countries as well as failing states. In this report, the Commission recommends a set of coordinated policies that will move the Alliance closer to achieving its shared vision of a peaceful, secure, prosperous, and free world. As major economic powers and democracies, Japan and the United States should continuously stress two foundational pillars of the Alliance. First, leaders and opinion makers in the United States and Japan need to strengthen and sustain public support in both countries for active international leadership, using the full range of foreign policy tools, including military capabilities when necessary. In the United States, the wars in Iraq and Afghanistan have caused debates in both the Republican and Democratic parties about the utility of force, particularly with respect to the Middle East. In Japan, although security legislation was enacted in 2015 to allow the exercise of the right to collective self-defense, there is persistent and substantial opposition to a more active security role for the military, and misgivings about the use of military force—even for purely defensive purposes. The Commission recognizes that military power cannot be the sole or even the primary instrument of national security policy. However, the potential employment of military force is often necessary to support diplomacy, deter aggression, and keep the peace; and the utilization of the armed forces, whether in the form of advisers, peacekeepers, or combat units, will remain essential to deal with some threats to peace and security in the future. The United States and Japan must have fully-funded, modern, and highly capable military forces, and they must be willing to employ them in support of the peaceful, secure, prosperous, and free world that they seek. Leaders in both countries have a responsibility to explain these realities to their publics. Second, in order to provide the foundation for the policies outlined in this report, both countries need to take action to support their economies, to resume economic growth in the case of Japan, and to sustain recovery from the recession of 2008 in the case of the United States. Without higher rates of economic growth, the United States and Japan will face significantly greater difficulties managing the international challenges that are likely to emerge over the coming 15 years. Both countries have the fiscal and monetary policy tools necessary to stimulate growth, but both must also undertake structural changes that require continued political attention. In the case of Japan these include: growing the workforce in the face of a falling national birth rate; increasing productivity through more widespread adoption of information technology; and reversing the growth of the highest debt levels of any advanced country. In the case of the United States these include: modernizing the country’s aging physical and cyber infrastructure; containing the costs of medical care and social security payments for the large generation now retiring; and providing real energy security by coupling the increased production of domestic oil and gas with reduced dependence of the transportation sector on oil. Both countries must also improve their educational systems to create the digital workforce of the future. II. The Strategic Environment through 2030 For the first time in nearly a quarter century, **the world** is witnessing **multiple momentous challenges** to the international order. **China**’s emergence, **Russia**’s resurgence, and the Islamic State of Iraq and the Levant’s (**ISIL**’s) barbarity are forcing the **U**nited **S**tates and Japan to address simultaneous, diverse threats to the international order. Within Asia, increasing prosperity and economic interdependence coincide with intensifying **friction among the major powers**. Changes in relative power, rapid expansion in the military budgets of some states, **territorial disputes**, historical animosities, **irregular threats**, and **nuclear proliferation** all present **serious risks** to regional security. Managing these challenges will require an understanding of how long-term trends, such as demographics, technology, and climate change, are likely to affect the strategic environment. Asia is the world’s most dynamic region, so understanding current trends and potential future discontinuities is essential if the United States and Japan are to adopt an overall strategy that is capable of adapting effectively to rapid shifts in the security environment. While regional trends in the Asia-Pacific region favor continued growth and economic integration, there are pockets of uncertainty that could threaten both economic progress and political stability. These include: obstacles to China’s economic transition from its past export-led growth model to a domestically driven model; the shrinking working age population in Japan, South Korea, China, Taiwan, and Singapore; and the over-reliance of countries such as Taiwan, South Korea, Malaysia, Thailand, and Australia on Chinese momentum to drive their own growth. Economic growth and integration in Asia have been driven by intra-regional trade as well as global investment flows and production networks, underpinned by the international financial institutions established at Bretton Woods and sustained since then with the active support of Japan and the United States. However, as the international economy has diversified, the original managers of global financial governance, such as the G-7, have lost ground to more inclusive but less effective groupings, such as the G-20. Moreover, progress on global trade liberalization at the World Trade Organization (WTO) has stalled. China is challenging the existing international financial institutions with the Asian Infrastructure Investment Bank (AIIB) and its new “One Belt, One Road” initiatives. At the same time, the Trans-Pacific Partnership (TPP), led by the United States and Japan, has the potential to reboot international trade liberalization and governance. Passage of TPP in Japan, the United States, and the ten other participating countries would boost economic growth in Asia by reducing barriers, establishing standards for ensuring protection of intellectual property in new areas such as e-commerce, empowering China’s economic reformers as Beijing is drawn by preferential tariffs to join TPP, animating negotiations on the Transatlantic Trade and Investment Partnership (TTIP), and perhaps eventually helping to revitalize the pursuit of global free trade agreements through the WTO. Governance of global trade and finance is in flux, but the forces of liberalization and integration are still present. Beyond these economic concerns the dangers of **climate** change and **ecological degradation** threaten the region. The ability of the major Asia-Pacific economies to cooperate in the face of all these **transnational challenges** will have **important implications** for the future strategic environment. While China and the United States are the world’s leading emitters of greenhouse gases (in that order), Japan is the world’s superpower in clean technology and energy efficiency. There are encouraging signs of U.S. and Chinese initiatives to curb greenhouse gas emissions as well as the recent agreement at the 2015 Paris Climate Conference, but these promises remain aspirational and unenforceable, requiring further efforts at bilateral, regional, and global cooperation to reduce carbon emissions.

### Off

States CP

#### The 50 states and all relevant subnational entities should:

#### - Enforce federal antitrust laws to separate platforms from commerce for platforms in the private sector.

#### - Enact parallel statutes adopting the same principle.

#### Solves.

Juan A. Arteaga & Jordan Ludwig 21. \*Former Deputy Assistant Attorney General for the US Department of Justice’s Antitrust Division. JD, Columbia Law School. \*\*Partner in the Antitrust and Competition Group at Crowell & Moring LLP. JD, Loyola Law School. “The Role of US State Antitrust Enforcement”. Global Competition Review. 1-28-2021. <https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement>

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States’ antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so.

Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring parens patriae suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

### Off

T-Private Sector

#### Interp---private sector means all non-governmental individuals or entities.

Senate Report 95. “S. Rept. 104-1 – Unfunded Mandate Reform Act of 1995”. 104th Congress. 1995. https://www.congress.gov/congressional-report/104th-congress/senate-report/1

“Private sector” is defined to cover all persons or entities in the United States except for State, local or tribal governments. It includes individuals, partnerships, associations, corporations, and educational and nonprofit institutions.

#### Violation---the plan only applies to digital platforms, a specific subset of the private sector.

#### Vote Neg:

#### 1. Limits---there are infinite potential subsets---industries, products, companies, individuals, etc.

#### 2. Ground---only economy-wide Affs have link uniqueness and literature.

### Off

Politics DA

#### Infrastructure passes---PC is key.

Lisa Mascaro, 10-28-2021, "Biden announces 'historic' deal — but still must win votes," AP NEWS, https://apnews.com/article/joe-biden-congress-democrats-budget-framework-60a1bc276d0ab8eb3e0347fc54ee8c2c

President Joe Biden announced Thursday that he and Democrats in Congress have reached a “historic” framework for his sweeping domestic policy package. But he still needs to lock down votes from key colleagues for what’s now a dramatically scaled-back bill.

Eager to have a deal in hand before his departure late in the day for global summits, Biden made his case privately on Capitol Hill to House Democrats and publicly in a speech at the White House. He’s now pressing for a still-robust package — $1.75 trillion of social services and climate change programs — that the White House believes can pass the 50-50 Senate.

The fast-moving developments put Democrats closer to a hard-fought deal, but battles remain as they press to finish the final draft in the days and weeks ahead.

“Let’s get this done,” Biden exhorted.

“It will fundamentally change the lives of millions of people for the better,” he said about the package, which he badly wanted before the summits to show the world American democracy still works.

Together with a nearly $1 trillion bipartisan infrastructure bill, Biden claimed the infusion of federal investments would be a domestic achievement modeled on those of Franklin Roosevelt and Lyndon Johnson.

“I need your votes,” Biden told the lawmakers at the Capitol, according to a person who requested anonymity to discuss the private remarks.

But final votes will not be called for some time. The revised package has lost some top priorities, frustrating many lawmakers as the president’s ambitions make way for the political realities of the narrowly divided Congress.

Paid family leave and efforts to lower prescription drug pricing are now gone entirely from the package, drawing outrage from some lawmakers and advocates.

Still in the mix, a long list of other priorities: free prekindergarten for all youngsters, expanded health care programs — including the launch of a new $35 billion hearing aid benefit for people with Medicare — and $555 billion to tackle climate change.

There’s also a one-year extension of a child care tax credit that was put in place during the COVID-19 rescue and new child care subsidies. An additional $100 billion to bolster the immigration and border processing system could boost the overall package to $1.85 trillion if it clears Senate rules.

One pivotal Democratic holdout, Sen. Kyrsten Sinema of Arizona, said, “I look forward to getting this done.”

However, another, Joe Manchin of West Virginia, was less committal: “This is all in the hands of the House right now.”

The two Democrats have almost single-handedly reduced the size and scope of their party’s big vision, and are crucial to sealing the deal.

#### The plan trades off.

Peter C. Carstensen 21. Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School. “The ‘Ought’ and ‘Is Likely’ of Biden Antitrust”. Concurrences. February 2021. https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen

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

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

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

#### The bill solves existential climate change.

Jason Bordoff 21. March 15; J.D. from Harvard Law School, co-founding dean of the Columbia Climate School, Professor of Professional Practice in International and Public Relations at Columbia University; Foreign Policy, “The Time for a Green Industrial Policy Is Now,” https://foreignpolicy.com/2021/03/15/biden-climate-energy-transition-green-new-deal-industrial-policy/

Now that U.S. President Joe Biden’s $1.9 trillion plan for economic stimulus and pandemic relief has become law, his administration will turn its attention to a multitrillion-dollar plan to rebuild the United States’ ailing infrastructure. Its scope goes far beyond roads and bridges. Viewed in combination with other parts of Biden’s economic agenda, it reflects a new openness on both sides of the aisle to what has traditionally been known as industrial policy. Critics deride industrial policy as protectionist and as the government picking “winners,” but when it comes to clean energy—a top priority for Biden—a push by his administration to build new and innovative clean energy sectors using industrial policy may actually be the greatest contribution it can make to combating climate change.

Industrial policy, long anathema to mainstream economic policymakers in Washington, is back in vogue. The Biden administration’s Build Back Better economic plan includes targeted support for specific industries to make them more competitive with Asia and Europe and government procurement provisions to boost domestic manufacturing with “Buy America” requirements. As White House economist Jared Bernstein wrote in Foreign Policy, “the rationale for industrial policy is as strong as ever.” Biden’s national security advisor, Jake Sullivan, similarly wrote in Foreign Policy that “advocating industrial policy … should be considered something close to obvious.” Even Republicans, such as Sen. Marco Rubio, have been willing to deviate from the free-market’s gospel by endorsing industrial policy.

The push for industrial policy has been particularly strong for clean energy—as a way to combine battling climate change with building strategically important parts of the economy. The Green New Deal in 2019 drew the link between achieving net-zero emissions and creating millions of jobs by investing in the “industry of the United States.” Biden’s top economic advisor, Brian Deese, said, “some of the biggest opportunities” in climate policy right now are “what some people would call straight-out industrial policy.”

Industrial policy is a phrase used to mean different things. Broadly speaking, it refers to government intervention in the economy to promote and protect targeted sectors, often those considered strategically important. The term is therefore instinctively distasteful to those schooled in the laissez-faire, free-market orthodoxy of Adam Smith’s “invisible hand.” They worry about a creeping state capitalism that favors well-connected companies, stifling innovation and competition.

In reality, of course, the energy sector has never been free of government intervention. Nearly every source of energy receives some degree of favorable tax treatment. Nuclear energy receives government liability protection. Government investment and research gave rise to the shale revolution. As Robert McNally points out in his book, Crude Volatility: The History and the Future of Boom-Bust Oil Prices, the Texas Railroad Commission was the most successful oil cartel in history in setting prices, and even a Republican president like Dwight D. Eisenhower protected the domestic oil industry from the threat of imported oil.

To be fair, there are good reasons for government intervention in the energy market. Energy use and production can impose harm on others, such as through air pollution and carbon emissions. Energy innovation delivers benefits to all of us beyond the economic gains the innovator can capture. Energy infrastructure investment, such as pipelines, transmission lines, and electric vehicle chargers, may be hampered if any one firm’s investments benefit all their competitors or if it risks monopolistic market power of energy delivery mechanisms.

The argument for government’s role in the energy sector is even stronger today. First, the world faces an existential threat from climate change. With time running short to begin sharply curbing emissions, market forces will not deliver the pace of transition needed without robust government intervention. Second, the scale of that transition creates enormous economic opportunity to build new energy sectors

. With the economy in a deep hole from the pandemic, leading in these new sectors can spur significant job growth. Finally, given the strategic importance of energy—critical to every citizens’ economic and physical well-being and safety, as the recent crisis in Texas reminded us—there is a strong national security rationale to develop these technologies and capabilities in the United States. As the energy system transitions to cleaner alternatives, there will be new risks associated with the critical minerals’ supply chains required for renewable energy and batteries, cybersecurity, and global trade chokepoints, which argues for reinforcing the domestic U.S. industrial base in these technologies.

To tackle the problem of climate change, Sullivan and Biden’s China advisor, Kurt Campbell, persuasively argued that the United States must pursue not only cooperation but also economic competition with China, for example. Noting that both Democrats and Republicans “are making a convincing case for a new U.S. industrial policy,” they called for more government investment in infrastructure and research in clean energy, among other areas, to confront such a “challenging economic competitor” as China.

The argument against industrial policy to combat climate change is that the government cannot anticipate which technologies will deliver the cheapest solutions. Yet, as the International Energy Agency explained, most of the key technologies the energy sector needs to reach net-zero emissions are known today. Market forces are still powerful—when properly directed by a carbon price—to give firms and consumers the right incentives to adopt and develop those technologies and to determine which ones emerge as the best solutions in different energy sectors.

Moreover, critics of industrial policy argue that if the goal is to reduce emissions as fast as possible, it should matter less whether the technology is made in the United States than whether it is as cheap as possible so more people will adopt it. Germany’s Energiewende, a comprehensive plan to shift the country to renewable energy, has been criticized for its high cost per ton of emissions avoided, which economists have estimated to be between $600 and $1500, much costlier than most other policy interventions. (To put the German numbers in context: The Obama administration estimated the total harm caused by one ton of carbon dioxide to be around $50, although there are good arguments to revise that figure higher.) Jason Furman, a Harvard professor and former Obama administration economic advisor, said “if you think climate change is the biggest challenge facing the country … you should want to make sure a lot of solar and wind energy is produced in the United States. You shouldn’t care nearly as much where panels and turbines are produced.”

Furman’s view is correct if the goal is to cut emissions in the United States as fast as possible. But what if the goal is to decarbonize the entire world’s emissions as fast as possible? What if the goal is to show climate leadership by helping all nations achieve net-zero emissions? In that case, the measure of U.S. climate policy should be less about how fast it brings down domestic emissions, only 15 percent of the world’s annual total, than about how fast it brings down the cost of clean technologies needed for the rest of the world to decarbonize.

Some clean energy technologies, such as solar and wind power or electric vehicles, are fairly cost competitive today relative to their carbon-intensive counterparts. Yet as Bill Gates explained in his new book, the cost difference between carbon-emitting and carbon-free production—what he calls the “green premium”—remains exceptionally high for many sectors and technologies, such as cement and steel, air travel and shipping, long-duration energy storage to cope with the intermittency of renewable energy, and steady sources of electricity like nuclear power or natural gas with carbon capture and storage. These technologies may not be needed to make a large dent in emissions by 2030, but they will absolutely be needed to achieve net-zero emissions by mid-21st century. Consider that the largest source of global greenhouse gas emissions comes from what Gates calls “making things,” such as the production of cement, steel, and plastics—sectors that will almost certainly need nascent technologies to decarbonize.

To promote domestic industries developing technologies for such hard-to-decarbonize sectors, policies should boost demand for such products, spur their deployment, and lower production costs. As first U.S. Treasury Secretary Alexander Hamilton famously explained: “In matters of industry, human enterprise ought, doubtless, to be left free in the main, not fettered by too much regulation; but practical politicians know that it may be beneficially stimulated by prudent aids and encouragements on the part of the Government.”

What might such a clean energy industrial policy look like? Dramatically increasing clean energy research and development funding can accelerate needed innovation. Subsidies can lower the cost of clean energy technologies, and a carbon price can increase the cost of carbon-intensive alternatives. The government can use its procurement power to create more demand or reduce risk for developers by signing long-term energy purchase agreements or guaranteeing them a certain price by paying the difference to prevailing market prices (the “contract for difference” model used in the United Kingdom). Low-cost loans and loan guarantees can support projects by lowering the cost of capital and the barriers to accessing private capital because of perceived technological risk. Infrastructure investment and streamlined permitting can boost demand and overcome chicken-and-egg problems. For example, there may be little incentive to develop zero-carbon hydrogen or install carbon-capture technology on power plants if there are no pipelines to transport fuel or carbon dioxide—but firms will not build the infrastructure until the new technology is commercialized. Trade and economic policy can align U.S. competitiveness with a global clean energy transition, such as through export finance to help clean energy companies compete with Chinese and other competitors in emerging markets. Some argue industrial policy should also protect U.S. firms through import tariffs or “Buy America” provisions, but such protectionist tools risk backfiring if retaliatory measures by other countries close export markets to these new domestic industries.

There are three reasons a U.S. clean energy industrial policy makes particular sense today. First, the technologies needed for sectors that are hard to decarbonize also offer many of the biggest economic opportunities for growth. According to the International Energy Agency, almost half of the cumulative emission reductions needed to achieve net-zero emissions by 2050 come from technologies that are not yet commercially available. China already dominates the market for solar panels and batteries, a result of government decisions taken more than a decade ago, so it would be very difficult for the United States to displace China in these technologies, which China already produces very cheaply. By contrast, the United States is well-positioned to build a strong industrial base to produce and export zero-carbon energy in the form of hydrogen and ammonia, fuel cells to produce zero-carbon electricity, or carbon-capture and removal technologies.

Second, these technologies will be needed to decarbonize globally, and by bringing the cost of these technologies down through government investments, Washington can help accelerate their deployment outside the United States as well. In this way, a U.S. industrial policy to promote clean energy can serve not as protectionism but as one of the country’s greatest contributions to global efforts to combat climate change. In the future, roughly 95 percent of all greenhouse gas emissions will come from outside the United States. Yet developing market countries, which are poorer and use much less energy per capita than developed countries do, will not adopt low-carbon solutions unless they are affordable.

Third, industrial policy that drives down the cost of clean energy “green premiums” while also putting U.S. citizens to work can be among the most effective ways to account for the United States’ historic responsibility for the climate change problem. Climate change results from the cumulative total of all carbon emissions over time, and as of 2019, the United States has contributed 25 percent. By contrast, the entire continent of Africa represents only 2 percent. One way to address this inequity is for wealthy countries to send cash to poorer countries. For example, the Biden administration has pledged that the United States will fulfill its 2014 commitment to provide climate-related assistance to poorer countries, of which $2 billion is still outstanding. But making it affordable for developing countries to grow their energy use and prosperity in climate-friendly ways can be a far greater contribution.

At present, U.S. climate policy ambition is being framed around what commitment Biden will make to reduce domestic emissions by 2030. Yet the steps the Biden administration takes to invest in nascent clean energy technologies and research can be even more important to long-term temperature stabilization goals, even if most of the dividends come after 2030 because of the time it takes for hydrogen, long-duration power storage, carbon capture, advanced nuclear power, and other emerging technologies to scale.

### Dynamism Adv---1NC

#### New consensus in CWS will be sufficient to solve the aff

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

4.1.2 The Problems are Practical, Not Legal or Conceptual

The concern about CW’s supposed blind spots in platform markets is misplaced. Let us start with the first and second blind spots: The idea that CW-driven antitrust cannot address problems of platform innovation and monopsony power is wrong: both conceptually and as a matter of law.

Take innovation first. It is universally accepted that technological innovation improves both consumer and total welfare in many ways other than by increasing allocative efficiency and that the welfare benefits of innovation are in aggregate much greater than those from increasing allocative efficiency (Solow 1957). Conceptually—using the stylized supply and demand curves that are so common in antitrust analysis—the welfare improvements that result from technological innovation can be represented as rightward shifts in the demand (reflecting product improvements) and supply (refleting productive efficiencies) curves. The normative implications of such shifts are obvious: A firm that prevents rivals from effecting such shifts is able it to charge higher prices for existing products or services than otherwise, with a resulting reduction in output compared to the but-for world, and in that way can be said to have gained market power.

The cases recognize this, for they have long emphasized the very dynamic, nonprice harms with which CW critics are concerned. At least as early as Judge Hand’s seminal 1945 decision in United States v. Aluminum Co. of America, antitrust law has been keenly interested in dynamic competition, entrepreneurship, and entry. And cases that were decided after the triumph of the CW paradigm in the late 1970 s or early 1980 s are to the same effect. In U.S. v. Microsoft Corporation, for example, the court condemned practices—unrelated to price—that threatened to raise entry barriers and thus to reduce or delay innovation.

The same is true of monopsony power. As a conceptual matter, monopsony power is the mirror image of monopoly power (Lerner 1934). Deadweight loss, wealth transfer, and perverse incentives in seller markets are parallel to those in buyer markets. If CW is understood as total welfare or trading partner welfare, it encompasses buy-side or monopsony issues to the same extent as sell-side or monopoly issues (Hemphill and Rose 2018).

And the case law reflects the application of antitrust law in just that way (Werden 2007). In U.S. v. Adobe Systems, Inc., et al. for example, the Justice Department prosecuted a series of bilateral agreements amongst several large technology firms—including Google, Apple, Intel, Pixar, Intuit, and Adobe—that had allegedly agreed to refrain from soliciting, cold calling, recruiting, or otherwise competing for each other’s computer engineers and scientists. The Justice Department noted that in a “well-functioning labor market, employers compete to attract the most valuable talent for their needs”. And it regarded the agreement as facially anticompetitive because it “disrupted the normal price setting mechanisms that apply in the labor setting”. The Justice Department has also challenged mergers on the ground that they would injure competition in buy-side markets.

So, one might ask, why the controversy over CW? The answer is that successful challenges to pure innovation harms and monopsony power have been rare. The problem, however, is not legal or conceptual. It is practical. Like all decision-makers, antitrust agencies and courts are constrained in their ability to discover facts that are imperfectly observable (e.g., successful entry deterrence), measurable (e.g., product quality), or predictable (e.g., innovation and technological progress). Some data are easier to obtain, and some facts are easier to establish. So public and private antitrust enforcers have, for reason of prudence or pragmatism, focused on price and output effects.

Enforcers and courts do examine non-price effects and upstream markets, mindful that conduct can produce either injury or improvement, loss or benefit. Consider the FTC’s 2013 decision to terminate its investigation against Google. The Commission explained that the search platform’s “display of its own content could plausibly be viewed as an improvement in the overall quality of Google’s search product”.

And in Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.—which was not a platform case—the Supreme Court rejected a claim of anticompetitive buy-side conduct: not on the ground that such conduct was beyond the reach of the antitrust laws, but because the plaintiff had failed to show that the conduct in question was anticompetitive.

Similarly, the criticism that current antitrust enforcement has not prevented innovation harm caused by shootout mergers has nothing to do with the CW standard. For one thing, many of those acquisitions are too small to meet the requirement for pre-merger notification. More important, those acquisitions might be pro-competitive for a number of reasons. They often—or even usually—provide a profit-maximizing exit opportunity for early investors in new and unproven technologies a

marked

nd are thus likely to promote investments in innovation. They can both enable small units with organic constraints to scale through external growth and enhance opportunities for socially efficient combination of complementary assets and the ability and incentives of purchasing incumbent platforms to innovate.

The acquisitions might, on the other hand, be harmful if they “nip in the bud” nascent or potential competition that would otherwise take place. The enforcement problem is a practical one: In platform markets, it is difficult to distinguish startup acquisitions that seek to extinguish an incipient competitive threat “from a situation in which the dominant incumbent can and will greatly expand the reach and usage of the target firm’s products” (Shapiro 2017). Nothing about the CW standard prevents the law from incorporating different presumptions about the likely pro- and anti-competitive effects of such mergers based on different assessments of factual likelihoods or different attitudes about the relative risks of Type 1 and Type 2 errors.

The same can be said about the argument that antitrust law cannot adequately address anticompetitive conduct in “zero price” markets. The problems here are neither conceptual nor legal. For one thing, there is often less to “zero price” than meets the eye. First, the “zero price” is sometimes temporary, when the product or service is new or elementary (which is, incidentally, a common feature in intangible markets with beta and test versions). Antitrust law has ample experience with temporary low-price policies that are followed by price increases: such as loss leading, versioning, or two-part tariffs, some of which are ubiquitous on platform markets.

Second, there is less of a dichotomy between “zeroprice” services and others than the rhetoric suggests. “Zero price” refers to the nominal monetary price that is charged by the seller for services that the customer pays back with a non-monetary contribution, and a zero monetary price is not always the same as “free.” In platform markets, for example—such as search and social networking—the user transfers valuable resources to the platform: time, attention, and personal data (search queries, social graph, sentiment information). In principle, therefore, antitrust decision makers could estimate the total monetary and non-monetary price and analyze the market similar to any other. Estimating the non-money price is, however, likely to be very difficult as a practical matter.

Third, sustained zeroprice markets are typically one side of a multi-sided market or platform in which the seller generates revenue from other sides. Obvious examples include broadcast television, “free” shoppers or other newspapers, and a multitude of online services, such as those that are offered by Google or Facebook. And, as will be seen in the discussion below of the American Express case, no changes to the CW standard are required in order for antitrust law sensibly to address issues that are raised by multi-sided markets or platforms.

Still, zero price markets do sometimes present new challenges. Among other things, they can induce customer lock-in and distort competition in complementary markets, and they require decision makers to use tools other than analyses of pricing data to define markets and assess market power. These challenges are usually not insurmountable. The competitive harm that might be caused in zeroprice markets is almost always the result of more complex conduct that involves positive prices at some point, bundling or tying with positive-priced goods, or nonprice conduct and that can be assessed by traditional antitrust tools (Rubinfeld and Gal 2016a). And markets and market power are commonly assessed without reliance on pricing data. In the Microsoft case, for example, the government was able to define a market and demonstrate that Microsoft had monopoly power in that market without relying on price data and, in fact, over Microsoft’s argument that its low prices demonstrated that it lacked market power.

The CW standard, in short, presents no conceptual or legal obstacle to addressing issues that involve innovation, monopsony, and zeroprice markets. The “blind spot” criticisms of the CW standard thus need to be based on pragmatism rather than principle. The argument might be as follows: “Even if CW works in theory, as it has been applied, it requires factual and economic understanding that is often impractical. It should thus be replaced with a standard that is less difficult to apply.”

We do not quarrel with the first sentence, but the second is a non-sequitur. For one thing, the practical problems are likely to be less serious in the future. Antitrust academics—lawyers and economists—have, for example, developed various formal and empirical tools, such as those described in the agencies’ merger guidelines for defining markets as a proxy for measuring market power. They are now turning their attention to the new issues that are raised by dynamic markets characterized by winner-takes-all competition, multi-sided platforms, network effects, and often the utilization of big data and the provision of services for a zero nominal price—which are rapidly replacing yesterday’s static and slowly evolving markets (Katz and Sallet 2018; Rubinfeld and Gal 2016b). One can reasonably expect the development of new tools that will reduce the practical problems that are posed by antitrust enforcement in the information economy.

Moreover, critics complain that antitrust law is too humble and that it defaults to non-enforcement when faced with factual or economic uncertainty—often by concluding that the complainant has not proven that the alleged conduct was anticompetitive or harmed competition. Whether the substantive, default, and burdenof-proof rules are optimal in some or all cases is a fair subject for debate. The important point for present purposes is that nothing in the CW paradigm prevents revising those rules.

As we previously noted, antitrust doctrine evolves through a common law process “as circumstances change and learning grows” (Easterbrook 1982). Antitrust law can and does replace rules that do not reflect sound analysis, as it has done, for example, with safe harbors for exclusive dealing that covers less than a specified percentage of the market or that is not implemented in long-term contracts. And it can replace rules that require detailed factual assessment of individual cases with simpler, more categorical rules, such as: the per se prohibition of price fixing; the modified per se rule that is applicable to most tying arrangements under Jefferson Parish; presumptions such as those used in horizontal merger analysis; a greater willingness to find a violation on the basis of likely effects, especially where actual competitive effects are difficult to observe or measure; and abbreviated ruleof-reason standards that permit an inference of harm to competition under some circumstances without proof of actual harm to competition.

While antitrust law has moved away from such simplified rules in recent years, there is nothing about the CW paradigm that would preclude a movement of the pendulum in the other direction: either in response to new understandings about factual and economic issues, or in response to a revised assessment of the likelihood and costs of Type 1 and Type 2 errors in general or with respect to platforms or other specific matters.

#### Wrecks international competitiveness.

Robert D. Atkinson and Michael Lind 18. president of the Information Technology and Innovation Foundation. visiting professor at the University of Texas Johnson School of Public Affairs. Commentary: Who Wins After U.S. Antitrust Regulators Attack? China. Fortune. 3-29-2018. https://fortune.com/2018/03/29/commentary-who-wins-after-u-s-antitrust-regulators-attack-china/

Unfortunately, this kind of reverse industrial policy in the name of antitrust continues. In 2016, the Federal Trade Commission required that the semiconductor maker NXP divest its RF (radio frequency) power business as a condition for its $11.8 billion acquisition of U.S.-based Freescale Semiconductor Ltd. While this was done with a focus on the consumer, it opened up the business for acquisition by the Chinese investment company Jianguang Asset Management Co. Ltd., which has financial backing from the Chinese government. Just like that, thanks to an action undertaken by the U.S. government, critical U.S. technology capabilities went to China.

The lesson from this tale of unintended consequences for current antitrust enforcement is clear: It is time to stop ignoring potential adverse consequences of U.S. antitrust policy for America’s international competitiveness. Antitrust policies may be justified in terms of limiting anti-competitive behavior that hurts other firms in the U.S. economy. But when antitrust judgments weaken U.S. firms, allowing foreign firms and nations to free-ride on American R&D in order to catch up with and sometimes eliminate entire U.S. firms and industries, the result is to enrich other countries at America’s expense.

Maintaining American technological primacy in key industries should be a key consideration of U.S. antitrust policy—not just reducing concentration ratios in particular industries. The Justice Department and FTC appear to have little interest or capacity to consider the effects of their actions on U.S. international competitiveness. Going forward, when they decide to take action affecting a leading U.S. innovation-based firm, experts on the broader national interest in maintaining global competitiveness should have a seat at the table.

It is time for antitrust policy regarding firms in advanced technology industries to be carried out in coordination with the Commerce Department. The alternative is to allow antitrust actions, which are supposed to benefit all Americans, to backfire by helping foreign rivals bring American firms and industries down.

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

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

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

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

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

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

5.1 No‑Fault Antitrust for Platforms

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

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

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

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

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

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

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

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

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

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

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

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

### Dependency Trap Adv---1NC

#### Internet access outweighs

Thembalethu Buthelezi and James Hodge 21. Thembalethu Buthelezi is Principal Economist at the Economic Research Bureau of the Competition Commission of South Africa. James Hodge is Chief Economist at the Economic Research Bureau of the Competition Commission of South Africa. “Chapter IV: Competition Policy in the Digital Economy: the South African Perspective” in Competition and Consumer Protection Policies for Inclusive Development in the Digital Era. https://unctad.org/system/files/official-document/ditccplp2021d2\_en\_0.pdf

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

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

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

#### AND so does skills financing

Thembalethu Buthelezi and James Hodge 21. Thembalethu Buthelezi is Principal Economist at the Economic Research Bureau of the Competition Commission of South Africa. James Hodge is Chief Economist at the Economic Research Bureau of the Competition Commission of South Africa. “Chapter IV: Competition Policy in the Digital Economy: the South African Perspective” in Competition and Consumer Protection Policies for Inclusive Development in the Digital Era. https://unctad.org/system/files/official-document/ditccplp2021d2\_en\_0.pdf

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

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

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

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

Governing cyberspace

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

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

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

Digital sovereignty and the primacy of alliances

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

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

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

### Systemic Risk Adv---1NC

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

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

6. Conclusion

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

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

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

First, the methodological principles of data-driven DSS and information technology for SC disruption risk management were derived using system-cybernetic analysis. Future DSS in SC disruption risk management will extensively utilise datadriven technologies and be united by three basic principles of system-cybernetic research to form SC risk analytics decision support and learning frameworks. A combination of these principles builds a framework of future digital SC twins for managing disruptions, i.e. DSS for SC disruption risk management which utilises integrated disruption risk modelling with simulation, optimisation, and analytics components to support situational forecasting, predictive simulation, prescriptive optimisation, and adaptive learning based on a transition from offline to online simulation and optimisation.

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

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

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

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

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

#### Big tech fixing cybersecurity now---only the have the power to do it.

Ingrid Chung 21. Summer editorial intern at National Review. "Big Tech Is Doing the Right Thing on Cybersecurity". National Review. 8-30-2021. https://www.nationalreview.com/corner/big-tech-is-doing-the-right-thing-on-cybersecurity/

President Joe Biden recently met with Big Tech executives to discuss how to improve cybersecurity after recent cyberattacks in which government software contractor Solarwinds and oil pipeline Colonial Pipeline were targeted. Leading tech corporations, including IBM, Google, and Amazon, will all try to improve cybersecurity by investing in the training of personnel in this field and upgrading their respective encryption and security systems. Microsoft has also committed to investing $150 million in upgrades for cybersecurity systems of government agencies. Big Tech may not always do the right thing, but these plans to enhance cybersecurity are certainly something that we can all stand behind.

In recent years, as the Internet has become increasingly influential and indispensable, cybersecurity has, correspondingly, become an increasingly prominent threat to not only citizens’ privacy but also to national security. Former national-security adviser John Bolton explained the significance of cybersecurity to national defense in a recent National Review article, in which he characterized threats from cyberspace as “a multiplicity of hidden, ever-changing threats.” A recent report by the Heritage Foundation raised concern over espionage, trading of secrets, and the disruption of military commands and communication potentially being conducted in the cyber domain.

The effective regulation of cyberspace, a relatively new front for modern warfare characterized by its elusiveness and lack of boundaries, is sometimes challenging. Laxness in cybersecurity, however, has often led to catastrophic consequences. For instance, the WannaCry Ransomware Cyber Attack in 2017, in which files in affected computer systems were locked until ransom was paid for their decryption, affected approximately 200,000 computers in 150 countries and led to enormous financial costs. Victims of the cyber-extortion scheme included entities from government agencies such as the English National Health Service to major international corporates such as Boeing.

It is well established that both the state and leading tech corporations have a legitimate interest in enhancing cybersecurity. The government is responsible for engaging in national defense in the cyber domain and tech corporations are obligated to protect the privacy of their users, whose personal information is often entrusted to them.

Big Tech’s plans to cooperate with the government to improve cybersecurity through financial investments appears to be promising. While it may be difficult to predict the effectiveness of such investments, the fact that Big Tech and the government are placing the enhancement of cybersecurity close to the top of their agenda and are committing to coordinated efforts is good news. Big Tech, with its financial prowess derived from the sheer size of the industry, and a unique relationship with the use of cyberspace, is uniquely positioned to materially contribute to state-led efforts to secure cyberspace. Furthermore, investing in education on cybersecurity of employees may also be useful in raising awareness and amplifying the industry’s collective concern over capacity to combat cyberattacks in the long run.

#### Disaggregation is worse for cyber and grid resilience.

John Brandon 13. Contributing Editor. "Why Hackers Target Small Businesses: Cybersecurity Threats to Start-Ups". From The Dec. 2013/Jan. 2014 Issue of Inc. Magazine https://www.inc.com/magazine/201312/john-brandon/hackers-target-small-business.html

For many years, the average American small business was an unlikely target for a sophisticated cyberattack. Fewer financial resources and a relatively unknown brand worked in your favor to ward off hackers. Not anymore.

The dam has broken for small companies when it comes to security. Jeremy Grant, an adviser at the Department of Commerce’s National Institute of Standards and Technology, says in the past two years he has seen "a relatively sharp increase in hackers and adversaries targeting small businesses."

According to the security company Symantec, cyberattacks on small businesses rose 300 percent in 2012 from the previous year.

Smaller companies are attractive because they tend to have weaker online security. They’re also doing more business than ever online via cloud services that don’t use strong encryption technology. To a hacker, that translates into reams of sensitive data behind a door with an easy lock to pick. If you have any Fortune 500 companies as customers, you’re an even more enticing target--you’re an entry point.

#### EMP’s zero the case---they obvi don’t solve it.

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

Consequences of a sustained power outage

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

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

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

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

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

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

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

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

A prescription for failure

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

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

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

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

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

## 2NC

### Regs CP---2NC

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

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

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

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

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

#### “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

#### OR it 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).

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

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

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

#### Antitrust fails---delays make solvency impossible and only enhance market consolidation. Only regulation solves.

Steve Lohr 20. Covered technology, business and economics for The Times for more than 20 years. In 2013, he was part of the team awarded the Pulitzer Prize for Explanatory Reporting. “Forget Antitrust Laws. To Limit Tech, Some Say a New Regulator Is Needed.” <https://www.nytimes.com/2020/10/22/technology/antitrust-laws-tech-new-regulator.html>.

For decades, America’s antitrust laws — originally designed to curb the power of 19th-century corporate giants in railroads, oil and steel — have been hailed as “the Magna Carta of free enterprise” and have proved remarkably durable and adaptable. But even as the Justice Department filed an antitrust suit against Google on Tuesday for unlawfully maintaining a monopoly in search and search advertising, a growing number of legal experts and economists have started questioning whether traditional antitrust is up to the task of addressing the competitive concerns raised by today’s digital behemoths. Further help, they said, is needed. Antitrust cases typically proceed at the stately pace of the courts, with trials and appeals that can drag on for years. Those delays, the legal experts and economists said, would give Google, Facebook, Amazon and Apple a free hand to become even more entrenched in the markets they dominate. A more rapid-response approach is required, they said. One solution: a specialist regulator that would focus on the major tech companies. It would establish and enforce a set of basic rules of conduct, which would include not allowing the companies to favor their own services, exclude competitors or acquire emerging rivals and require them to permit competitors access to their platforms and data on reasonable terms. The British government has already said it would create a digital markets unit, with calls for a Big Tech regulator to also be introduced in the European Union and in Australia. In the United States, recommendations for a digital markets regulator have also been made in expert reports and in congressional testimony. It could be a separate agency or perhaps a digital division inside the Federal Trade Commission. Significantly, the leading proponents of this path in the United States are mainstream antitrust experts and economists rather than break-’em-up firebrands. Jason Furman, a professor at Harvard University and chair of the Council of Economic Advisers in the Obama administration, led an advisory group to the British government that recommended the creation of a digital markets unit in 2019. Breaking up the big tech companies, Mr. Furman said, is a bad idea because that would risk losing some of the consumer benefits these digital utilities undeniably deliver. A regulator is necessary to police digital markets and the behavior of the tech giants, he said. “I’m a small ‘c’ conservative, and I’m not a fan of regulation generally,” Mr. Furman said. “But it’s needed in this space.” Regulators that focus on specific sectors of the economy are common in the United States. For financial markets, there is the Securities and Exchange Commission; for airlines, the Federal Aviation Administration; for pharmaceuticals, the Food and Drug Administration; for telecommunications, the Federal Communications Commission; and so on. There is also precedent for picking out a handful of big companies for special treatment. In banking, the biggest banks with the most customers and loans are classified as “systemically important financial institutions” and subject to more stringent scrutiny. Several supporters of a new tech regulator were officials in the Obama administration, which was known for being friendly to Silicon Valley. But the advocates said that experience — as well as the conservative, pro-big business drift of court rulings in recent years — left them frustrated with antitrust law as the only way to restrain the growing market power and conduct of the big tech companies. “The mechanism of antitrust is not working to protect competition,” said Fiona Scott Morton, an official in the Justice Department’s antitrust division in the Obama administration, who is an economist at the Yale University School of Management. “So let’s do something else — use a different tool.”

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

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

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

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

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

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

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

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

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

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

D. Political Backlash

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

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

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

#### This is a card they used to read, but it’s so good for the counterplan that we’ll read it in this debate anyways. Infrastructure outweighs, it’s a larger internal link than platforms.

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

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

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

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

II. Digital Platform Use in Developing Countries

A. An Overview

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

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

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

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

B. Mapping Platform Use in Africa: Four Areas

1. Online retail sales

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

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

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

2. Value chains

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

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

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

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

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

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

3. FinTech

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

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

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

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

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

4. Sharing platforms

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

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

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

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

C. Conclusion

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

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

III. Lessons For Competition Policy For Digital Platforms

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

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

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

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

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

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

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

### Competitiveness---2NC

#### Extending antitrust’s reach over digital platforms undermines innovation.

Alden F. Abbott 21, General Counsel, Federal Trade Commission, Washington, DC, February 2021, “COMPETITION POLICY CHALLENGES FOR A NEW U.S. ADMINISTRATION: IS THE PAST PROLOGUE?,” https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

11. First, a word about innovation and “high-tech” digital platforms, which have been much in the public eye of late. Unquestionably, big tech companies, particularly those that currently possess monopoly power in particular markets, merit antitrust challenge if they act inefficiently (not on the business merits) to exclude new forms of competition or harm the competitive process. The Trump administration Justice Department and FTC’s bringing of monopolization cases against Google and Facebook, noted above, manifested a willingness to apply current monopolization law to challenge specific practices by digital platform giants. 12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [12] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [13] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [14] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [15] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

#### Independently---‘Big Tech’ maintains competitiveness via fostering innovation:

#### 1. Invests in innovation now---long term strategy.

Steve Denning 7-11. Senior Contributor at Forbes. Why Biden’s War On Big Tech Is Misguided. Forbes. 7-11-2021. https://www.forbes.com/sites/stevedenning/2021/07/11/why-bidens-attack-on-big-tech-is-misguided/?sh=1530c9aa61e0

Kahn’s article attacks Amazon for having a long-term strategy of innovation, and a willingness to forgo short-term profits for long term returns. Such criticisms are bizarre at a time when most big firms are too much focused on the short-term, and using share-buybacks to reward their shareholders and executives, to make up for a lack of real growth or innovation, at serious cost to customers and society.

Repeal of SEC rule 10B-18, introduced in 1982, which has led directly to rampant short-termism, income inequality, and self-dealing by executives is a much more urgent task than trying to right-size Big Tech. Let’s be clear: investing in innovation and value creation are good. It’s failure to innovate, and value extraction, that are bad.

#### 2. Multiple qualities make it uniquely salient for innovation.

Expert Panel 7-9. Forbes Council Members, An Invitation-Only Organization For Senior-Level Technology Executives . Council Post: 16 Smart Strategies Every Company Should Borrow From Big Tech. Forbes. 7-9-2021. https://www.forbes.com/sites/forbestechcouncil/2021/07/09/16-smart-strategies-every-company-should-borrow-from-big-tech/?sh=27e0575846c8

7. Creating Explicit Processes

Much innovation is born out of chaos, but many Big Tech companies have explicit processes and practices that encourage consistent companywide innovation. Whether it’s an internal incubator or a mentorship program, don’t shy away from creating business processes for innovation. You don’t want innovations to be a one-off, so invest in processes just like the big companies do. - John Shin, RSI Security

8. Disrupting The Market

For me, companies must learn about digital disruption — identifying where existing solutions have matured and going beyond customer need to find a fresh opportunity to introduce a new approach to fulfillment and “reset” the market. The best-known example of this is how Netflix disrupted the market Blockbuster was in, but vendors recognizing an opportunity to disrupt the market through a new, innovative approach happens all the time. - Al Kingsley, NetSupport

9. Investing In Marketing And Communications

The Big Tech companies are in the news for agility and innovation because they have incredible marketing and PR teams that get them in the news. Smaller companies that may have the same — or higher — levels of agility and innovation need to focus on strong marketing and communications strategies to gain exposure for their company, products and services. - Amanda Dorenberg, COMMB

10. Rewarding Strong Performers

Big Tech companies look to hire the best people, and then they reward those people appropriately. They implement strong meritocracies that keep high talent engaged and innovating. - Michael Adler, N-able

11. Being Flexible And Resilient

While agility is a key factor in achieving innovation goals, leaders should also focus on flexibility and resilience to succeed in the face of disruption. With these core tenants at the helm, leaders can rethink and create new ways of working, implement new business models, and address changing customer needs — ultimately driving agility while also instilling purpose. - Jeff Wong, EY

12. Entering Growing Markets

Big Tech knows that execution is instrumental in stealing market share and gaining traction. They are not deterred from entering a market even when someone else is already doing it. Either through improved functionalities, marketing or acquisition, Big Tech focuses on playing to win in growing markets. - Dan Merzlyak, London Stock Exchange Group (LSEG)

13. Experimenting

It is the willingness of the Big Tech giants to experiment with technology that sets them apart from traditional organizations. Rapid experimentation helps an organization achieve a learning curve that subsequently acts as a catalyst to innovation and growth. Even if initial attempts fail to produce a minimum viable product, firms must persevere. - Sayandeb Banerjee, TheMathCompany

14. Balancing Control And Freedom

Teams should not be forced to follow traditional bureaucratic processes but should rather be allowed to try new approaches that may appear “wrong” from the firm’s perspective. This allows the employees to try new ideas without the fear of being victimized in case of failure. However, mechanisms should be put in place to keep them in check and avoid the misuse of freedom. - Roman Taranov, Ruby Labs

15. Being Customer-Obsessed

One important and less obvious lesson other businesses can learn from big tech companies is customer obsession. The best company I know that demonstrates this core value is Amazon. From small and humble beginnings in 1994, Amazon has become the third-largest tech company by market cap. The one thing that seems to drive its continuous and insatiable agility and innovation is customer obsession. - Bob Fabien Zinga, Directly, Inc./U.S. Navy Reserve

16. Having An Appetite For Risk

One of the main things that separate Big Tech from traditional businesses is risk appetite. Big Tech businesses are hardwired to take lots of risks and are set up to then invest heavily in the ones that pay off. This approach is what makes them fast and agile — bureaucratic risk aversion doesn’t get an opportunity to take hold and slow the pace of innovation down. - Mark Cameron, W3.Digital

#### 3. “Other firms don’t enter” is empirically wrong---Enables other firms to innovate.

Sintia Radu 20. Communications director at the Information Technology and Innovation Foundation. Independent, nonprofit, nonpartisan research and educational institute focusing on the intersection of technological innovation and public policy . Is Big Tech Killing Startups and Stifling Innovation? No, Says New ITIF Report After Examining the Evidence . IITF. 11-9-2020. https://itif.org/publications/2020/11/09/big-tech-killing-startups-and-stifling-innovation-no-says-new-itif-report

WASHINGTON—Critics accuse big technology companies such as Amazon, Facebook, or Google of stifling innovation by buying start-ups just to kill them or by exerting market dominance that discourages entrepreneurs. But a new report released today by the Information Technology and Innovation Foundation (ITIF), the leading think tank for science and technology policy, shows these claims—asserting that large Internet companies are impeding competition by engaging in “killer acquisitions” or by creating “kill zones” through market dominance—are vastly exaggerated.

“Concerns about so-called ‘kill zones’ are overstated, as evidenced by the fact that there has been no negative impact on venture investing, which has grown dramatically in the last decade,” says Joe Kennedy, a senior fellow at ITIF, who authored the report. Moreover,  “While it is true that big Internet companies have engaged in hundreds of acquisitions, very few have drawn any criticism—and the heavy focus on the few deals that have proven to be highly successful ignores those that have failed. Acquisitions serve useful purposes, such as motivating investments in new companies, obtaining workers with key skills, and putting technology in the hands of those that can develop and scale it the fastest.”

According to the ITIF report, acquisitions can in fact be beneficial to innovation if they allow the larger firm to apply economies of scale or network effects, and enable the smaller firms to reach more customers more quickly with higher-quality products. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest.

In addition, antitrust agencies have all the power necessary to stop problematic acquisitions when they see fit. They should base decisions on a detailed understanding of markets, including current and future sources of innovation, and focus on increasing overall economic welfare.

“Rather than looking at big tech companies as a start-up deterrent, it is more accurate to view them as an innovation enabler. Through their acquisitions, they are guiding entrepreneurial resources, such as talent and capital, to areas that have the best chance of success,” adds Kennedy. “As for regulators, they have sufficient authority to protect competition and carefully review 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.”

#### 5. Big Tech needs a free hand---ramping up enforcement threatens competitiveness.

Peter Morici 20. Economist and emeritus business professor at the University of Maryland, and a national columnist. Opinion: Antitrust crackdown on Big Tech could impair U.S. competitiveness. MarketWatch. 11-30-2020. https://www.marketwatch.com/story/antitrust-crackdown-on-big-tech-could-impair-u-s-competitiveness-11606691636

Much of this would make U.S. law more extreme than European Union ambitions, which are to regulate how these internet giants treat competitors, suppliers and customers but not limit their lines of business.

Thanks to the networking effect, FAAG have a large enough lock on digital markets that they should be treated as essential facilities, as we know the concept in antitrust law, and be required to provide fair access to all potential consumers and suppliers who abide by reasonable standards. Again, fair arbitration should be available for prompt resolution of complaints—Amazon can’t be let to decide how and who competes with its store brands without a neutral referee.

The Democrats would go further and deny most mergers with suppliers—we don’t keep Ford from making steel if it chooses, or Exxon from acquiring a windshield wiper manufacturer.

I doubt we want to keep Facebook from developing an American answer to WeChat. That app permits Chinese to do just about everything in one place—buy theater tickets, pay utility bills, purchase computers and pay for them and so forth. For our Big Tech to answer that competitive challenge or Alipay in the fintech space, they need a much freer hand than the antibusiness bias the House antitrust committee would prescribe.

The United States and China are in a high tech race. Increasingly, we rely on businesses to fund those efforts, and Congress should consider how busting up Big Tech would also affect American competitiveness.

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

Luke Herrine 21. Ph.D. in Law candidate at Yale Law School, J.D. NYU School of Law, clerked for the Honorable Rosemary S. Pooler of the Second Circuit Court of Appeals, worked as a Legal Fellow at the Furman Center for Real Estate and Urban Policy, and directed legal strategy for the Debt Collective. “The Folklore of Unfairness”. New York University Law Review Volume 96, Number 2. May 2021. <https://www.nyulawreview.org/issues/volume-96-number-2/the-folklore-of-unfairness/>

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

### Dependency Trap---2NC

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

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

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

#### 4. Wong concludes its inevitable.

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

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

---DARTMOUTH’S CARD ENDS---

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

#### 5. Can’t solve populism---other larger alt causes thump—inequality frm wage fixation, non-competes, decreasing purchasing power, and other nationalist sentiments overcome.

#### 6. Alt causes to nativism---Immigration.

Uri Friedman 17. Managing Editor at The Atlantic. What is a nativist? Global. The Atlantic. 4-11-2017. https://www.theatlantic.com/international/archive/2017/04/what-is-nativist-trump/521355/

“Nativism is the core feature of the radical right today,” Mudde told me, and the other ideological dimensions of contemporary radical-right politicians—like populism and authoritarianism—tend to pass through a nativist filter. In terms of populism, he said, “the elite is considered to be corrupt because it works in the interest of the non-natives or it undermines the native group.” In terms of authoritarianism, which emphasizes the enforcement of law and order, “crime is almost always linked” to outsiders. While nativist movements have long argued that immigrants pose a multifaceted threat to the culture, security, and economic well-being of natives, Mudde writes in his 2012 paper, in the post-9/11 era the cultural and security threats have become intertwined with religion. “Increasingly the immigrant is seen as a Muslim, not a Turk or Moroccan,” he notes.

Some studies indicate that as levels of immigration to a country rise, so does support for nativist, radical-right politicians. But Mudde contends that the connection is more complicated than that: It’s not sufficient for the ranks of the foreign-born in a nation to swell; immigration also has to be turned into a political issue. It has to be made visible to a large part of the population. He pointed out that labor-migration flows to Western Europe increased in the years before the 1973 oil crisis, but that immigration wasn’t politicized there until the 1980s and ’90s, when asylum-seekers flocked to the region, efforts to integrate immigrants and their children into society and the labor market sputtered, and radical-right parties like the National Front in France began achieving political success.

### Cyber---2NC

#### 1. JCDC, defense planning, info-sharing. That’s Ivanon, Brendon, AND…

Pymnts 8-5. News Source. Feds Turn To Big Tech To Fight Cybercrime. PYMNTS. 8-5-2021. https://www.pymnts.com/news/security-and-risk/2021/feds-turn-to-big-tech-to-fight-cybercrime/

Following a series of high-profile infrastructure attacks, the federal government has turned to the world of Big Tech to help protect against cybercrime.

As The Wall Street Journal reported on Thursday (Aug. 5), the Department of Homeland Security’s (DHS) Cybersecurity and Infrastructure Security Agency is asking companies like Amazon, Google and Microsoft to assist in its Joint Cyber Defense Collaborative.

The initiative will initially focus on dealing with ransomware and cyberattacks on cloud-computing providers, [Jen Easterly](https://www.linkedin.com/in/jen-easterly-225380123/), director of the agency, told the newspaper. But ultimately, the agency wants to boost defense planning and information sharing between the government and Big Tech companies. “This will uniquely bring people together in peacetime, so that we can plan for how we’re going to respond in wartime,” Easterly said in an interview.

The past year has seen ransomware attacks cause major supply chain disruptions throughout the U.S., leading to gas shortages in the south and holdups in meat production.

“Following a ransomware attack last month on cloud-services provider Kaseya Ltd, President Biden warned Russian President Vladimir Putin that the U.S. would take ‘any necessary action’ to protect its infrastructure from these incidents,” the Journal report stated. “Just days later, the administration blamed hackers affiliated with China’s Ministry of State Security for a separate set of attacks on users of Microsoft Exchange Server software.”

#### 2. Massive investments into cybersecurity startups, with prioritizing personal and corporate data.

CB Insights Research 19. Report Research Briefs. How Big Tech Is Finally Tackling Cybersecurity. 3-27-2019. https://www.cbinsights.com/research/facebook-amazon-microsoft-google-apple-cybersecurity/

It comes as no surprise, then, that big tech players like Facebook, Amazon, Microsoft, Google, and Apple (FAMGA) are investing heavily in data security — especially as several have fallen victim to data breaches themselves.

Facebook, for example, disclosed that an unprecedented data breach in September 2018 exposed the social media accounts of up to 90M users — including login credentials — effectively compromising access to any site that lets users log in with their Facebook account.

But the company is not alone. These tech giants track our behavior, store our financial information, know where we work and live, what we buy, and more — and as a result, each has made moves to prioritize cybersecurity initiatives across two distinct areas:

Personal data: Perhaps the most sought after currency of the digital age. And because it’s so valuable — and not well understood — the scope of exactly what the big tech brands have been collecting is only recently being recognized by the general public.

Corporate data: Virtually every major company, across industries ranging from healthcare to finance, has back end systems that are built around services provided by big tech.

Collectively, FAMGA has poured nearly $2.5B into cybersecurity startups globally — especially as tech companies have been largely at the center of privacy regulation issues. In May 2018, for example, the General Data Protection Regulation (GDPR) went into effect as a means to protect personal data across the EU, further propelling companies worldwide to take data protection more seriously.

#### 3. Only our ev is comparative. Smaller businesses breed cyber-attacks---infrastructure spending issues, targets, and failure to invest resources.

Dakota Foster and Zachary Arnold 20. Visiting Researcher at Georgetown’s Center for Security and Emerging Technology (CSET). Research Fellow at Georgetown’s Center for Security and Emerging Technology (CSET). Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI. CSET Issue Brief. May 2020. Pg. 32

Smaller AI firms might invest less in cybersecurity, making them and their products more vulnerable. Cybersecurity is expensive, and trade secret theft occurs primarily through cyberattacks.155Although big companies have a larger attack surface and more points of vulnerability, they also have the ability to invest in cybersecurity. By contrast, small firms often lack the cybersecurity resources to defeat sophisticated, state-sponsored hackers. The top U.S. tech firms lead in domestic absolute spending on IT, which includes cybersecurity.156 Facebook’s Head of Global Affairs, Nick Clegg, claimed that “the resources that we will spend on security and safety this year alone [2019] will be more than our overall revenues at the time of our initial public offering in 2012. That would be pretty much impossible for a smaller company.”157 Not coincidentally, smaller businesses run a greater risk of cyberattack,158 and they are less likely than large companies to identify the source.159 Because of their size and access to larger companies through the supply chain, smaller firms are lucrative cyberattack targets.160Moreover, if smaller, post-breakup companies increasingly work on defense-relevant products, they will become more salient targets for foreign actors. Cybersecurity breaches generally result from internal mistakes rather than foreign government activity,161 yet “Defense Technology” and “Information and Communication Technology” are two of six industries identified by the National Counterintelligence and Security Center as the most likely targets for foreign intelligence collectors.162

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

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

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

## 1NR

### FTC DA---1NR

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

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

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

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

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

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

#### It’s an existential threat.

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

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

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

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

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

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

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

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

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

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

#### 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

#### **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.

#### **New policy streamlines merger process by requiring prior approval**

Ayla Ellison 10/26/21. Editor-in-Chief of Becker's Hospital Review. “FTC tightens reins on merger control: 6 things to know.” https://www.beckershospitalreview.com/hospital-transactions-and-valuation/ftc-tightens-reins-on-merger-control-6-things-to-know.html

The Federal Trade Commission announced Oct. 25 it is restoring its practice of requiring companies that previously pursued an anticompetitive merger to get prior approval for future transactions.

Six things to know:

1. The FTC will now require companies to get prior approval from the agency for any transaction "affecting each relevant market for which a violation was alleged" for at least 10 years.

2. The FTC said in some situations it may seek prior approval provisions that cover broader geographic markets beyond just the relevant markets affected by the merger. The agency will consider several factors to make the determination, including the level of market concentration, the degree to which the transaction increases concentration and evidence of anticompetitive market dynamics.

3. The FTC is less likely to pursue a prior approval provision against merging companies that abandon their transaction, the commission said.

4. The FTC is reinstating the prior approval practice after the commission voted in July to repeal a 1995 policy statement that prevented the agency from imposing these merger restrictions.

5. The agency said it has already implemented the policy by imposing strict limits on future acquisitions by Denver-based DaVita after the company's acquisition of University of Utah Health's dialysis clinics.

6. "The FTC should not have to waste valuable time and resources investigating clearly anticompetitive deals that should have died in the boardroom," Holly Vedova, director of the agency's bureau of competition, said in a news release. "Restoring the long-standing prior approval policy forces acquisitive firms to think twice before going on a buying binge because the FTC can simply say no."

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

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

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

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

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

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

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

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

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

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

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

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

#### **Khan knows FTC history and will avoid overstretch now.**

Ben Brody 10/5/21. Senior reporter at Protocol, formerly covered tech policy at Bloomberg News. “The FTC's next privacy move is a dangerous game years in the making.” https://www.protocol.com/policy/ftc-privacy-rules?rebelltitem=1#rebelltitem1

Litigation could tie up any new rules up for years, but from the commission's perspective it may be the lesser evil as compared to drawing ire from Congress. Critics of FTC inaction trace the agency's timidity to the 1980s. At the time, many saw the FTC's attempts to regulate children's advertising as the height of nanny-state overreach, in part thanks to a campaign by advertisers. In response to "kidvid," Congress reined in the agency's regulatory powers — and in the process taught generations of FTC staff to tiptoe around lawmakers.

It's a cycle that's recurred throughout FTC's existence, and Khan, who loves the agency's history, has made clear she's well aware of it.

Her colleagues, too, seem well aware that the clock is ticking: In a speech earlier in October, Slaughter discussed online ads and pushed the idea that companies should only collect data necessary for their offerings.

#### 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.

#### 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Rulemaking requires immense time and resources.

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

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

#### It 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.

#### It 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.

#### 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.

Nathaniel L. Asker 21. Partner in the Antitrust Department. Bernard (Barry) A. Nigro Jr., Chair of Fried Frank's Global Antitrust and Competition Department, former Principal Deputy Assistant Attorney General at the DOJ. Aleksandr B. Livshits, special counsel in the antitrust department. 1-5-2021. “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.

#### Privacy is the focus now.

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

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

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

#### Specifically, algorithmic bias.

Kyle R. Fath et al. 10/19/21. Counsel in the Data Privacy & Cybersecurity Practice at Squire Patton Boggs, with Kristin L. Bryan, Christina Lamoureux, and Elizabeth P. Helpling. “Data Privacy and Cybersecurity FTC Priorities Going Forward.” https://www.natlawreview.com/article/data-privacy-and-cybersecurity-ftc-priorities-going-forward

The FTC already has enforcement capabilities to regulate the development and use of artificial intelligence (“AI”) and its associated algorithms. These include the Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices,” the Fair Credit Reporting Act, which rears its head when algorithms impact lenders’ decisions to provide credit, and the Equal Opportunity Credit Act, which prohibits the use of biased algorithms that discriminate on the basis of race, color, sex, age, and so on when making credit determinations. In using these tools, the FTC aims to clarify how algorithms are used and how the data that feeds them contributes to algorithmic output, and to bring to light issues that arise when algorithms don’t work or feed on improper biases.

Bias and discrimination arising from use of biometrics will also now be a focus of the FTC. Interestingly, much recent research and criticism has pointed out that algorithms and biometric systems are biased against faces of color. This has arisen in many contexts, from the iPhone’s FaceID feature to the 2020 remotely-administered bar exam that threatened to fail applicants of color because their webcams could not detect their faces. These are just some of the issues that arise when companies turn to algorithms to try to create heuristics in making business decisions. The FTC has not let these concerns go by the wayside, and after preliminarily addressing them in an April 2021 blog post, has now reestablished that algorithmic and biometric bias is a new focus for the upcoming years.

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

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

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

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

Unfortunately there is no requirement that companies demonstrate an algorithm’s effectiveness before putting it to use. The Algorithmic Justice and Online Transparency Act, introduced this year, has a requirement that algorithms used by online platforms be “safe and effective,” but that would only apply to sites like Facebook or Youtube, according to the proposed bill. Congress should consider expanding such protections to all products and services.

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