# 1NC – Navy Quarters

## Offcase

### T-Structural – 1NC

#### interpretation---“prohibitions” are structural---otherwise, it’s a remedy

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

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

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

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

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

#### violation---plan only expands behavioral remedies

#### vote neg:

#### 1---limits---there are infinite ways behavioral remedies can be applied to anticompetitive business practices

#### 2---ground---“break up” industries is key to link uniqueness and core controversy on a topic with no disads

### Cap K (Big Tech v2) – 1NC

#### Competition is a logic of neoliberal expansion that seeks conflict with foreign actors in the economic sphere – that inevitably spills into military conflict.

Cecilia Rikap 21. Professor of Economics and Coordinator of YSI States and Markets Working Group, Institute for New Economic Thinking. “The Interplays of the United States, China and their Intellectual Monopolies.” *Capitalism, Power and Innovation Intellectual Monopoly Capitalism Uncovered*. Routledge. 2021. 77-80.

As Strange (1996) anticipated, the decline of the state’s power vis-à-vis corporations can be partly explained by the acceleration of technological change, which tilts the scale in favour of corporations. As identified by Feenberg (2010, p. 5) “political democracy is largely overshadowed by the enormous power wielded by the masters of technical systems”. Indeed, we should consider that powerful intellectual monopolies pass over their home states in specific contexts or respects.11 With this in mind we reconceived core states as one of capitalism’s multiple powerful actors.

Beyond explicit confrontations, since intellectual monopolies organize and plan production and innovation networks taking place in different countries, they generate an overlap of political realms with sometimes contradictory rules and norms. Who oversees production and innovation inside the networks organized by intellectual monopolies? The latter or the different states where intellectual monopolies’ production or innovation networks are based? To whom subordinate firms and other organizations are accountable for their actions? Their state or the intellectual monopoly coordinating the network? The simple answer is both. The complicated part is to identify what happens when they are in contradiction, and what are the consequences of this complex set of power structures for workers and subordinated organizations.

Intellectual monopolies have replaced state functions as policymakers. An extreme example recently disclosed is Eric Schmidt, Alphabet’s former executive chairman, advising the US federal government while still managing Alphabet. He was the chair of the US Defense Innovation Board, which recommended the use of artificial intelligence to the US Department of Defense. He also chaired the National Security Commission on Artificial Intelligence which advises the US Congress on analogous topics (Klein, 2020).

The government’s threat over China is – at least to some extent – driven by US data-driven intellectual monopolies’ concern over Chinese rivals like Alibaba, Tencent and Huawei. The CEOs of Google, Amazon, Facebook and Apple made this clear in their testimonies in the 2020 US Congress Hearing. As a remedy, Schmidt had been pushing for more public investment in research related to artificial intelligence and tech-enabling infrastructure (such as 5G) (Klein, 2020). Furthermore, these data-driven intellectual monopolies make their own rules and norms for their digital republics and, to some degree, replace the role of states. Facebook’s founder and chief executive, Mark Zuckerberg, states it clearly

Every day, platforms like Facebook have to make trade-offs on important social values – between free expression and safety, privacy and law enforcement, and between creating open systems and locking down data.12

(Mark Zuckerberg, Feb 16, 2020)

And immediately afterwards, he advocates for more public regulations and informs that Facebook is working together with different governments to that end. A similar claim was raised by Sundar Pichai, arguing that artificial intelligence needs to be regulated.13

The division of power is not clear, given that corporate power and planning capacities go beyond national frontiers and beyond the capital they own. Overall, there is a legal vacuum in the reach of each state’s power and where the power of the intellectual monopoly controlling a portion of global production and innovation begins. This vacuum allows intellectual monopolies to expand their power and profits.

Another source of conflict between intellectual monopolies and core states concerns the relative absence of the usual benefits of being home to big corporations: employment generation and tax payments. Considering their earnings, global leading corporations do not generate in their home countries expected employment due to outsourcing and offshoring (of production and innovation), which is particularly the case of US and also European intellectual monopolies. This has contributed to the rise in inequalities in these regions. The consequent social distress put pressure on stringent regulations. In the US, we referred in Section 2.1 to the 2017 Tax and Jobs Act (Public Law 115-97), but changes have not been significant.

US intellectual monopolies are masters of tax avoidance. As we mentioned before, operations leading to lower tax bills and financialized profits are easier for companies with higher shares of intangible over tangible assets. Offshoring IPRs to countries where corporations are not required to pay taxes for their intellectual property is a mechanism frequently used to divert profits to tax havens (Bryan et al., 2017) (see Chapter 7 on Apple’s case). By the end of 2016, the top ten companies in terms of offshored savings were: Apple, Microsoft, Cisco, Oracle, Alphabet, Johnson & Johnson, Pfizer, Qualcomm, Amgen and Merck (Pozsar, 2018).

In China, whose global intellectual monopolies sprang from the sustained stimulus and protection of its state, the latter’s central planning capacity is starting to find limits vis-à-vis new intellectual monopolies. These corporations were not born as the chosen ones by the state, but still enjoyed the benefits of China’s protectionism. The recent case of Bytedance provides a good example. The company was spending its Chinese profits to expand its unprofitable business in the US when the US government banned its blockbuster TikTok app. Bytedance was not among Beijing’s favoured companies, among others, because of the difficulties in controlling the videos uploaded to TikTok (Yang, 2020). Regardless of the end of the story between TikTok, the US and Chinese governments and US intellectual monopolies as potential buyers for part of TikTok’s business, what the case put forward was a possible surge of clashes between emerging Chinese (data-driven) intellectual monopolies and their state. Indeed, in late 2020 the Chinese state delayed Ant Group’s IPO, followed by the introduction of antitrust regulation for digital companies.

Meanwhile, Europe remained focused on increasing regulations on foreign data-driven intellectual monopolies, including different accusations of excessive market power and unfair competition. Unlike previous stages in capitalism, Europe risks playing in the subordinate side, where the peripheries have historically been and generally remain. Germany’s fear of falling behind the US and China’s tech giants should also be read as a broader European concern to lag (far) behind those core economies.14 Overall, Europe and Japan are latecomers of the digital economy, and this space is being filled primarily by China, emerging as a digital technological power (UNCTAD, 2019). Moreover, with a drop of eight companies between March 2009 and December 2019, Europe’s share of global top 100 corporations in market capitalization fell from 27% to 15%. This drop was taken over by the US (PWC, 2020). Regulating the digital economy could thus be seen as Europe’s geopolitical rebalancing move.15

5 Final remarks

In this chapter, we argued that core states and certain corporations built a mutually beneficial relationship. We identified US and Chinese policies that contributed to the emergence and spread of global intellectual monopolies. Likewise, we elaborated on how these corporate leaders sustain and expand their respective countries’ geopolitical power. Nevertheless, we also addressed states’ concerns and the overall tensions of the juxtaposition of power between core states and intellectual monopolies.

The US state cannot afford to lose its intellectual monopolies since its global hegemon power significantly depends on those companies. Likewise, it cannot afford to let its intellectual monopolies be given their consequences for income and wealth concentration resulting in increasing social unrest. From the US state perspective, the technological war with China is necessary to remain the only superpower. Nevertheless, this conflict is also a powerful device to redirect public attention and blame – as it has always been the case of the United States – an “other” of the internal consequences of home (and global) capitalism.

Neither can the Chinese state afford to lose its alliance with its intellectual monopolies. Its national innovation system and geopolitical power are based on a strong partnership – although not without tensions – between China’s state and intellectual monopolies, the only ones challenging the US and its intellectual monopolies.

All in all, the US and Chinese states have benefited from their respective intellectual monopolies to build and reinforce their geopolitical power. Meanwhile, in the rest of the world, knowledge and data extractivisms are further expanding inequalities, diminishing social well-being and curtailing development opportunities (see Chapters 11–13). The resulting world scenario is a ticking bomb.

A missing piece in this puzzle that will be addressed in future research concerns integrating international organizations to our analysis, seeking to understand how intellectual monopolies influence them and their role as arenas of core states’ contest for global hegemony. Let us just point out that each time the US withdraws from international coordination, China moves forward. Remarkably, during Trump’s administration, the US withdrew from international treaties and organizations, putting into question its historical openness. A possible interpretation could be that the hegemon fosters an open world economy but as far as it benefits from it.

To conclude, beyond the focus on the US and China, this chapter has also made self-evident that unfolding the interplay between state and corporate power is always context-dependent. While in some contexts the state rules over global leader corporations, the latter overcome even core states’ power in other contexts. As capitalism develops through the interplay of its powerful actors, it is not possible to anticipate concrete outcomes of such a multifaceted relationship. Neither can we anticipate the counter-hegemonic tendencies that, as Cox (1981) emphasized, generally emerge to oppose the state and world order structures of capitalism. The institutions that will lead the counter-offensive to intellectual monopoly capitalism remains to be seen.

#### Debate is not a game but a site of policing the imaginative politics of post-capitalism – that causes serial policy failure. Debates should center representations.

McCarraher 19 [Eugene; 11/12/19; Associate Professor of Humanities at Villanova University, PhD in US Cultural and Intellectual History from Rutgers University; The Enchantments of Mammon: How Capitalism Became the Religion of Modernity, p. 15-18]

Words such as “paradise” or “love” or “communion” are certainly absent from our political vernacular, excluded on account of their “utopian” connotations or their lack of steely-eyed “realism.” Although this is a book about the past, I have always kept before me its larger contemporary religious, philosophical, and political implications. The book should make these clear enough; I will only say here that one of my broader intentions is to challenge the canons of “realism,” especially as defined in the “science” of economics. As the master science of desire in advanced capitalist nations, economics and its acolytes define the parameters of our moral and political imaginations, patrolling the boundaries of possibility and censoring any more generous conception of human affairs. Under the regime of neoliberalism, it has been the chief weapon in the arsenal of what David Graeber has characterized as “a war on the imagination,” a relentless assault on our capacity to envision an end to the despotism of money.24 Insistent, in Margaret Thatcher’s ominous ukase, that “there is no alternative” to capitalism, our corporate plutocracy has been busy imposing its own beatific vision on the world: the empire of capital, with an imperial aristocracy enriched by the labor of a fearful, overburdened, and cheerfully servile population of human resources. Every avenue of escape from accumulation and wage servitude must be closed, or better yet, rendered inconceivable; any map of the world that includes utopia must be burned before it can be glanced at. Better to follow Miller’s wisdom: we already inhabit paradise, and we can never make ourselves fit to live in it if we obey the avaricious and punitive sophistry professed in the dismal pseudoscience.

The grotesque ontology of scarcity and money, the tawdry humanism of acquisitiveness and conflict, the reduction of rationality to the mercenary principles of pecuniary reason—this ensemble of falsehoods that comprise the foundation of economics must be resisted and supplanted. Economics must be challenged, not only as a sanction for injustice but also as a specious portrayal of human beings and a fictional account of their history. As a legion of anthropologists and historians have repeatedly demonstrated, economics, in Graeber’s forthright dismissal, has “little to do with anything we observe when we examine how economic life is actually conducted.” From its historically illiterate “myth of barter” to its shabby and degrading claims about human nature, economics is not just a dismal but a fundamentally fraudulent science as well, akin, as Ruskin wrote in Unto This Last, to “alchemy, astrology, witchcraft, and other such popular creeds.”25

Ruskin’s courageous and bracing indictment of economics arose from his Romantic imagination, and this book partakes unashamedly of his sacramental Romanticism. “Imagination” was, to the Romantics, primarily a form of vision, a mode of realism, an insight into the nature of reality that was irreducible to, but not contradictory of, the knowledge provided by scientific investigation. Romantic social criticism did not claim the imprimatur of science as did Marxism and other modern social theories, yet the Romantic lineage of opposition to “disenchantment” and capitalism has proved to be more resilient and humane than Marxism, “progressivism,” or social democracy. Indeed, it is more urgently relevant to a world hurtling ever faster to barbarism and ecological calamity. I wrote this book in part out of a belief that many on the “left” continue to share far too much with their antagonists: an ideology of “progress” defined as unlimited economic growth and technological development, as well as an acceptance of the myth of disenchantment that underwrites the pursuit of such expansion. The Romantic antipathy to capitalism, mechanization, and disenchantment stemmed not from a facile and nostalgic desire to return to the past, but from a view that much of what passed for “progress” was in fact inimical to human flourishing: a specious productivity that required the acceptance of venality, injustice, and despoliation; a technological and organizational efficiency that entailed the industrialization of human beings; and the primacy of the production of goods over the cultivation and nurturance of men and women. This train of iniquities followed inevitably from the chauvinism of what William Blake called “single vision,” a blindness to the enormity of reality that led to a “Babylon builded in the waste.”26

Romantics redefined rather than rejected “realism” and “progress,” drawing on the premodern customs and traditions of peasants, artisans, and artists: craftsmanship, mutual aid, and a conception of property that harkened back to the medieval practices of “the commons.” Whether they believed in some traditional form of religion or translated it into secular idioms of enchantment, such as “art” or “beauty” or “organism,” Romantic anticapitalists tended to favor direct workers’ control of production; the restoration of a human scale in technics and social relations; a sensitivity to the natural world that precluded its reduction to mere instrumental value; and an apotheosis of pleasure in making sometimes referred to as poesis, a union of reason, imagination, and creativity, an ideal of labor as a poetry of everyday life, and a form of human divinity. In work free of alienation and toil, we receive “the reward of creation,” as William Morris described it through a character in News from Nowhere (1890), “the wages that God gets, as people might have said time agone.”27

Rendered gaudy and impoverished by the tyranny of economics and the enchantment of neoliberal capitalism, our sensibilities need replenishment from the sacramental imagination. As Americans begin to experience the initial stages of imperial sclerosis and decline, and as the advanced capitalist world in general discovers the reality of ecological limits, we may find in what Marx called the “prehistory” of our species a perennial and redemptive wisdom. We will not be saved by our money, our weapons, or our technological virtuosity; we might be rescued by the joyful and unprofitable pursuits of love, beauty, and contemplation. No doubt this will all seem foolish to the shamans and magicians of pecuniary enchantment. But there are more things in heaven and earth than are dreamt of on Wall Street or in Silicon Valley.

#### The alt is a platform commons – cooperatives solve the abuses of tech platforms with reliance on cooperation instead of competition.

Silke Helfrich & David Bollier 19. Helfrich studied romance languages and pedagogy at the Karl-Marx-University in Leipzig, served as head of Heinrich Böll Foundation Thuringia and head of the regional office of Heinrich Böll Foundation for Central America, Cuba and Mexico. Bollier worked in policy advocacy with a Member of Congress, the auto safety regulatory agency, and public-interest organizations, and co-founded Public Knowledge, a Washington advocacy organization for the public’s stake in the Internet, telecom, and copyright policy.“ Free, Fair, and Alive : The Insurgent Power of the Commons” July 2019.

Platform Cooperatives Digital networks have immense capacity to enable sharing and cooperation. Unfortunately, tech companies have captured much of these social energies for their own purposes, namely, to carry out the usual work of capitalism on powerful platforms. They call the result the “sharing economy” and “gig economy,” but in fact it is simply a new species of markets designed for microrentals, piecemeal labor, data mining, and consumerism. Platforms like TaskRabbit and Mechanical Turk have re-introduced piecework on a massive scale by offering pennies for a variety of microtasks that computers can’t perform, such as image tagging, transcription, and data cleaning. Other platforms entice us into converting our cars, apartments, and private time into rentable assets to compensate for our plunging incomes. As sophisticated computer algorithms constantly ratchet down wages for “independent contractors,” it is eroding the very possibility of stable jobs with benefits. To counter these trends, the platform cooperatives movement arose in 2015 as a field of experimentation. Its goal is to try to develop more socially constructive websites and mobile apps. If people can own and manage their own platforms as cooperatives, argues Trebor Scholz, one of the catalysts of the movement, they will be able to reap greater long-term benefits and control in the face of well-capitalized tech giants like Uber and Airbnb. “What if we owned our own version of Facebook, Spotify, or Netflix?” writes Scholz. “What if the photographers at Shutterstock.com could own the platform where their photos are being sold?”30 A number of efforts are underway to do just that. The idea is to help producers and users co-own member-driven websites for distributing stock photography, streaming music, and other artworks. Another type of platform cooperative is apps codeveloped by city governments and local users. Seoul, South Korea, for example, has been developing a Munibnb platform to enable apartment rentals on better terms than Airbnb, with revenues earmarked for public services. The app is also intended to prevent the conversion of stable rental properties into “ghost neighborhoods” used mostly by tourists, a problem afflicting many major world cities like Amsterdam, London, and Barcelona. While still an emerging strategy, platform coops hold great promise for preventing monopoly, exploitation, and data surveillance in digital spaces. They can also help democratize ownership and control over platforms, and assure greater self-determination for working conditions.

### Forecasting CP – 1NC

#### The United States should only allow the continuation of net harms on one side of platforms under antitrust law only when a team of the Good Judgment Project’s “super-forecasters” has determined that the activity reduces the numerical probability of abuse from an unacceptably high level.

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

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

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

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

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

B. Periodic Assessments of the Antitrust Laws Are Advisable

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

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

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

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

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

Information, risk and uncertainty

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

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

Economic and socio-psychological constraints

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

Individual differences

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

#### Binding forecasting solves security.

J. Peter Scoblic and Philip E. Tetlock 20. J. Peter Scoblic is Co-Founder of Event Horizon Strategies, a Senior Fellow in the International Security Program at New America, and a Fellow at Harvard’s Kennedy School. Philip E. Tetlock is Leonore Annenberg University Professor at the University of Pennsylvania, Co-Founder of Good Judgment, and a co-author of Superforecasting: The Art and Science of Prediction. “A Better Crystal Ball The Right Way to Think About the Future”. https://www.foreignaffairs.com/articles/united-states/2020-10-13/better-crystal-ball

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

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

### 1NC---Regs CP

#### The United States federal government should:

#### determine that harm to a single side of the market in platform markets are sufficient ground for a case on unfair, deceptive, or abusive acts or practices; and

#### clarify that the harms are not prohibited under antitrust law.

#### solves.

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

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

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

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

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

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

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

### FTC DA – 1NC

#### FTC’s increasing enforcement in privacy now.

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

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

#### Antitrust enforcement saps up finite 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

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

#### 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.”

### T-Private – 1NC

#### Interpretation – private sector means all non-governmental persons or entities.

Senate Report 95 (Senate Report. 104-1, “UNFUNDED MANDATE REFORM ACT OF 1995,” <https://www.congress.gov/congressional-report/104th-congress/senate-report/1> , date accessed 9/10/21)

"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 AFF exclusively applies to tech, a segment of the private sector.

#### Vote NEG:

#### 1 – Limits – the number of potential subsets is infinite – any industry, product, company, individual

#### 2 – Ground – kills NEG access to in-depth debates on structural regulations in favor of sector specificity – causes race to beat regs that eliminates NEG ground.

### Counterplan – 14A PIC – 1NC

**The United States federal government, without changing the scope of its core antitrust laws, should determine that anticompetitive business practices which cause net-harm on one side of platforms violate the 14th Amendment.**

#### Counterplan solves the case and reinvigorates the 14th Amendment by making it the exclusive basis for decision.

Robert M. Ahlander 17. J.D. candidate, April 2017, J. Reuben Clark Law School, Brigham Young University. “Undressing Naked Economic Protectionism, Rational Basis Review, and Fourteenth Amendment Equal Protection”. BYU L. Rev. 167 (2017). https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3084&context=lawreview

V. CONCLUSION If the only plausible rationale for a law is to protect a certain group from economic competition, the law should not be upheld. The Fourteenth Amendment states that the government cannot deny to any person the equal protection of the laws. When the legislature denies one person certain economic liberties but grants those same economic liberties to another similarly situated person, and there is no rational basis for the classification, equal protection of the law has been denied, and the classification is a violation of the Fourteenth Amendment’s Equal Protection Clause. On the other hand, if there is some rational basis for the law, including some legitimate government interest, the law does not violate the Fourteenth Amendment, and should be upheld. Finding some rational basis for economic legislation is a very low threshold; however, naked economic protectionism should not be a rational basis for law because (1) Supreme Court precedent is weak and untested when it comes to naked economic protectionism, (2) naked economic protectionism is virtually impossible to negate, and (3) a rational basis for a law should include a government interest that serves (to some extent) the public good, not simply the group receiving economic protection. The Supreme Court has not explicitly endorsed naked economic protectionism as a rational basis under the Equal Protection Clause. In each decision where the Court upheld economic legislation that resulted in an economic benefit to a certain group, the Court upheld the law on other, legitimate rational bases—not naked economic protectionism. Even in the two circuit court decisions that explicitly legitimize naked economic protectionism, the courts relied on some rationale apart from mere economic protectionism of a certain group. Therefore, naked economic protectionism as a rational basis is, for the time being, a legal fiction that has not been tested as an exclusive basis for upholding a law. Naked economic protectionism is virtually impossible to negate. Since every piece of legislation favors some group over another, and courts only need to find some possible reason that the legislature enacted the law, courts could simply hypothesize that the economic legislation was enacted to protect the benefited group. This protection does not even need to be the actual purpose for which the legislature enacted the statute, nor does the law need to show any sign of effectuating that purpose. Barring the potential for legislative animus against the disfavored group, naked economic protectionism is virtually impossible to negate. Rational basis review should include a government interest that serves, at least to some extent, the public interest or the general welfare. In the decisions discussed in this Comment, there is no precedent established for upholding economic legislation that lacks some strand of public interest. Rational basis review provides a low threshold, and the possibilities for a legitimate public interest are many, including consumer protection, consumer safety, public health, economic development, neighborhood preservation, protecting reliance interests, historical preservation, and tourism attraction. While otherwise publicly minded laws may result in the economic protection of certain groups, economic protectionism should not stand as the sole basis for enacting a law. Legitimizing naked economic protectionism as a rational basis for enacting a law may seriously harm the general public. For example, we may see occupational licensing requirements protect certain professions from economic competition in areas where the licensed professional is not specialized, the most skilled, or even qualified. These unfounded protections harm the public by reducing supply, choice, and quality. Courts should not uphold a law when the only basis for the law is naked economic protectionism.

#### 14th Amendment collapsing now – but the counterplan’s expansion of equal protection solves healthcare.

Scott J. Schweikart 21. JD, MBE. “How to Apply the Fourteenth Amendment to the Constitution and the Civil Rights Act to Promote Health Equity in the US”. https://journalofethics.ama-assn.org/article/how-apply-fourteenth-amendment-constitution-and-civil-rights-act-promote-health-equity-us/2021-03

Abstract

Health equity in the United States requires elimination of differentials in access to health services according to race, ethnicity, sex, gender identity, comorbidity, or ability. To achieve health equity, governments can use a variety of tools, including civil rights legislation and constitutional jurisprudence. In the United States, 2 such examples are the Fourteenth Amendment to the Constitution’s Equal Protection clause and Title VI of the Civil Rights Act. While both have the capacity to reduce health disparities, in practice, neither has achieved its full potential because of how the judicial branch has interpreted and allowed these 2 laws to be enforced. How courts adjudicate health-related cases, especially those in which civil rights or other human rights legislation are at stake, is key to the successful promotion of legislative and jurisprudential approaches to motivating health equity and realizing justice for all.

What Is Health Equity?

Health equity has been widely defined as an “absence of socially unjust or unfair health disparities.”1 Equity is different than equality. While both equity and equality focus on notions of fairness, equality emphasizes giving people “the same resources or opportunities” while equity “recognizes that each person has different circumstances and allocates the exact resources and opportunities needed to reach an equal outcome.”2 Health equity in particular “focuses attention on the distribution of resources and other processes that drive a particular kind of health inequality.”1 Health equity is important because health is fundamental to the human experience. As Amartya Sen explains: “health is among the most important conditions of human life and a critically significant constituent of human capabilities in which we have reason to value.”3 Complete health equity is a theoretical ideal; in reality, different nations and governing structures have differing success in achieving health equity. The United States, for example, has stark disparities in health and access to care compared to peer nations like Canada.4 Hence, the drive to effectuate health equity in American society is paramount and key to achieving a more just society, while it would also enhance the quality of human life and its essence.

Legislative Action on Civil Rights

Either by acting “as a provider or guarantor of human rights” or by implementing “policy frameworks that provide the basis for equitable health improvement,” governments can contribute to effectuating health equity.5 With respect to human rights, the United States has no formally codified right to health, nor does it participate in a human rights treaty that specifies a right to health. A prime example of such a treaty is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for a specific—though criticized as “vague” and “unrealistic”—right to health.6 The ICESCR has only been ratified and not signed by the United States, thus “making the treaty only morally rather than legally binding on the US.”6 However, as Paula Braveman et al have noted, the values underlying health equity are “rooted in deeply held American social values”7; hence there is scope for government action to effectuate health equity. The United States does have law in the domain of human rights. These laws—nominally known as civil rights—are, on the whole, designed to protect citizens from “discriminatory practices by governments and institutions” and also to “protect citizens from discriminatory practices by other citizens.”8 Indeed, Robert Hahn et al argue that civil rights laws are social determinants of health, as they “causally affect the societal distribution of resources that in turn affect disease, injury, and health.”8 While not as explicit as an international human rights treaty, both the Fourteenth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964 offer examples of civil rights law that attempt to achieve more equitable outcomes in American society. What follows is an exploration of how effective these aspects of American civil rights law are in promoting health equity in America.

Fourteenth Amendment. The Fourteenth Amendment of the US Constitution is famously known for its Equal Protection clause, which states that “nor shall any state … deny to any person within its jurisdiction the equal protection of the laws.”9 With regard to implementing health equity, the Fourteenth Amendment seems a natural place in US law on which to focus. Indeed, “the equal protection clause is generally thought to require government to treat similarly circumstanced individuals in a similar manner.”10 However, there is a history of US courts (the US Supreme Court in particular) not applying a heightened level of scrutiny to equal protection claims regarding unequal access to health care, which has allowed for inequities to continue.10 Throughout its jurisprudential history, the “Supreme Court [has] interpreted the Fourteenth Amendment far more narrowly than many of its drafters intended, most notably by holding that it did not apply to discrimination by private actors.”11 Additionally, the Supreme Court required the “exceedingly difficult” burden that “for a litigant to prevail” in an Equal Protection case, the plaintiff “must prove that the government acted with a ‘discriminatory purpose’” and that simply demonstrating that a “policy or practice has a disparate impact on people of a particular race is not sufficient to prevail on an Equal Protection claim.”11 Because of the narrow and restrictive legacy of court interpretation, the Fourteenth Amendment has been weakened and has not operated as an effective tool to implement civil and human rights. Ultimately, success and actual progress in enforcing civil rights came when the Supreme Court “upheld the Civil Rights Act of 1964, although it relied on Congress’s authority under the Commerce Clause, and not the Fourteenth Amendment.”11

#### That solves disease and bioterrorism – extinction.

John Mecklin 17. Editor-in-chief of the Bulletin of the Atomic ScientistsHow the House health care bill undercuts bioterror and pandemic defenses http://thebulletin.org/how-house-health-care-bill-undercuts-bioterror-and-pandemic-defenses10752

For all sorts of reasons, **the US public health system**—as patchwork as it may be—**is absolutely vital to protecting the United States and the world from bioterrorism and natural disease outbreaks that could turn pandemic**. I could offer a long policy discussion here to support the previous sentence, but I think two words will do the job: Ebola. Anthrax. According to a question-and-answer string generated by the Washington Post, the House health care bill “would eliminate funds for fundamental public health programs, including for the prevention of **bioterrorism and disease outbreaks**, as well as money to provide immunizations and heart-disease screenings” and gut a fund that provides almost $1 billion annually to the Centers for Disease Control and Prevention (CDC). The panic that attended the anthrax letter attacks of 2001 and Ebola cases in 2014—incidents that claimed only a relative handful of victims each in this country—**would pale in comparison to the uproar accompanying a widespread outbreak of serious disease**, whether it were natural in origin or manmade. The systems needed to detect outbreaks early and **forestall pandemic** are exactly the programs that the House health care bill cuts. Many of those systems are run by state health departments, which would lose hundreds of millions of dollars because of cuts in funding for the CDC. At the same time, it seems likely that if the Senate agrees to something close to the House health care bill, millions of Americans will also lose health insurance coverage. This combination—disinvestment in public health and large reductions in the number of people with access to timely medical care—could facilitate the type of pandemic that **causes mass casualties and threatens social order**. Such a level of risk demands an increased level of attention from the media, and from the Senate, as it decides how it will address—and, I hope, greatly change—the House version of health care “reform."

## Platforms

### 1NC---AT: FinTech Innovation Low

#### Fintech innovation is high.

Beauchamp 20. – Canadian journalist, researcher and content contributor covering topics ranging from the environment, business, and the economy at Valuer AI ( Lauren, ‘The Best Fintech Startups in the USA’, November 18 2020, <https://www.valuer.ai/blog/best-fintech-startups-in-usa> )

Fintech, or financial technology has become one of the most successful global industries in the last decade. From mobile payment, trading, and cryptocurrency applications, FinTech has transformed the way finances are done. The hub of this technological trend is in the United States, where there is currently 1,491 startups and $58.5 billion investment in the industry, according to Digital Information World. Fintech is a global industry with startups having a presence in 6 continents. The USA is considered the global capital of Fintech with the largest investment in the industry, followed by China, The United Kingdom, and India. [graph omitted] With the fintech industry growing every subsequent year, the market is starting to fill up with fintech startups and innovative financial services trying to fulfill customers' needs that will ultimately shape the future of finance. [graph omitted] The last year has shown that startups are on the rise across all of America. In March 2019, there were 774,725 businesses that were less than 1 year old, according to Statista. These businesses had all started from scratch and were unrelated to existing corporations. These startups have generated $34.5 billion in revenue globally.

### 1NC – Sanctions Fail

#### Sanctions fail – data proves

Hakimian 19. – Hassan Hakimian, Director of the London Middle East Institute and Reader in Economics at SOAS, University of London. (Hassan, 05/09/19, “Seven key misconceptions about economic sanctions,” <https://www.weforum.org/agenda/2019/05/seven-fallacies-of-economic-sanctions/>) np

But it remains highly doubtful that Iran will change its policies, let alone its regime, in the face of Trump’s sanctions. The simple truth about economic sanctions is that, though widely used, they often fail. A [comprehensive study](https://cup.columbia.edu/book/economic-sanctions-reconsidered/9780881324129) of 170 twentieth-century cases in which sanctions were imposed concluded that only one-third of them attained their stated objectives. [Another study](https://www.mitpressjournals.org/doi/pdf/10.1162/isec.22.2.90?casa_token=AcKCubt-Fc4AAAAA%3A2NZEygEBEtYZAVv5HkUpnxedSfH9l0qLklgJHaUu0JpqWDZ6bDa8o2BuvKHVWziqmwOVhmSr1Nbk&) estimates the success rate of sanctions regimes to be lower than 5%. Such a high failure rate suggests that governments often use flawed arguments to justify imposing sanctions, tainting our understanding of their rationale and effectiveness. Seven misconceptions or fallacies stand out. Each needs to be debunked.

### No Iran Prolif---1NC/2AC

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

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

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

### AT: Israel Strikes

#### No Israel strikes---costs outweigh benefits.

Louis Beres 15. Professor of political science and international law at Purdue University. \*\*Leon Edney is a retired US Navy admiral, NATO supreme allied commander, and distinguished professor of leadership at the US Naval Academy. “What -Now for Israel?” US News. 7/14/2015. <http://www.usnews.com/opinion/blogs/world-report/2015/07/14/after-the-iran-nuclear-agreement-what-are-israels-security-options>

To be sure, following careful assessments of the new Iran agreement, Israel's prime minister will need to make an 11th-hour decision on preemption. In principle, at least, considering any such defensive first strike against Iranian nuclear assets and infrastructures could still make strategic sense if the following conditions were assumed: 1. Iran will inevitably become militarily nuclear; 2. Iran will very likely plan to use its new nuclear forces in a first-strike aggression against Israel; and 3. Iran's key decision makers will likely be irrational. Regarding core definitions, irrational decision-makers would be those Iranian leaders who could sometime value certain preferences or combinations of preferences (e.g., certain Shiite religious expectations) more highly than Iran's national survival. In the absence of any one of these three critical assumptions, the expected retaliatory costs to Israel of any contemplated preemption would plausibly exceed the expected benefits. Moreover, there would be nothing genuinely scientific about making such difficult policy choices. For one thing, all of the associated probability judgments would need to be overwhelmingly subjective. How, for example, could Israeli analysts say anything meaningfully predictive about unique or unprecedented circumstances? In science, probabilities must always be based upon the determinable frequency of past events. Here, however, in pertinent history, there exists no usable guidance. To wit, exactly how many preemptive attacks have already been launched by a nuclear state against a nearly-nuclear state? The "zero" answer is obvious and irrefutable. It must, therefore, be a cautionary reply. An additional complication exists. The nearly-nuclear state, Iran, will still possess large conventional and chemical rocket forces. Many other threatening missiles will remain under the operational control of its sub-state terrorist proxies. Hezbollah, the well-armed Shiite militia, already has more rockets in its arsenal than do all NATO countries combined; it is even less likely than Iran's own leaders to hold back on any post-preemption retaliations. All things considered, Israel's best security plan, going forward, would be to enhance its underlying nuclear deterrence posture, and to render this critical enhancement as conspicuous as possible. More precisely, this means that Jerusalem should do everything possible to signal to any future Iranian aggressor that its own nuclear forces are plainly survivable, and capable of penetrating any of Tehran's ballistic missile or other active defenses. Correspondingly, it will also become necessary for Israel to move very carefully beyond its traditional posture of deliberate nuclear ambiguity, or the so-called "bomb in the basement." In the irremediably arcane world of Israeli nuclear deterrence, it can never be adequate that enemy states should simply acknowledge the Jewish State's nuclear status. It is equally important that these adversarial states believe Israel to hold usable and survivable nuclear forces, and be willing to employ these weapons in certain clear and readily identifiable circumstances. Israel's nuclear doctrine and weapons are necessary to various scenarios that could require conventional preemptive action, or more residually, a specifically nuclear retaliation. In any event, for Israel, the core purpose of its nuclear weapons must always be deterrence ex ante, not revenge ex post. An integral part of Israel's multi-layered security system lies in maintaining effective ballistic missile defenses, primarily, the Arrow or "Hetz." Yet, even the well-regarded and successfully-tested Arrow could never achieve a sufficiently high capacity for missile intercept, a quality needed to adequately protect Israeli civilians from any Iranian nuclear attack. In essence, this means that Israel can never rely too heavily upon active defenses for its national protection. What about the prospect of an irrational Iranian adversary? Any Israeli move from ambiguity to disclosure, however selective, might not help in the particular case of an irrational nuclear enemy . It remains possible, or even plausible, that certain elements of Iranian leadership will determinedly subscribe to certain end-times visions of a Shiite apocalypse. Still, taken by itself, such subscription does not automatically or even persuasively call for an Israeli preemption.

### Saudi-Iran War D---1NC

#### No Saudi-Iran war

Bilal Y. Saab 18, senior fellow and director of the Defense and Security program at MEI, May, “Beyond The Proxy Powder Keg: The Specter Of War Between Saudi Arabia And Iran,” https://www.mei.edu/sites/default/files/publications/PP3\_Saab\_IranSaudi.pdf

Indeed, their intense rivalry notwithstanding, Saudi Arabia and Iran do not have territorial disputes—a major reason why nations go to war—and do not share a history of direct military conflict. Moreover, Iran does not feel existentially or directly threatened by Saudi Arabia. While Saudi Arabia competes with Iran across the region and challenges its Islamic regime’s religious pretensions, Riyadh does not pose an independent and direct military threat to Iran, unlike Israel. It is the Saudis’ close partnership with Washington that concerns the Iranians, not Saudi military power per se. A direct war between Saudi Arabia and Iran is also very unlikely, the argument goes, because Saudi Arabia does not have the capabilities to engage in a military confrontation with Iran. Both the Saudis and the Iranians realize that they have more to lose than gain from a direct clash. That is why these two adversaries have preferred throughout their four decade-long struggle to manage their rivalry by competing through proxies instead of battling head-to head. Last but not least, America’s massive military presence in the Gulf will continue to help deter war between Saudi Arabia and Iran.

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

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

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

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

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

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

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

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

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

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

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

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

## Conduct

### Gradualism Turn---1NC

#### Current ruling is limited.

Richard Brunell 18. General Counsel of the American Antitrust Institute, Washington, DC. The AAI filed an amicus brief in Amex in the Supreme Court in support of the government. The views expressed in this article are those of the author and do not necessarily reflect the view of AAI. “Ohio v. Amex: Not So Bad After All?” https://www.antitrustinstitute.org/wp-content/uploads/2018/12/Brunell-Amex-Magazine-article.pdf

Conclusion

The majority decision in Amex raises uncertainty over numerous issues, but it is actually quite limited in scope. Regardless of which two-sided platforms may qualify for “single market” treatment for purposes of analyzing vertical restraints, Amex’s market-definition analysis should have no application to per se or quick-look claims, claims challenging horizontal restraints more generally, or to Section 2 monopolization claims.

As to vertical restraints, Amex does not abrogate the direct effects test nor establish a market power screen.To the extent that it may be read to require market definition beyond the two-sided platform context, defining the “rough contours” of the market should be sufficient in a direct effects case. And to the extent Amex applies to the rule of reason generally, it does not make reduced output a necessary factor in demonstrating anticompetitive harm; rather, it suggests that when a prima facie case is based on weak evidence of supracompetitive pricing and there is a demonstrable increase in industry-wide output, a plaintiff may be required to show that the increase in output is not caused by the restraint at issue. Finally, because it ostensibly turned on market definition, Amex does not alter the established rules that defendants have the burden of proving procompetitive justifications at step two of the rule of reason and that out-of-market benefits do not count. In short, Amex may not be as bad for antitrust enforcement as some contend.

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

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

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

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

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

#### That decks certainty---turns innovation.

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

Verizon participates in multi-sided markets both as a provider of connective platforms and as a market participant relying on a platform for connection. Verizon businesses rely on platform services from the credit card payment systems in Verizon-owned stores to the operating systems that run on mobile devices and connect Verizon subsidiaries’ applications to consumers. Consumers access third-party content over Verizon’s Fios and mobile services. Verizon’s applications from its Oath subsidiary (such as Yahoo! Sports) act as an intermediary between content providers and consumers in the digital world. Verizon is also itself a platform provider. ThingSpace is Verizon’s web-based Internet of Things platform that provides a workspace for developers to create applications and services for customers with connected IoT devices that are served by Verizon’s network. BrightRoll by Yahoo! provides programmatic tools to help buyers and sellers connect with consumers across ad formats and devices, and ONE by AOL provides a mobile monetization platform that connects publishers, advertisers, and consumers to enable these groups to connect. In short, platforms support Verizon’s business, and in many instances, they are Verizon’s business.

Verizon thus has a strong interest in the proper application of the antitrust laws and the Court’s antitrust jurisprudence and, most relevant here, a heightened interest in how the Court applies those laws and precedent to multi-sided markets. Although some markets with two or more sides have existed for some time now (e.g., newspapers), our modern economy has seen an explosion in the development of multi-sided markets. It is only recently that economic theory has focused on these complex markets; likewise, it is only recently that courts have considered their antitrust implications. Not surprisingly, then, there is no generally accepted guidance in the law or economic theory about how they should be treated under the antitrust laws. The Court thus should proceed cautiously here to avoid impairing pro-competitive behavior and harming consumer welfare in the process.

Verizon expresses no opinion on the merits of the case. Rather, Verizon writes to respectfully request that the Court refrain from issuing any broad pronouncements on novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

### Encourages Litigation---1NC/2NC

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

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

III. IGNORING THE EFFECTS OF MULTISIDEDNESS THREATENS INNOVATION

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

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

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

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

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

CONCLUSION

The judgment of the Second Circuit should be affirmed.

### 1NC---Monopoly Inevitable

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

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

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

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

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

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

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

As The Economist has put it,

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

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

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

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

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

#### Innovation is fine.

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

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

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

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

And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler

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

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

### 1NC---No Cyberattacks

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

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

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack. To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge. It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted. More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are: Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals. There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.) No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare. State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war. This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation. The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability. One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies

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

## Adv 3

### No Bio Weaponry/Bio Terror---1NC/2AC

#### No Bioweapon threat---empirical consensus, technical challenges, and no scenario for extinction.

Marc-Michael **Blum 20**. Dr. Blum is working the in the field of analysis, decontamination, countermeasures and mitigation of chemical warfare agents with more than 15 years’ experience. "Corona and Bioterrorism: How Serious Is the Threat?" War on the Rocks. 6-22-2020. <https://warontherocks.com/2020/06/corona-and-bioterrorism-how-serious-is-the-threat/>

The novel coronavirus pandemic has put the threat of bioterrorism back in the spotlight. White supremacist chat rooms are [teeming with talk](https://www.businessinsider.com/coronavirus-white-supremacists-discussed-using-covid-19-as-bioweapon-2020-3?r=DE&IR=T) about “biological warfare.” ISIL even called the virus “[one of Allah’s soldiers](https://www.wsj.com/articles/what-jihadists-are-saying-about-the-coronavirus-11586112043)” because of its devastating effect on Western countries. According to a recent [memo](https://www.independent.co.uk/news/world/americas/coronavirus-terrorist-white-supremacy-fbi-bioterrorism-a9417296.html) by the U.S. Department of Homeland Security, terrorists are “[making] bioterrorism a popular topic among themselves.” Both the United Nations and the Council of Europe have warned of bioterrorist attacks. How serious is the threat? There is a long history of terrorists being fascinated by biological weapons, but it is also one of failures. For the vast majority, the **technical challenges** associated with weaponizing biological agents have **proven insurmountable**. The only reason this could change is if terrorists were to receive support from a state. Rather than panic about terrorists engaging in biological warfare, governments should be vigilant, secure their own facilities, and focus on strengthening international diplomacy. A **History of Failures** Biological warfare, which uses organisms and pathogens to cause disease, is [nearly **as old as war** itself](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200679/). The first known use of biological agents as a weapon dates back to 600 B.C., when an ancient Greek leader poisoned his enemies’ water supply. Throughout the Middle Ages, especially during the time of the Black Death, it was common to hurl infected corpses into besieged cities. And during the two world wars, all major powers maintained biological weapons programs (although only Japan used them in combat). Among terrorists, however, the use of biological weapons has **been rarer**, although groups from nearly all ideological persuasions [have contemplated it](https://mitpress.mit.edu/books/toxic-terror). Recent examples include a plot to contaminate Chicago’s water supply in the 1970s; food poisoning by a religious cult in Oregon in the 1980s; and the stockpiling of ricin by members of the Minnesota Patriot Council during the 1990s. **No one died** in **any** of these instances. The same is true for the biological warfare programs of al-Qaeda and the Islamic State group. Both groups have sought to [buy, steal, or develop biological agents](https://www.jstor.org/stable/26369585?seq=1#metadata_info_tab_contents). For al-Qaeda, this seems to have been a priority in the 1990s, when its program was overseen by (then) deputy leader Ayman al-Zawahiri, a trained physician. With the Islamic State, evidence dates back to 2014, when Iraqi forces discovered thousands of files related to biological warfare on a detainee’s laptop. Yet **none of these efforts succeeded**. The only al-Qaeda plot in which bioterrorism featured prominently — the so-called “ricin plot” in England in 2002 — was interrupted at such an early stage that [none of the toxin](http://news.bbc.co.uk/2/hi/uk_news/4433499.stm) had actually been produced. The Islamic State’s most serious attempt, in 2017, involved a small amount of ricin, whose [**only fatality** was **the hamster**](https://www.dw.com/en/cologne-ricin-plotters-bought-a-hamster-to-test-biological-weapon/a-44804164) on which it was tested. Of the **tens of thousands** of people that jihadists have murdered, not a **single one** has died from biological agents. It may be no accident that the most lethal bioterrorist attack in recent decades was perpetrated by a scientist and government employee. In late 2001, the offices of several U.S. senators and news organizations received so-called “anthrax letters,” which killed five people and injured 17. Following years of investigation, the FBI identified the sender as [Bruce Ivins,](https://www.npr.org/templates/story/story.php?storyId=93194941&t=1591560313301) a PhD microbiologist and senior researcher at the U.S. Army’s Medical Research Institute of Infectious Diseases. Unlike the others, he was no amateur or hoaxer, but a trained expert with years of experience and full access to the world’s largest repository of lethal biological agents. **Technical Challenges** Ivins’ case helps to explain why so many would-be bioterrorists have failed. At a **technical level**, launching a sophisticated, large-scale bioterrorist attack involves a toxin or a pathogen — generally a bacterium or a virus — which needs to be **isolated** and **disseminated**. But this is more **difficult** than it seems. As well as advanced training in biology or chemistry, isolating the agent **requires significant experience**. It also has to be done in a **safe**, **contained** environment, to stop it from spreading within the terrorist group. Contrary to what [al-Qaeda said in one of its online magazines,](https://www.telegraph.co.uk/news/worldnews/7865978/Al-Qaeda-newspaper-Make-a-bomb-in-the-kitchen-of-your-mom.html) you **can’t** just make a **(biological) weapon** “in the **kitchen** of your mom!” In addition, there is the **challenge of dissemination**. Unless the agent is super-contagious, a powerful biological attack relies on a large number of initial infections in **pe**

**rfect conditions**. In the case of the bacterium anthrax, for example, only spores of a **particular size** are likely to be effective in certain kinds of **weather**. State-sponsored programs often needed years of testing and experimentation to understand how their weapons could be used. Though not impossible, it is **unlikely** that terrorist groups possess the resources, stable environment, and patience to do likewise. **Doomsday Scenarios** Even if terrorists somehow succeeded, it is **nearly inconceivable** that the resulting “weapon” would be as powerful as the recent coronavirus, SARS-CoV-2. One of its uniquely devastating features has been that people are infectious while experiencing no symptoms. As it spread across the globe, there was no treatment, no vaccine, an incomplete understanding of its pathological modes of action, and no easy, cheap and widely available testing. It was the viral equivalent of a “zero-day exploit” — a cyber-attack that happens before any patch is available. None of the viruses on the U.S. Centers for Disease Control and Prevention’s list of the [**most dangerous biological agents**](https://emergency.cdc.gov/agent/agentlist-category.asp) could be easily “weaponized” or would have the same, **devastating effects** as SARS-CoV-2. Pathogenic viruses such as smallpox, Ebola, Marburg, and Lassa are extremely hard to find, isolate, and spread. Botulinum and ricin are dangerous toxins, but **not contagious**, while [Tularemia](https://www.cdc.gov/tularemia/index.html) cannot be transmitted from human to human. The plague is, of course, capable of causing pandemics, but most countries are nowadays [well prepared for this particular virus,](https://www.who.int/csr/resources/publications/plague/CSR_ISR_2000_1/en/index3.html) and will be able to limit — and cope with — localized outbreaks. This leaves only anthrax, a soil bacterium which is relatively easy to obtain. Even so, isolating a **highly pathogenic strain** is difficult. More importantly, anthrax is **not contagious**, and while its spores are durable and affected areas can be hard to de-contaminate, it is **unable to spread** on its own. Regarding SARS-CoV-2, it is important to distinguish between the possibility that the virus occurred naturally and escaped from a laboratory, and the idea that it was engineered for maximum infectiousness and deliberately released. The first remains a possibility, although other explanations are equally — if not more — plausible, while the second has been debunked by a [comprehensive examination](https://www.nature.com/articles/s41591-020-0820-9) in the journal Nature Medicine, which concluded that SARS-CoV-2 was “not a laboratory construct or a purposefully manipulated virus.” The chances that terrorists would be capable of engineering a virus such as SARS-CoV-2 **without access** to a state’s resources are **virtually zero.** If anything, the possibility of a lab escape — however remote — highlights the importance of [biosafety.](https://warontherocks.com/2020/06/a-guide-to-getting-serious-about-bio-lab-safety/) While governments have paid much attention to laboratories with the highest biosafety level (level 4), work on bat-born coronaviruses is regularly performed at lower levels (level 3, and even level 2), and should instead be subject to similar safety requirements. In sum, small-scale attacks using anthrax or other agents may be possible, but the risk of a highly advanced, weaponized pathogen that spreads among large populations — a **terrorist-initiated biological doomsday** — is **very low.** The only exception, of course, is if terrorists received support from a state, acted as its proxies, or were able to draw on its resources — as in Ivins’ case.

### 1nc – democracy

#### Democracy doesn’t solve war – increases hostility.

Sam GHATAK ET AL. 17. \*\*Lecturer, Political Science, University of Tennessee Knoxville. \*\*Aaron Gold, PhD Student, Political Science, UT Knoxville. \*\*Brandon C. Prins, Professor and Director of Graduate Studies, UT Knoxville. “External threat and the limits of democratic pacifism.” *Conflict Management and Peace Science* 34(2): 141-59. Emory Libraries.

Conclusion

It has become a stylized fact that dyadic democracy lowers the hazard of armed conflict. While the Democratic Peace has faced many challenges, we believe the most significant challenge has come from the argument that the pacifying effect of democracy is epiphenomenal to territorial issues, specifically the external threats that they pose. This argument sees the lower hazards of armed conflict among democracies not as a product of shared norms or institutional structures, but as a result of settled borders. Territory, though, remains only one geo-political context generating threat, insecurity, and a higher likelihood of armed conflict. Strategic rivalry also serves as an environment associated with fear, a lack of trust, and an expectation of future conflict. Efforts to assess democratic pacifism have largely ignored rivalry as a context conditioning the behavior of democratic leaders. To be sure, research demonstrates rivals to have higher probabilities of armed conflict and democracies rarely to be rivals. But fundamental to the Democratic Peace is the notion that even in the face of difficult security challenges and salient issues, dyadic democracy will associate with a lower likelihood of militarized aggression. But the presence of an external threat, be that threat disputed territory or strategic rivalry, may be the key mechanism by which democratic leaders, owing to audience costs, resolve and electoral pressures, fail to resolve problems nonviolently.

This study has sought a ‘‘hard test’’ of the Democratic Peace by testing the conditional effects of joint democracy on armed conflict when external threat is present. We test three measures of threat: territorial contention, strategic rivalry, and a threat index that sums the first two measures. For robustness checks, we use two additional measures of our dependent variable: fatal MID onset, and event data from the Armed Conflict Database, which can be found in our Online Appendix. As most studies report, democratic dyads are associated with less armed conflict than mixed-regime and autocratic dyads. In every one of our models, when we control for each measure of external threat, joint democracy is strongly negative and significant and each measure of threat is strongly positive and significant. Here, liberal institutions maintain their pacific ability and external threats clearly increase conflict propensities. However, when we test the interactive relationship between democracy and our measures of external threat, the pacifying effect of democracy is less visible. Park and James (2015) find some evidence that when faced with an external threat in the form of territorial contention, the pacifying effect of joint democracy holds up. This study does not fully support the claims of Park and James (2015). Using a longer timeframe, we find more consistent evidence that when faced with an external threat, be it territorial contention, strategic rivalry, or a combination, democratic pacifism does not survive. What are the implications of our study? First, while it is clear that we do not observe a large amount of armed conflict among democratic states, if we organize intersta

te relationships along a continuum from highly hostile to highly friendly, we are probably observing what Goertz et al. (2016) and Owsiak et al. (2016) refer to as ‘‘lesser rivalries’’ in which ‘‘both the frequency and severity of violent interaction decline. Yet, the sentiments of threat, enmity, and competition that remain—along with the persistence of unresolved issues—mean that lesser rivalries still experience isolated violent episodes (e.g., militarized interstate disputes), diplomatic hostility, and non-violent crises’’ (Owsiak et al. 16). Second, our findings show that the pacific benefits of liberal institutions or externalized norms are not always able to lower the likelihood of armed conflict when faced with external threats, whether those hazards are disputed territory, strategic rivalry, or a combination of the two. The structural environment clearly influences democratic leaders in their foreign policy actions more than has heretofore been appreciated. Audience costs, resolve, and electoral pressures, produced from external threats, are powerful forces that are present even in jointly democratic relationships. These forces make it difficult for leaders to trust one another, which inhibits conflict resolution and facilitates persistent hostility. It does appear, then, that there is a limit to the Democratic Peace.

### China

#### No violent China rise---it isn’t a threat to the LIO.

Koh King Kee 20. President, Centre for New Inclusive Asia (CNIA). Associate Fellow, Institute of China Studies, University of Malaya. “China’s Rise Is No Threat to the Liberal International Order “ China Focus. 01-22-2020. http://www.cnfocus.com/china-s-rise-is-no-threat-to-the-liberal-international-order/

China has given the world a sterling report card for its economic reform over the last four decades. Its achievements have won admirations and applauses across the world, from men on the street to political elites. Its success stories are inspirations to leaders of the emerging economies who see in China an alternative development model, a growth path that is strikingly different from the conventional economic text. But its meteoric rise has also **stirred concerns and fears in the West**. To the advocates of Western democracy, China is a centralized authoritarian regime, the rise of which is a threat to the liberal international order. Particularly, America views China as a revisionist power that poses an imminent challenge to its global hegemony. In a radio interview last year, U.S. Secretary of State Mike Pompeo alleged that China is “buying an empire” with its Belt and Road Initiative, and America intends to “oppose them at every turn”. **Are such allegations justified** or misguided? What sets China’s political system apart from the rest of the world? China’s centralized system is rooted in its history “The Chinese tradition of order imposed by a centralized system” is “a pattern that goes back at least 3,500 years”, says Newt Gingrich, former US House Speaker in his newly published book “Trump Vs China: Facing America’s Greatest Threat”. Newt Gingrich, a harsh critic of the Communist Party of China (CPC) has no empathy for China. However, he is right in pointing out that China’s political system under CPC is rooted in thousands of years of its history, a system that is inextricably embedded in its millennial-old civilization. Centralization has been China’s mainstream political philosophy spanning from the ancient dynasties to modern days. China has remained a unified nation after Qinshihuang’s conquest of the Warring States more than 2,000 years ago despite the rise and fall of the dynasties, thanks to the centralized system. It glues the immense territory together and prevents China from falling into the fate of Europe – disintegration into small nation states. China’s centralized system of governance is run based on meritocracy – a key tenet of Confucianism, which is the **bedrock of Chinese civilization**. “When the Great Principle prevails, the world belongs to all, rulers are selected according to their wisdom and ability (⼤道之⾏也，天下为公，选贤与能),” said Confucius. In ancient China, talents were picked based on the principle of meritocracy through an open imperial examination system to serve the ruler of the day. Likewise, in present day China, leaders are selected after they have passed through tiers of ability and loyalty mill tests. Centralization and meritocracy are the foundation of Chinese polity. Despite regime change, they have remained China’s unchanged statecraft throughout its history. CCP’s consultative democracy is, in fact, a blend of centralization and meritocracy. Advantages of China’s political system Many factors have contributed to China’s startling economic rise. Free trade and globalization are unequivocally important drivers. However, many countries with a huge population or immense territory such as India, Russia and Indonesia have not been able to achieve the same economic growth as that of China, even though the same international environment and opportunities were availed to them. Many political pundits and economists have failed to recognize that what sets China apart from others in its development path is, in fact, its unique political system. China’s centralized CPC-led system has obvious advantages over electoral democracy as it allows the government to formulate long-term economic development plans for the country as opposed to focusing on short term populist policies for voters’ satisfaction. It is not uncommon for a new government to reverse development policies of the previous regime due to different ideologies in a parliamentary democracy. Meritocracy and political stability enhance government efficiency and accountability. China is well acknowledged for its high efficiency in delivering mega infrastructure projects. It builds highways, railways, bridges, dams, power plants, airports and other infrastructure projects in record time, now come to know as “China Speed”. Typically, a HSR project in China takes about 4 years to complete irrespective of its size, whilst in other countries, a similar project may take up to a decade to build. “China Speed” speeds up China’s economic growth as infrastructure is not only the prerequisite, but also the catalyst for economic development. BRI – a platform for international cooperation China’s Belt and Road Initiative (BRI) is the biggest infrastructure built out in the history of mankind. It is a mammoth transcontinental development project that aims to build connectivity across the Eurasian landmass based on the principles of mutual consultation, joint contribution and shared benefits. “China will actively promote international cooperation through the Belt and Road Initiative. In doing so, we hope to achieve policy, infrastructure, trade, financial, and people-to-people connectivity and thus build a new platform for international co-operation to create new drivers of shared development,” said President Xi Jinping at the 19th CPC National Congress. Sound infrastructures are the prerequisite for economic development. According to ADB’s estimate, Asia alone requires $26 trillion of infrastructure investment from 2016 to 2030 in order to maintain its growth momentum, eradicate poverty and respond to climate change. China is well positioned to contribute to the global infrastructure investment needs in view of its technology and expertise in building infrastructure projects, coupled with its huge pool of foreign reserves. To deepen its reform, China must move up the global value chain, migrate its low technology industries and alleviate its excess industrial capacities by opening-up new markets. BRI connects China’s landlocked northwest provinces to the world with overland highways and railways. It opens a safe passageway to the Indian Ocean through the China-Pakistan Economic Corridor. BRI is thus a **win-win transnational development project** benefiting China and the partner countries. However, in the eyes of Washington, BRI is China’s grand strategy to project its global influence and a challenge to America’s world supremacy. Washington accused China of coercive economic diplomacy by indiscriminate lending to developing countries with poor repayment ability, eventually seizing the strategic assets of the recipients when they failed to repay the loans – a scheme propagated by the West as “debt trap”. China is developing through interaction with the world China is a member of the global village. It is developing through interactions with the world. “China has been seeking development with its door open. China has **embraced the world**, learned from the world, and contributed to the world, **through positive interaction** and shared development.” China sums up its relationship with the world in “ China and the World in the New Era”, a White Paper commemorating the 70th Anniversary of the founding of the People’s Republic of China. China promotes interconnected development and **benefits from the existing international order.** It advocates **free trade and multilateralism.** When China started its reform and opening-up to the world, the West cast a mould, expecting China to grow accordingly. However, China took a path not traversed by others – a mixed economy under the centralized authoritarian system, or as CPC puts it, Socialism with Chinese Characteristics. It is a system rooted in thousands of years of its history and civilization, a development model that suits China and produces an economic miracle never seen in human history. The Belt and Road Initiative is China’s mega initiative for globalization **aiming at win-win outcome.** It is China’s offer of public goods to the world as an emerging economic superpower, a manifestation of its age-old philosophy, “When you are rich, share your wealth with the world (达则兼济天下）.” China is now the second largest economy and top trading nation in the world, contributing about 30 percent to global growth. Inevitably, the international order should reflect the new economic dynamics of the 21st century. While China’s economic achievements offer valuable lessons to the world, it has no messianic aspirations. As President Xi Jinping has categorically said, “We will not import other countries’ models, and will not export the China model.” China’s growth is being realized within the existing international order. China has **no reason to sabotage** it nor the intention to supplant America’s global preeminence. **China’s rise is no threat to the liberal international order!**

#### China tech fears are unfounded---they can’t catch up.

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

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

awards the most advanced degrees; provides the most advanced business, financial and information services and is the largest producer in knowledge-intensive, high-tech sectors, from pharmaceuticals to semiconductors. The fear that China will displace the United States as the global tech superpower is grossly exaggerated. Unfortunately, such paranoia dominates the minds of protectionist U.S. politicians and China hawks and has already amplified a destructive trade war between the world’s two largest economies. For China’s part, its soul-searching is overdue. Beijing should resist the prevalent yet ill-justified self-complacency and triumphalism that contributed to the fear in Washington in the first place, and it should make serious efforts to reform and open its domestic economy. Unless Beijing amends its heavy-handed statist approach to economic development, China’s potential as a leading nation in science and technology could be seriously curtailed.

#### Alt causes to digital authoritarianism – biometric, facial recognition technology, blood and audio sampling, etc. – plan doesn’t solve.

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

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

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

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

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

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

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

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

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

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

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

# 2NC – Navy Quarters

## T-Structural

### Offense---2NC

#### Strongly err neg on a topic with no clear external limit---our interpretation is aff remedies can only be structural---the aff introduces behavioral remedies like “make sure you comply with x,” light civil fines and oversight which fails.

#### 1 – Predictable limits and ground outweigh---only our interpretation ensures that the aff has to “break up” big industries if they commit the anti-competitive action---otherwise the aff can implement any regulation on a practice---means they can require new data standards, submit companies to congressional oversight, penalize them monetarily, or ANY OTHER MECHANISM that makes a practice harder but doesn’t structurally prohibit it. Multiply that by the number of industries AND by all possible business practices within each industry---makes the topic a NIGHTMARE for the neg because there’s zero link uniqueness for case-by-case remedies.

#### 2 – Causes bidirectionality and circumvention.

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

We can now look at the causal relations between the variables of primary interest: the relationship between antitrust actions and merger frequencies: Prohibitions has a statistically-significant negative impact on future merger behavior in five out of the six regression equations (excluding only the OLS estimation in regression #1). The consistent significance and strong impact of this variable suggests that spikes in the use of Prohibitions seem to send a very clear signal of toughness by antitrust authorities—a signal that significantly reduces future merger proclivities.

Remedies, on the other hand, seem to positively influence future Mergers; though, the coefficient estimate is only significant in three regression equations—regressions’ #1, #2, & #4. Accordingly, we can interpret these results as suggesting that the effect of remedies coming at the expense of prohibitions (a lowering of antitrust toughness) is stronger than the effect of remedies coming at the expense of clearances (an increase in antitrust toughness). In other words, we have some evidence that firms seem to interpret spikes in remedies as indicating softer behavior on the part of antitrust authorities. Such an interpretation should be cautioned by the fact that the remedies coefficient estimate is not significant in the fixed- effects estimation (regression #3); thus, suggesting that the remedies effect may only be capturing cross-jurisdictional variation. Nevertheless, the important point here is that the application of Remedies does not seemingly involve a significant deterrence effect.

### AT: We Meet---2NC

#### They don’t meet – no permanent prohibitions because they “get to yes”

#### 1 – Behavioral remedies are an alternative to separation – AFF specific.

Richard J. Gilbert 20. Emeritus Professor of Economics, Univerity of California, Berkeley United States. “Separation: A Cure for Abuse of Platform Dominance?” Information Economics and Policy Volume 54, March 2021, 100876 https://www.sciencedirect.com/science/article/pii/S0167624520301207

A handful of platforms wield substantial market power in the digital economy. A theme that resonates with legislators and antitrust enforcers is the ability of the platform owners to advantage their own products or services by distorting the information they display to consumers or by misusing information they obtain from firms that utilize their services. Key questions are whether these concerns can and should be addressed by antitrust enforcement or regulation and, if they should be addressed, whether remedies should require structural or functional separation or be limited to behavioral conditions.

There is no single formula to address concerns about the alleged abuse of market power by these platforms. Separation is an alternative to behavioral remedies of the type imposed by the European Commission in the Google Shopping case. These behavioral remedies have accomplished little to restore competition that the EC alleged was harmed by Google’s search algorithms. Separation has the potential to be a more effective remedy to restore competition allegedly harmed by the conduct of a platform owner, but separation raises many questions, including the platforms that require separation, the services that must be separated, the terms and governance of separation requirements, and procedures to evaluate appeals from line-of-business restrictions.

#### 2 – The plan’s contingent on the effects in each individual case. That’s distinct.

Kevin Boyle & Hurst Hannum 74, Boyle is Barrister at Law at Queen’s University of Belfast; Hannum is a member of the California Bar, “Individual Applications Under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case,” The American Journal of International Law, vol. 68, no. 3, American Society of International Law, 1974, pp. 440–453

In reply, the respondent government argued that the “administrative practices” exception developed by the Commission in relation to interstate cases could not in any circumstances apply to an individual application under Article 25. They submitted that it applied only where an application raised a general issue, distinct from its effects on individuals, and that an individual was incompetent to raise such general issues under Article 25.52 While denying generally that any violation of Article 3 had occurred, the respondent government maintained that, if violations did occur, adequate and effective remedies existed within domestic United Kingdom law which had not been exhausted by the individual applicants.

#### 3 – Requirements that firms act in a certain way are behavioral remedies---that describes the Aff.

Lisl Dunlop 18. Partner in the New York office and co- chair of the firm’s antitrust and competition practice group of Manatt, Phelps & Phillips, September 2018. “Current Themes in U.S. Merger Control.” https://www.manatt.com/getattachment/311dc3d1-8754-447e-91d2-01bbead87763/attachment.aspx

Two related themes that have emerged over the past year are an increased hostility toward remedies that result in ongoing supervision or monitoring by the agencies (known as “behavioral” remedies) and a sharper focus on vertical merger enforcement. The two are closely related in that the typical “fix” for competition concerns in vertical transactions is often a behavioral remedy—the imposition of requirements that the merged firm act in a certain way after consummation of the transaction, such as an obligation to continue to give access to competitors. In the absence of such a resolution, the agencies are faced with a decision to permit the transaction to proceed, look for a structural solution or challenge the transaction in its entirety.

#### 4 – Those aren’t prohibitions---only structural remedies meet the violation.

John E. Kwoka 12. Neal F. Finnegan Professor of Economics, Northeastern University, with Diana L. Moss, Vice President and Director, American Antitrust Institute. “Behavioral merger remedies: Evaluation and implications for antitrust enforcement.” THE ANTITRUST BULLETIN: Vol. 57, No. 4/Winter 2012. ProQuest.

C. Preference for structural remedies in the United States and other major jurisdictions

As noted, the 2004 Remedies Guide expressed a clear preference for structural remedies, citing “speed, certainty, cost, and efficacy” as key factors by which the potential effectiveness of a remedy should be measured.19 By way of explanation, the 2004 Remedies Guide stated that structural remedies were preferred to behavioral remedies because “they are relatively clean and certain, and generally avoid costly government entanglement in the market. A carefully crafted divestiture decree is ‘simple, relatively easy to administer, and sure’ to preserve competition.”20 This preference for structural remedies was illustrated in countless merger cases both before and after issuance of the 2004 Remedies Guide.

In this approach, U.S. policy was consistent with the enforcement posture in Canada, the European Union, the UK, and Canada. In 2001, the European Commission stated:

Commitments that are structural in nature, such as the commitment to sell a subsidiary, are, as a rule, preferable from the point of view of the [Merger] Regulation’s objective, inasmuch as such a commitment pre- vents the creation or strengthening of a dominant position previously identified by the [European] Commission and does not, moreover, require medium or long-term monitoring measures.2

The UK Competition Commission expressed a similar preference in 2008 in this way:

In merger inquiries, the [Competition Commission] will generally prefer structural remedies, such as divestiture or prohibition, rather than behav- ioral remedies because: (a) structural remedies are likely to deal with [a substantial lessening of competition] and its resulting adverse effects directly and comprehensively at source by restoring rivalry; (b) behavioral remedies may not have an effective impact on the [substantial lessening of competition] and its resulting adverse effects, and may create significant costly distortions in market outcomes; and (c) structural remedies do not normally require monitoring and enforcement once implemented.22

#### 5 – The plan bans ‘doing x in a way that causes effect y’---that means the object of the prohibition is effect y, NOT practice x.

Andriani Kalintiri 20, Lecturer in Competition Law at King's College London, “Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions,” Jnl of Competition Law & Economics (2020) 16(3): 392-433, Lexis

Normative and economic premises provide policymakers and adjudicators with valuable analytical shortcuts, insofar as they relieve them of the need to establish the merits of the entailed generalizations every single time they interpret and apply the competition rules. This is important in view of the far-reaching implications that the employed premises may have for competition enforcement.

Firstly, normative assertions and economic propositions are what gives shape to the otherwise vague letter of the antitrust and merger provisions. Arguably, those provisions do not immediately reveal what is prohibited and are in need of elaboration to become operational. In this process, varying perceptions about the goals of the discipline may completely shift the focus of the analysis. 45 For example, if competition law is to be enforced with a view to protecting small- and medium-sized enterprises or employment-as opposed or in addition to, say, promoting consumer welfare-then different effects in the market may become relevant. 46 On the other hand, economic premises about the procompetitive or anticompetitive nature of the conduct at hand typically inform the choice between the application of a 'rule' or a 'standard'. 47 The prohibition, for instance, of cartels as 'by object' violations of antitrust law rests on the economic premise that conduct of this kind lacks any efficiency justification and thus a rule of prima facie illegality is not liable to chill procompetitive behaviour. 48 Conversely, the treatment of quantity rebates as prima facie lawful is grounded in the idea that this type of discount reflects the cost savings achieved by the undertaking in question. 49 In the same vein, the 'by effect' analysis of exclusive dealing under Article 101(1) TFEU is explained by the economic insight that behaviour of this kind may entail efficiencies. 50 Accordingly, normative and economic premises are instrumental in the construction of competition law.

It is worth noting at this point that in the EU the 'by object' test has been occasionally portrayed as a presumption of actual or likely anticompetitive effects. Arguably, the language employed by the EU Courts is partly to blame for this. 51 In Cartes Bancaires, for instance, the Court of Justice explained that 'certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects ( ... ), that it may be considered redundant ( ... ) to prove that they have actual effects on the market', since 'experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers'. 52 This wording though is confusing, insofar as it may create the misimpression that a finding of 'by object' violation rests on a presumption-in the technical sense of the word-of the existence of actual or likely anticompetitive effects in the circumstances at hand. Considering that presumptions shift the burden of proof, in this case it should be open to undertakings to challenge such a finding by showing that their cartel agreement, for instance, was never implemented or that the presumed negative effects are unlikely to occur. Nevertheless, the EU Courts' jurisprudence demonstrates that such arguments may not reverse a finding of 'by object' liability. 53 Consequently, to speak of a presumption of actual or likely anticompetitive effects is incorrect.

Secondly, premises also play a fundamental role in the design of administrative priorities-that is, the identification of cases on which the authority will choose to expend its limited resources to maximize the return on taxpayers' money. For instance, if the goal is to promote consumer welfare, then it of course makes sense to prioritize investigations into practices which may have a bigger impact on it. Economic premises are critical in this screening exercise, since they can guide administrative agencies in detecting the most but also least 'problematic' types of behaviour in view of the pursued objective.

For example, the prioritization of cartel enforcement worldwide rests on the economic insight that cartel conduct is among the most harmful for competition and consumers. Conversely, the development of 'safe harbours' setting out the circumstances where an authority is unlikely to intervene is grounded in the idea that competition is not liable to be impaired in the absence of a degree of market power. The Commission Guidelines on agreements of minor importance, for instance, explain that arrangements entered into between parties whose market shares do not exceed certain thresholds will be considered not to appreciably restrict competition in the meaning of Article 101(1) TFEU. 54 Similar pronouncements may be located in the Commission Guidelines on horizontal cooperation agreements or in the Commission Guidelines on horizontal and nonhorizontal mergers. 55 While these 'safe harbours' are often presented as 'presumptions of lawfulness', strictly speaking they are simply illustrations of the authority's policy and understanding of the law. 56

Last but not least, premises have a third important function in competition enforcement-they form part of the backdrop against which the standard of proof inquiry is conducted. The reason for this is that the process of determining whether the available evidence is sufficient to surpass the requisite level of conviction or probability for a decision to be lawfully adopted is informed-among others-by normality considerations, which allow us to make sense of the evidence and to 'connect the dots'. Generally, our perception of 'usual' and 'unusual' is shaped by past experience and common sense. 57 In competition enforcement though, economic premises may also determine what is 'normal' and what is not. 58 For instance, because cartels are deemed to harm competition, claims and evidence of plausible explanations and efficiencies will be evaluated against this default idea. Likewise, the insight that 'the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition' led the General Court to emphasize in Tetra

Laval that 'the proof of anticompetitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects'. 59 Therefore, premises inform not only the construction of the law and the design of policy but also fact-finding, insofar as they provide 'rules of thumb' and baselines for drawing inferences from the evidence. 60

B. The Construction and Deconstruction of Normative and Economic Premises

Premises are not set in stone though. Because they embody contemporary norms and values as well as current knowledge, they may-and do-evolve over time. Societal and political shifts and advances in economics may lead to the emergence of new premises or the critical revisiting of old ones. The construction and deconstruction of normative and economic premises in competition enforcement occur in an incremental and cumulative manner predominantly outside but also within the legal system.

Outside the legal system, scholarly works exposing the thinking underlying competition enforcement and challenging its theoretical and empirical foundations, as well as its consistency, play a pivotal role in this regard. This is hardly surprising-by promoting evidence-based dialogue and allowing for the fermentation of ideas, academic debates may result in the elimination of weak propositions, the emergence of consensus positions, and the creation of new knowledge. This process though is a constant work in progress, which partly explains why many of the disputes concerning competition enforcement resurface now and again. The recently reignited conversation about the goals of the discipline is a good example of this-after the espousal by many of efficiency and consumer welfare as the main aims of competition law, the issue has again been brought into the spotlight by commentators advocating for the pursuit of broader social and political objectives. 61 Economic premises are not immune to challenges either. As the currently ongoing discussion around the low levels of vertical merger enforcement illustrates, even well-established propositions-such as the idea that nonhorizontal concentrations generally benefit competition and generate efficiencies-may be questioned and potentially overturned. 62 Finally, academic works exposing inconsistencies in the legal treatment of various categories of conduct may also cast doubt on the convincingness of the premises underlying the applicable tests. 63

Within the legal system, the construction and deconstruction of premises naturally occur during the development of policy and in the context of specific cases. Indeed, on several occasions the emergence of new knowledge or changes in the prevailing circumstances have prompted competition authorities to reflect on-and update, where necessary-the premises driving their enforcement activities. In the EU, for instance, the heavy criticisms against the Commission's early formalistic approach to the legal treatment of various practices led the authority to rethink its policy in different areas-from vertical agreements to horizontal arrangements to mergers and unilateral conduct. The replacement of old premises with new ones culminated in the publication of several soft law documents, which were seen as signalling a 'more economic' approach to EU competition enforcement. 64 More recently, the challenges of the digital economy have impelled several authorities to commission expert reports and to launch task forces or strategies with a view to ascertaining what normative and economic premises should drive antitrust and merger policy in that context. 65

By contrast, courts are naturally more cautious against regular or radical changes in the law as a result of contemporary developments due to the need to preserve legal certainty and stability. 66 Nevertheless, the normative and economic propositions underpinning competition enforcement may be exposed or challenged in the context of judicial proceedings, too. Leegin is probably among the best examples of a drastic overhaul of the law in judicial acknowledgment of an evolution in current thinking. Noting that 'economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance', the US Supreme Court overturned Dr Miles and dismissed the per se illegality test in favour of a rule of reason analysis. 67 In the EU, the Courts have frequently spelt out the premises behind their interpretation of the law. While many have survived the passage of time relatively unscathed, for example, the idea that pricing below average variable costs is generally irrational for an undertaking or the insight that certain restraints are necessary in selective distribution or franchising, 68 others have been tested-for instance, the idea that exclusivity rebates offered by a dominant firm are inherently harmful for competition and consumers. 69 Over the years, such challenges have provided EU judges with the opportunity to incrementally clarify and elaborate on the main ideas driving the enforcement of the antitrust and merger rules. 70

C. Economic Premises and Evidence Rules

Most, if not all, premises, in particular economic ones, have at least some empirical grounding, and their 'truth' or 'validity' may thus be contested, as just noted. To the extent that they underpin the construction of the competition provisions and their application to specific practices and may be challenged in the context of judicial proceedings, it is necessary to briefly consider whether they are subject to the evidence rules. Are economic propositions to be established to the standard of proof before being endorsed by the court? If there is disagreement between the parties about the 'correct' premise, say, for instance, regarding the competitive effects of exclusive dealing by dominant firms or the relationship between market structure and innovation, is this to be resolved in accordance with the rules on the burden of proof? And are judges exclusively dependent on parties to produce the relevant information, or can they engage in independent research?

These queries go to the heart of a rather old, yet highly important problem-that of the integration of social science in law. 71 To the extent that the construction and the application of the legal rules hinge on 'knowledge' derived from social science, including economics, is this to be treated as 'fact' or as 'law' or perhaps as something else? Scholars have approached this question in different, albeit not fundamentally conflicting, ways. On the one hand, it has been suggested that so-called legislative facts-that is, facts that 'inform ( ... ) a court's legislative judgment on questions of law and policy'- must be distinguished from adjudicative facts, that is, facts about 'what the parties did, what the circumstances were, what the background conditions were', and that the evidence rules apply only to the latter. 72 On the other hand, it has been argued that social science may be treated both as 'law' and as a 'fact depending on its use: it is akin to 'law' when it provides the basis for law-making or is employed to establish background knowledge and general methodology, while it is akin to 'fact', when it is applied to case-specific issues or to produce case-specific research findings. 73

With these remarks in mind, when economic premises are employed for the purpose of determining the optimal legal test-that is, whether a conduct should be subject to a rule or a standard (in EU terminology, the 'by object' or the 'by effect' test)-they arguably escape the application of the evidence rules. In the EU this conclusion is further reinforced by the exclusive competence of the EU Courts to provide authoritative guidance on the meaning of EU law. 74 Accordingly, conduct-specific economic premises, that is, generalized propositions pertaining to the economics of different practices-say, tying or price discrimination or refusal to supply-need not be established to the standard of proof to be accepted by EU judges as the motivation behind their choice of legal test. By contrast, where economic premises are employed as 'background knowledge' or even 'rules of thumb' for the purpose of making sense of the evidence, the answer is not as straightforward. As noted earlier, in [TABLE 1 OMITTED] this context economic premises may enable judges to draw inferences from the available pieces of information. Inevitably though, the strength of the inference is partly correlated with the strength or relevance of the economic premise. If either is prima facie challenged, then in principle the party with the burden of persuasion should explain why the inference should still be drawn.

V. PRESUMPTIONS AS ANALYTICAL SHORTCUTS IN EU COMPETITION ENFORCEMENT

A. A Brief Account of the Existing Presumptions

Somewhat ironically, considering the popularity of the term in competition scholarship, there are not many presumptions in the technical sense in EU competition law. Indeed, the examination of the EU Courts' jurisprudence reveals the existence of only five (Table 1). 75 These effectively correspond to different elements of the antitrust rules that the Commission must prove to adopt a prohibition decision.

The first presumption pertains to the notion of 'undertaking' against which Articles 101 and 102 TFEU are addressed. 76 As explained in H?fner and Elser, the concept comprises 'any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed'. 77 Further elaborating on this in Hydrotherm, the Court stressed that the term 'undertaking' must be understood as designating an economic-rather than a legal-unit. 78 In this regard, the existence of distinct legal entities is immaterial; what matters is-as elucidated in Shell-that there is a 'unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement'. 79 In the case of parent companies and subsidiaries in particular, such an economic unit will exist where 'the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'; according to settled jurisprudence, in these circumstances the anticompetitive conduct of the subsidiary may be imputed to the parent company. 80 In Akzo the Court of Justice confirmed that 'where a parent company has a 100% shareholding in a subsidiary ( ... ) there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary'. 81 Ever since its first affirmation, the Akzo presumption has been reiterated multiple times and is now solidly rooted in the Courts' jurisprudence.

In any event, to find a violation of Article 101(1) TFEU in particular, the Commission must also demonstrate that the undertaking participated in a collusive arrangement-be it a concerted practice or an agreement. 82 Showing the existence of a concerted practice in principle entails proving three elements: concertation, subsequent market conduct, and causal connection between the two. In H?ls and in Commission v Anic Partecipazioni, however, the Court clarified that 'subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market'. 83 Ever since, the Anic presumption-as is often called-has become firmly embedded in the Courts' case law. 84 While it was initially developed in connection with concerted practices-that is, collusive arrangements falling short of an agreement-this presumption soon provided the basis for the emergence of another one, that of participation in a cartel upon evidence that the undertaking has attended a meeting with an anticompetitive object. Indeed, as confirmed for the first time in Aalborg Portland, 'it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anticompetitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in a cartel', the presumption being that its will concurs with that of the other attendants. 85

At any rate, to adopt a prohibition decision, the Commission must also establish the duration of the antitrust violation and of the undertaking's involvement in it. This can be a daunting task-especially in complex infringements extending over longer periods of time. In recognition of this challenge, the EU Courts have eased the authority's burden of proof in two ways. Firstly, they have developed the doctrine of single, continuous or repeated infringement, according to which there is one infringement-rather than several-where a series of acts form part of an unlawful 'overall plan'. 86 The latter may be deduced 'from the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings, and lastly, of the geographical scope of those practices'. 87 Secondly-and most importantly, for the purposes of this work, the EU Courts have adopted a presumption of continuity, whose foundations originate in Dunlop. According to the latter, 'if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates'. 88

Finally, the case law arguably points at the existence of one more presumption-that is, if a conduct lacks any plausible explanation, it is intrinsically capable of harming competition. 89 Premises about the economics of the practice at hand and any 'objective justifications' raised by the parties will be crucial to ascertaining whether, on the facts, there is no legitimate ground for it. 90 In this case, the anticompetitive potential of the practice is automatically inferred and needs not be proved ad hoc, unless the undertaking concerned produces evidence to the contrary, and a 'by object' violation will be considered established, provided that the other elements of Article 101 TFEU or Article 102 TFEU have been sufficiently demonstrated. In the context of Article 101 TFEU, the Court of Justice explained in T-Mobile that 'the distinction between "infringements by object" and "infringements by effect" arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'. 91 As the Court elaborated, 'in order for a concerted practice to be regarded as having an anticompetitive object, it is sufficient that it has the potential to have a negative impact on competition'; in this case, there is no need for the Commission to consider its effects. 92 Nevertheless, Football Association Premier League clarifies that undertakings may 'put forward any circumstance within the economic and legal context' of the arrangement in question, which would justify the finding that it is 'not liable to impair competition'. 93 A similar presumption is visible in the context of Article 102 TFEU, as well. Indeed, the judgment of the Court of Justice in Intel implies that practices, which lack a plausible explanation, are presumed to be capable of harming competition, unless the dominant undertaking challenges this conclusion 'on the basis of supporting evidence'. 94

#### 6 – Not specifying the remedy is WORSE and links MORE to our offense! A vague plan prohibits nothing at all.

Andriani Kalintiri 20. Lecturer in Competition Law at King's College London, “Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions,” Jnl of Competition Law & Economics (2020) 16(3): 392-433, Lexis.

Firstly, normative assertions and economic propositions are what gives shape to the otherwise vague letter of the antitrust and merger provisions. Arguably, those provisions do not immediately reveal what is prohibited and are in need of elaboration to become operational. In this process, varying perceptions about the goals of the discipline may completely shift the focus of the analysis. 45 For example, if competition law is to be enforced with a view to protecting small- and medium-sized enterprises or employment-as opposed or in addition to, say, promoting consumer welfare-then different effects in the market may become relevant. 46 On the other hand, economic premises about the procompetitive or anticompetitive nature of the conduct at hand typically inform the choice between the application of a 'rule' or a 'standard'. 47 The prohibition, for instance, of cartels as 'by object' violations of antitrust law rests on the economic premise that conduct of this kind lacks any efficiency justification and thus a rule of prima facie illegality is not liable to chill procompetitive behaviour. 48 Conversely, the treatment of quantity rebates as prima facie lawful is grounded in the idea that this type of discount reflects the cost savings achieved by the undertaking in question. 49 In the same vein, the 'by effect' analysis of exclusive dealing under Article 101(1) TFEU is explained by the economic insight that behaviour of this kind may entail efficiencies. 50 Accordingly, normative and economic premises are instrumental in the construction of competition law.

#### 7 – The aff must specifically cite the business practices they prohibit

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

Here’s what a good antitrust fix would look like: Instead of asking judges to apply impossible standards, the law should spell out and prohibit a specific set of abusive business practices—just as it does with bribery, fraud, and employment discrimination. Each of those practices is illegal on its own terms, and we don’t ask whether it was “worth it” to society. Likewise, dominant firms should be explicitly banned from predatory pricing, coercive dealing, and exclusive dealing, for example. Agencies should overtly ban bad mergers, instead of engaging—as they now do—in negotiations for minor concessions that will allow mergers to proceed.

#### 8 – Independent reason to vote neg---vague plans are impossible to debate and enable all kinds of aff shenanigans. You should also assume aff solvency starts at zero absent specification.

### AT: Whyte C.I. – 2NC

#### Whyte counterinterp – awful:

#### 1 – Links to limits and ground – justifies infinite AFFs regarding changing legal tests around behavioral remedies – literally as broad as cyberspace allowed – you could add any standard to adjudication, like not paying initial lawyer fees or Chevron Step 2 – they don’t expand the scope of prohibitions on company.

#### 2 – Links to precision – Whyte evidence is from a Free Exercise Clause case, so nothing to do with antitrust specific prohibitions. Further, it’s from a case that they lost BADLY, so clearly better judges didn’t agree.

https://www.oyez.org/cases/2019/18-1195

#### 3 – Regardless, consensus votes NEG:

#### 4 – A – Dictionary differential.

PEDIAA 15. “Difference Between Prohibited and Restricted”. https://pediaa.com/difference-between-prohibited-and-restricted/

Main Difference – Prohibited vs. Restricted

Prohibited and Restricted are used in reference to limitations and prevention. However, they cannot be used interchangeably as there is a distinct difference between them. Prohibited is used when we are talking about an impossibility. Restricted is used when we are talking about something that has specific conditions. The main difference between prohibited and restricted is that prohibited means something is formally forbidden by law or authority whereas restricted means something is put under control or limits.

What Does Prohibited Mean

Prohibited is a variant of the verb prohibit. Prohibited can be taken as the past tense and past participle of prohibiting as well as an adjective. Prohibited means that something is formally forbidden by law or authority. When we say ‘smoking is prohibited’, it means that smoking is not allowed at all, there are no exceptions. Prohibit indicates an impossibility. This gives out the idea that it is not at all possible under any condition or circumstance. The term Prohibited goods is used to refer to items that are not allowed to enter or exit certain countries. For example, the government of South America lists Narcotic and habit-forming drugs in any form, Poison and other toxic substances, Fully automatic, military and unnumbered weapons, explosives and fireworks as prohibited goods. The following sentences will further explain the use of prohibited.

Inter-racial marriages were not prohibited by the government.

He was proved guilty of using prohibited substances.

No one was allowed to enter the grounds; entry was prohibited.

Prohibited imports are the items that are not allowed to enter a country.Difference Between Prohibited and Restricted

What Does Restricted Mean

Restrict means to put under limits or control. Restricted can be either used as the past tense of restrict or as an adjective meaning limited. When we say something is restricted, it means that limits or conditions have been added to it. It does not mean that it is completely impossible. For example, Restricted goods are allowed to enter or exit a country under certain circumstances. A written permission can help you to import or export that item. Likewise, a restricted area does not mean that people are not allowed to enter; it means that a special permission is required to enter the place. Restricted information refers to information that are not disclosed to the general public for security purposes.

The new regulations restricted the free movement of people.

The club was restricted to its members and their family members.

Only the highest military personnel had access to the restricted area.

American scientists had only restricted access to the area.Main difference - Prohibited vs Restricted

Difference Between Prohibited and Restricted

Meaning

Prohibited means banned or forbidden.

Restricted means limited in extent, number, scope, or action

Possibility

Prohibited means that there is no possibility of doing something.

Restricted means that something can be done under certain conditions.

Adjective

Prohibited functions as an adjective derived from prohibit.

Restricted functions as an adjective derived from restrict.

Past tense

Prohibited is the past tense and past participle of prohibit.

Restricted is the past tense and past participle of restrict.

#### 5 – B – Courts.

Hiram E. Hadley 1909. Judge, McPherson v. State, 174 Ind. 60, Supreme Court of Indiana, December 1909, LexisNexis

In the majority opinion it is conceded "that there is a marked difference" between unqualified prohibition of the sale of intoxicating liquors and the regulation of such sale. It is said in the opinion that "to regulate, restrict and control the sale implies that the sale shall go on within the bounds of certain prescribed rules, restrictions or limitations." Citing Sweet v. City of Wabash (1872), 41 Ind. 7; Duckwall v. City of New Albany (1865), 25 Ind. 283; Loeb v. City of Attica (1882), 82 Ind. 175, 42 Am. Rep. 494.

"Prohibition," states the majority opinion, "as applied to the liquor traffic, implies putting a stop to its sale as a beverage; to end it fully, completely and indefinitely. So, if the purpose of the act in question is to authorize the exercise of unqualified prohibitory power, as usually understood by the term, the act is void because its subject is not expressed in the title." The court might properly have further said [\*\*\*45] that if the act under its provisions is not one to regulate the sale of intoxicating liquors it is void, for the reason that it does not meet or respond to the subject as expressed in its title.

#### 6 – C – More Courts.

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

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

#### 7 – D – Even more Courts!

Joseph N. Laplante 12, US District Court, New Hampshire, “SignalQuest, Inc. v. Tien-Ming Chou & Oncque Corp,” 284 F.R.D. 45, Lexis

Here, the parties agree that SignalQuest did not make service on defendants pursuant to Rules 4(f)(1), (2)(A)-(B), or (3). Taiwan is not a signatory to the Hague Convention or any other agreement specifying an appropriate means of service, so service pursuant to Rule 4(f)(1) is not a possibility, [\*\*8] and it is undisputed that SignalQuest did not follow Taiwan's law governing service, the directions given in response to a letter rogatory, or any order of this court. As just mentioned, SignalQuest relies solely on Rule 4(f)(2)(C)(ii), contending that it properly effectuated service of process under that section by having the clerk of this court deliver the summons and complaint to defendants by Federal Express. Defendants' disagreement with that contention is limited to a single issue: they argue that the method of service SignalQuest chose in this case is "prohibited by the foreign country's law," and therefore ineffective under Rule 4(f)(2)(C). 2

The principal point of disagreement between the parties is the proper interpretation of the term "prohibited by the foreign country's law." That matter has occupied a number of courts, and two clear lines of authority, [\*\*10] corresponding to the positions the parties stake out here, have developed. "The vast majority of cases to consider the issue have held that HN4 a method of service is not prohibited under Rule 4(f)(2)(C)(ii) unless it is expressly prohibited by a foreign country's laws." Fujitsu Ltd. v. Belkin Int'l, Inc., No. 10-cv-3972, 2011 U.S. Dist. LEXIS 99922, 2011 WL 3903232, \*3 (N.D. Cal. Sept. 6, 2011); see also SEC v. Alexander, 248 F.R.D. 108, 111-12 (E.D.N.Y. 2007) (collecting cases). The only judge of this court to consider the issue has also taken that view, see Emery v. Wood Indus., Inc., 2001 DNH 155, 4-5 (McAuliffe, J.), which is the interpretation SignalQuest urges. The remaining cases, which have interpreted the rule in the manner defendants urge, hold that "unless expressly permitted by foreign law, service by registered mail should be deemed prohibited under Rule 4(f)(2)(C)(ii)." TruePosition, 2006 U.S. Dist. LEXIS 39681, 2006 WL 1686635 at \*4.

As between the two interpretations, the court finds the majority view more persuasive. To begin, that interpretation fits more comfortably with HN5 the plain language of Rule 4(f)(2)(C) itself, which, of course, is the "starting point" for "interpreting a formal rule of procedure." Delgado v. Pawtucket Police Dep't, 668 F.3d 42, 49 (1st Cir. 2012). [\*\*11] HN6 To "prohibit" means "to forbid by authority or command: ENJOIN; INTERDICT." Webster's Third International Dictionary 1813 (1993); see also Black's Law Dictionary 1212 (6th ed. 1990) (defining "prohibit" as "[t]o forbid by law; to prevent"). 3 "A form [\*49] of service is not 'forbidden by authority' merely because it is not a form explicitly 'prescribed'

the laws of a foreign country." Dee-K Enters. Inc. v. Heveafil Sdn. Bhd., 174 F.R.D. 376, 380 (E.D. Va. 1997); see also Wright, supra § 1134 (noting that while the rule "can be interpreted to bar parties from using any method of service not explicitly prescribed by the laws of the foreign country . . . this reading of the rule seems inconsistent with the text on its face."). To be "prohibited" requires something more, akin to a clear command that a course of action cannot be taken.

#### 8 – E – Colloquial gold standard.

Dictionary.com “Inhibit vs. Prohibit”. https://www.dictionary.com/e/inhibit-vs-prohibit/

Prohibit is a transitive verb that means to forbid or prevent. Unlike inhibit, the word prohibit means that an action is being completely prevented. For example: “Angie’s coat was so tight, it prohibited any arm movement.” In this case, Angie isn’t able to move her arms at all. Prohibit is often used to describe the actions of authority figures. It can explain a rule or law. For example, “School rules prohibit cellphone use during class.” A street sign may say “Parking prohibited,” while a sign in a building lobby might say “Smoking prohibited by law.” All of these cases mean that cell phone use, parking in a certain area, or smoking are completely forbidden by their given authority figures, and can’t be done at all.

### AT: Aff Ground

#### Over-limiting.

#### 1 – No link. Every affirmative is topical if they impose a full prohibition rather than a remedy.

#### 2 – Link turn. It’s the only clear bright line---if the business practice described by the aff can still legally occur post-plan, it is not prohibited.

Martin G. Vallespinos 20. LLM, University of Michigan Law School; Manager at Ernst & Young Detroit, “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO,” 40 Va. Tax Rev. 93, Lexis

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251

#### 3 – Data base of anti-trust literature from 2000 to the present shows it’s aff leaning.

Fiona M. Scott Morton 19. Theodore Nierenberg Professor of Economics at the Yale University School of Management. Previous deputy assistant attorney general for economics at the Antitrust Division of the U.S. Department of Justice. B.A. in economics from Yale University and Ph.D. in economics from the Massachusetts Institute of Technology. "Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects," Equitable Growth, https://equitablegrowth.org/research-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/?longform=true

The experiment of enforcing the antitrust laws a little bit less each year has run for 40 years, and scholars are now in a position to assess the evidence. The accompanying interactive database of research papers for the first time assembles in one place the most recent economic literature bearing on antitrust enforcement in the United States. The review is restricted to work published since the year 2000 in order to limit its size and emphasize work using the most recent data-driven empirical techniques. The papers in the interactive database are organized by enforcement topic, with each of these topics addressed in a short overview of what the literature demonstrates over the past 19 years. These topics are: Horizontal mergers—mergers and acquisitions involving direct competitors Coordinated effects—the study of conditions under which competitors in an industry tacitly collude Vertical mergers—mergers and acquisitions where a company acquires another company to which it sells goods or services or from which it buys goods or services Exclusionary conduct—actions in the marketplace that deny a competitor access to either suppliers or customers Loyalty rebates—a type of conduct that occurs when a company gives a discount to a buyer for limiting its purchases from the company’s competitors Most F

avored Nation clause—this clause requires a seller to give a specific buyer the best terms offered to other (often competing) buyers Predation—the strategy of taking losses in the short run in order to drive out a competitor and retain or gain a monopoly position, permitting prices the later exercise of market power Common ownership—the impact on competition when mutual funds and other types of institutional investors are the largest owners of product market competitors Monopsony power—the anticompetitive exercise of market power by employers (firms) in the labor market for workers Macroeconomics and market power—the impact of competition issues on the larger economy

**---DATA BASE OMITTED---**

The bulk of the research featured in our interactive database on these key topics in competition enforcement in the United States finds evidence of significant problems of underenforcement of antitrust law. The research that addresses economic theory qualifies or rejects assumptions long made by U.S. courts that have limited the scope of antitrust law. And the empirical work finds evidence of the exercise of undue market power in many dimensions, among them price, quality, innovation, and marketplace exclusion. Overall, the picture is one of a divergence between judicial opinions on the one hand, and the rigorous use of modern economics to advance consumer welfare on the other.

#### 4 – Limits outweigh and turn topic education without clash---health care proves horizontal innovation solves.

#### 5 – Remedies v Prohibitions are a considerable debate.

Hiba Hafiz 8/9/21. Assistant Professor of Law at Boston College Law School; Affiliate Fellow, Thurman Arnold Project, Yale University. “Rethinking Breakups.” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3892326

The U.S. Department of Justice (DOJ) and FTC have leveraged these core antitrust statutes to investigate and challenge Big Tech firms like Google, Facebook, and Amazon, and the Biden Administration has appointed leading progressive antitrust advocates in the White House, DOJ, and FTC to preside over the “TrustBusting Biden Presidency”. 22 In addition, Congress has sought to buttress current law with proposals to expand this arsenal through reform legislation strengthening merger policy, antitrust agency authority, and expanding the range of prohibited conduct under Section 2 beyond current judicial interpretations of its scope. 23 States have joined the anti-monopoly movement with abuse of dominance legislation that goes beyond federal antitrust law, prohibiting a wider spectrum of dominant firm conduct and even firm dominance itself.24

But while there has been significant movement in the executive and legislative branches to tackle the problem of “bigness” through more robust agency practice and more expansive substantive law extending the scope of firm antitrust liability, exactly how to remedy the problem once firms are found to contravene the law is the subject of considerable debate.

### AT: Reasonability

#### Prefer competing interpretations –

#### 1 – First – limits prove their interp isn’t reasonable

#### 2 – Second – prevents a race to the fringes – no bright line – sum of all reasonable affs ensures topic explosion

#### 3 – Third – ensures judge intervention by determining what is enough – that takes debate out of the hands of the debaters and makes it subjective – motos the point of the activity

## Regulations

### O.V. – 2NC

#### The counterplan solves the AFF. It uses unfair analysis and has the CFPB do the same review as the AFF would do post-facto. Framing issue – their deficits assume that we are a structural, ex-ante regulation. That doesn’t apply because our counterplan establishes similar review patterns under the CFPB.

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

#### Perm do both---

#### 1 – Link to the net benefit---the CP does not “expand the scope of core antitrust laws” and PICs out of the FTC and DOJ as enforcers

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

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

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

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

the DOJ’s amicus brief in the Qualcomm case influenced the U.S. Court of Appeals for the Ninth Circuit’s decision to issue a stay pending appeal.

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

#### 3 – Kobayashi evidence is about ex-post v. ex-ante – the counterplan is ex-ante, that’s above.

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

#### Perm do the CP---it’s severance---the CP is a pic out of anti-competitive behavior AND anti-trust law

#### 1 – Enforcement---antitrust requires the FTC and DOJ as enforcers---regulations are distinct legal mechanisms to restrain anticompetitive effects, that’s Fullerton

#### 2 – “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.

#### 3 – 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 Ap

peals 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.

#### 4 – 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.

#### 5 – Severs “core” – counterplan uses Dodd-Frank

Teo Spengler 19. J.D. Reviewed by: Michelle Seidel, B.Sc., LL.B., MBA. “Consumer Laws: California Consumer Rights & Responsibilities”. Legal Beagle. https://legalbeagle.com/13720462-consumer-laws-california-consumer-rights-responsibilities.html

Federal and State Antitrust Laws

Antitrust laws are intended to protect consumers by not letting any business corner the market in a way that precludes competition. These laws protect free trade from unfair restraints, monopolies and price fixing. Antitrust vigilance helps consumers by ensuring fair prices for goods and services, a range of products to choose from and innovative, quality goods and services.

The core antitrust laws are federal – the Sherman Act and the Clayton Act. California's complementary laws are found in the Cartwright Act, Business and Professions Code Section 16720 and following sections. These laws bar agreements among competitors that would fix prices or allocate customers or markets. California law offers a more detailed list of forbidden actions than that included in the federal law's general prohibitions against restraints of trade. The California Attorney General enforces antitrust laws by reviewing business mergers, investigating violations of the law and litigation.

#### 6 – Severance is bad---moots lit base and allows teams to shift goalposts through plan writing---both fry ground---here’s…

### 2NC---Solvency/AT: PDCP

#### Solves best---its not antitrust law.

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

IV. A SOLUTION: CONSUMER FINANCIAL PROTECTION AS AUTHORITY

A. Broadening the Conception of Consumer Harm

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

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

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

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

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

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

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

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

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

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

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

B. UDAAP Authority

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

#### 1 – Solves best.

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

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

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

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

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

### 2NC---Solvency

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

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

In addition to practical difficulties deploying antitrust going forward, there are conceptual challenges as well. Despite our historical reliance on antitrust to rein in card networks, antitrust appears confused with respect to two-sided markets in a way that consumer protection authority does not, making the latter a more theoretically defensible means of taming two-sided platforms. In important ways, the traditional antitrust conception of the relevant market for scrutiny in platform pricing cases seems too narrow. Professor Jean Tirole, a Nobel Laureate who studies two-sided platforms, has argued that co

nsideration of the pricing practices on only one side of a two-sided market is indefensible and can lead to distortionary regulation.26 And yet historically—until AmEx— this narrow inquiry was the antitrust paradigm. And with its focus on precise market definition, antitrust fails to consider the consequences for consumers outside of the narrowly defined market, who may well be (and in the case of payment cards, are) suffering harm that feels importantly relevant to our consideration of how functional this market is. Consumer protection authority allows us to defend intervention—not by misapplying “one-sided logic” to “two-sided markets,” as economists caution against27— but instead by embracing a broader definition of the market that appreciates that platform users create unavoidable externalities for all consumers, and these externalities (when sufficiently harmful) must be addressed.

## 14A

#### 2 – Antitrust and constitutional law are distinct---their definitions double the scope of the topic

Daniel A. Crane 19. Frederick Paul Furth Sr. Professor of Law, University of Michigan. "Scrutinizing Anticompetitve State Regulations through Constitutional and Antitrust Lenses," William & Mary Law Review 60 (4): 1175-1214

Assuming that the political resources necessary to ramp up either the antitrust or constitutional theory are scarce and that support for the two theories is mutually competitive, the question arises of whether it would be more effective to focus exclusively on one of the two theories or instead attempt to create **two differentiated tools tailored to address different problems in different fields**. Such a move would require limiting the generality of each of the tools by focusing on distinctive factors or patterns. For example, the constitutional principle against anticompetitive parochialism could be focused on failures of political processes-particularl

y circumstances where costs are externalized outside the boundaries of the voting jurisdiction."' By contrast, the FTC's heightened preemptive powers might be focused on circumstances involving restraints that limit innovation.8 o While there would obviously be some overlap between these two categories and hence some contestable turf (assuming, again, that the two theories are mutually competitive), some effort at such a division of labor might assuage concerns about a return to Lochnerism

Finally, although the preceding analysis has assumed some benefits to making a coordinated strategic decision about which legal and policy levers to pull, such coordination may be infeasible given that-apart from the courts-the communities involved in forming **antitrust and constitutional law and policy are almost entirely distinct**. The antitrust bar that stocks the FTC is specialized and relatively insular. 8 ' Constitutional theories directed at anticompetitive state and local regulations have been largely pushed by public interest firms such as the Institute for Justice and the Pacific Legal Foundation, which have shown little interest in antitrust theories.'8 2 So perhaps the possibility of coordinating the deployment of the constitutional and antitrust theories is the sort of question that would interest our hypothetical Platonic guardian, but, like the rest of her hypothesized work, have little relevance to the rest of us.

### New Imapct

#### Equal protection key to protect voting and stop GOP elections.

Richard L. Hasen 2014, Chancellor’s Professor of Law and Political Science at the University of California, Irvine and is Co-Director of the Fair Elections and Free Speech Center. Hasen is a nationally recognized expert in election law and campaign finance regulation, writing as well in the areas of legislation and statutory interpretation, remedies, and torts. "Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere," Harvard Law Review, https://harvardlawreview.org/2014/01/race-or-party-how-courts-should-think-about-republican-efforts-to-make-it-harder-to-vote-in-north-carolina-and-elsewhere/

The race versus party bifurcation is unhelpful, and the solution to these new battles over election rules – what I call “the Voting Wars” – is going to have to come from the federal courts. Courts should apply a more rigorous standard to review arguably discriminatory voting laws. When a legislature passes an election-administration law (outside of the redistricting context) discriminating against a party’s voters or otherwise burdening voters, that fact should not be a defense. Instead, courts should read the Fourteenth Amendment’s Equal Protection Clause to require the legislature to produce substantial evidence that it has a good reason for burdening voters and that its means are closely connected to achieving those ends. The achievement of partisan ends would not be considered a good reason (as it appears to be in the redistricting context). This rule would both discourage party power grabs and protect voting rights of minority voters. In short, it would inhibit discrimination on the basis of both race and party, and protect all voters from unnecessary burdens on the right to vote.

I. NORTH CAROLINA AS PART OF THE VOTING WARS

It is easy to situate North Carolina’s law in the context of a national battle we have witnessed since 2000 over the rules for running our elections. I have told the story many times before14 and will not dwell on it here. The last decade has included great partisan battles over the rules for running our elections. Voter identification laws, for example, have been passed along partisan lines, with Republicans supporting them in the name of fraud prevention and Democrats blasting them in the name of voter suppression. There is virtually no impersonation fraud which a voter identification law would prevent, but it also appears that Democrats have exaggerated the extent to which these laws disenfranchise eligible voters who want to vote.15

The latest wave of Republican-led laws, however, may be increasing the burden on voters. While some of the early voter identification laws were not that onerous, Texas’s and North Carolina’s laws appear to make it more difficult to vote by accepting fewer forms of ID for voting and, in Texas’s case, offering fewer (and more distant) locations at which a person can obtain a “free” voter identification card. Other North Carolina changes, such as eliminating same-day voter registration and preventing the counting of ballots cast in a wrong precinct, may have an even larger effect on voter registration and turnout than the identification laws.

Judged through a partisan lens then, North Carolina’s law is just the latest Republican attempt to skew the electorate at least moderately to gain electoral advantage.

II. NORTH CAROLINA AS PART OF THE CIVIL RIGHTS STRUGGLE

I turn the lens from partisan politics to race and back to the 1965 passage of the Voting Rights Act. The Voting Rights Act first suspended and then later banned literacy tests and other voting rules. The ban on tests, combined with the presence of federal observers, mattered a great deal at the beginning. Over time, the preclearance provision became the most significant piece of the Act. Under this provision, a state or locality covered by section 5 had the burden to prove that any change in voting rules that it proposed would not have the effect, and was not enacted with the purpose, of making minority voters worse off.

The Voting Rights Act has been very successful. Although the percentage of objections was never high, because so many voting changes were submitted (everything from a ten-year redistricting plan to moving a polling place across the street) there were over 2000 objections between 1969 and 1989.16 Racial gaps in voter registration fell. The number of minority officeholders grew, especially after Congress expanded the Voting Rights Act in 1982 to include a new section 2, which mandated the creation of new majority-minority districts across the country. In the seven originally covered section 5 states, there were fewer than 100 black elected officials in 1975. That number rose to 3265 in 1989. In six states with especially large Hispanic concentrations, the number of Hispanic officeholders increased from 1280 to 3592 in 1990.17

The greatest significance of the law in recent years has been to give minority voters a bargaining chip – a chance to sit at the table and express concerns about proposed voting rules.18 The Justice Department has brought in minority voters into investigations and into negotiations with covered jurisdictions over proposed voting rules. Covered jurisdictions changed their laws to ease the impact on minority voters.

A nice recent example of this comes from South Carolina, which passed a voter identification law, one that was not quite as strict as Texas’s. South Carolina’s law allowed election officials to accommodate voters who had “reasonable impediment[s]” that prevented them from getting the type of photo identification needed for voting.19 The Justice Department still objected, as did legal organizations representing minority voters.20 And because of section 5, South Carolina had the burden of showing that the voter identification requirement did not discriminate.21 As the Justice Department’s case against South Carolina proceeded, the state watered down its law, making it easier for people without photo identification to vote by expanding the “reasonable impediment” provision.22 The court eventually approved South Carolina’s law for use in 2013, but only because section 5 spurred those changes. As Judge John Bates observed: “Without the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been more restrictive.”23

A different federal court blocked Texas’s new voter identification law.24 Its reasoning was simple: voter identification laws disproportionately affect the poor in Texas, like those voters who would have to travel up to 250 miles at their own expense to the county seat to get the so-called “free” voter identification.25 African Americans and Latinos are disproportionately poor in Texas, and therefore Texas could not demonstrate under the section 5 standard that the law would not make minority voters worse off.

Whatever impact these laws are going to have, their burdens are going to fall hardest on the poor and the less educated. To the extent that the vestiges of past discrimination mean that the poor will disproportionately include minority voters, section 5 assured that at least in covered jurisdictions these new burdensome laws would not make minority voters worse off. But the covered states objected. Texas in effect argued: “Why should we have to get federal approval before we implement a voter identification law when a state like Indiana or Pennsylvania can implement a voter identification law without getting such permission?”

This past summer, the Supreme Court agreed. States and jurisdictions that were covered under the section 5 preclearance rule were those with a history of racial discrimination in voting, as measured by a formula based in part on voter turnout statistics from 1964, 1968, or 1972. Section 5 was supposed to be temporary, but Congress kept reauthorizing it without updating this coverage formula. The most recent update occurred in 2006, when Congress renewed preclearance for another twenty-five years.26 In 2009, the Supreme Court issued an opinion warning that section 5 was in danger of being struck down as an encroachment on states’ rights,27 but Congress did nothing to update the coverage formula.28 Then in 2013, on a 5-4 party line vote, the Supreme Court in Shelby County v. Holder29 held that the coverage formula’s use was unconstitutional, because it treat the covered jurisdictions unfairly in violation of their rights to “equal sovereignty.”30 Although Congress might be able to pass a new coverage formula which would meet the Supreme Court’s test – I am doubtful about that31 – there is no political will in Congress to do so.

The loss of section 5 and the passage of new restrictive voting laws by states such as Texas and North Carolina in response has led the Justice Department to challenge Texas’s and North Carolina’s rules, under provisions of the Voting Rights Act that were not challenged in Shelby County.32 Section 2 of the Act, which applies nationwide, allows minority voters to sue for denial or abridgement of the right to vote on account of race.33 The language of the section provides that one can prove denial or abridgement by showing that the political processes leading to the nomination or election of officials in the state are not equally open to protected minority members, in that minority voters have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”34

Section 2 has been extremely successful in the redistricting context, causing the creation of many majority-minority districts. But courts have not read section 2 widely in the context of nonredistricting measures, such as voter identification requirements or restrictions on early voting.35 Unlike section 5, the burden here is on the challengers, not on the state, to disprove discriminatory effect. And unlike section 5, courts do not compare the old law to the new law; instead, courts compare the law in place to the abstract principles of nondiscrimination contained in the language of section 2.

Thus far, section 2 has not been a successful tool to challenge these laws, and unless courts change course it likely will not work now. Concededly, there have been few section 2 cases considering application of the provision to voter identification laws.36 However, if lower courts do change course and start holding that section 2 covers things like voter identification laws with a discriminatory effect, the Supreme Court could hold that section 2 is unconstitutional on the grounds that it exceeds congressional power and encroaches on states’ rights along the lines of the reasoning in Shelby County.

The other provision that the Department of Justice is relying upon is section 3 of the Voting Rights Act. This provision gives courts discretion to impose preclearance on a state or locality that has recently been guilty of intentional race discrimination in voting.37 It is discretionary; even if the Justice Department could prove intention, a court need not impose preclearance and even if it does, it can limit preclearance to particular changes or to a short period of time. The section 3 standard is tougher than both the section 5 and section 2 standards. How will the Department show that a state has discriminated on the basis of race, particularly when the state defends and says: “We were acting in good faith in passing our laws for good reasons, or at worst we were discriminating on the basis of party, not race?”

That is Texas’s argument and could well be North Carolina’s, although the latter is more likely to defend itself by claiming that its laws are necessary to prevent fraud or to promote efficiency. Texas may have a hard time defending itself against charges of intentional racism, because just a few years ago a federal court held that Texas did engage in intentional racial discrimination in its 2011 redistricting plan when, among other things, it cut the “economic guts” out of Black Democratic legislators’ districts but not white Democratic legislators’ districts.38 We will see what kind of evidence the Justice Department produces of intentional racial discrimination in North Carolina. It is also unclear if courts will infer discriminatory intent based upon discriminatory effects.39 And once again, if any court actually reimposes preclearance on Texas or North Carolina under section 3, the Supreme Court could reverse under Shelby County‘s equal sovereignty principle. Texas argues in its briefs that it is unconstitutional to impose preclearance unless a state’s racist conduct is as bad as what existed in 1965, when Congress first passed the Voting Rights Act.40

III. RACE OR PARTY? YES

I turn now to address the race-or-party question head-on. Recall Texas’s defense to the attack on its redistricting plan: this is about party, rather than race. But the lines between the two are inextricably intertwined.

To illustrate, consider another aspect of North Carolina history. In the 1990s, the state legislature was still controlled by Democrats, and redistricting was still subject to preclearance from the Justice Department.41 North Carolina had a long history of racial discrimination in its redistricting plans, and North Carolina knew it was going to have to do more to foster minority representation to avoid Voting Rights Act liability.

The 1990s process of redistricting was brutal and political. Democrats passed a congressional plan with just one majority-minority district, and the Justice Department, then under the control of the first Bush Justice Department, demanded the creation of a second district to satisfy the requirements of section 5 of the Voting Rights Act. Republicans thought this requirement would work to their advantage, as the packing of African-American voters into two districts would lead to more districts with a majority of Republican voters, helping give Republicans a majority in the Congressional delegation.

Democrats, still controlling the redistricting process, nonetheless created two majority-minority districts of quite unusual shapes. One of these districts ran 160 miles down I-85 from Durham to Charlotte. The Supreme Court noted: “At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that ‘[i]f you drove down the interstate with both car doors open, you’d kill most of the people in the district.”42 The initial Republican objection to this plan was that it was an unconstitutional partisan gerrymander. Republican plaintiffs, led by controversial conservative political player Art Pope,43 claimed it is unconstitutional to draw district lines to hurt one political party.44

The courts, however, rejected a partisan gerrymandering claim. The Supreme Court in the 1986 case Davis v. Bandemer45 had made it very hard to bring claims based upon discrimination on the basis of party in redistricting, and more recently made bringing such claims even harder in Vieth v. Jubelirer46. The Court held that the Equal Protection Clause of the Fourteenth Amendment provides no standard for separating unconstitutional partisan gerrymanders from permissible consideration of party, rendering all partisan gerrymandering claims losers.47

After the party-based claim challenging North Carolina’s redistricting failed, opponents argued that the districting plan constituted an unconstitutional racial gerrymander. In the 1993 case of Shaw v. Reno48, the Supreme Court agreed, holding that when voters are separated on the basis of race into districts without adequate justification, this separation violates the Fourteenth Amendment’s Equal Protection Clause. This was not a claim of vote dilution, but one based upon what Professor Richard Pildes has called expressive harms49: the problem, the Court said, was the message the district shapes sent to voters that race is all that matters in politics.50

Shaw was controversial, and the Supreme Court heard an unprecedented four challenges to North Carolina’s districts within the next decade. The last challenge was the most interesting. In Easley v. Cromartie51, the Court held that the crazy-shaped district lines in the latest North Carolina plan were not unconstitutional because they were designed to protect party, not to divide on the basis of race.52

Easley is the origin of Texas’s argument that it should be able to pass its tough redistricting law because the law was motivated by party rather than race. Yet is hard to credit Texas’s explanation that the redistricting’s effect on racial minorities is merely “incidental” if it targeted the Democratic Party. Consider the local Republican official in North Carolina who recently told The Daily Show not only that if the state’s new voter identification law will hurt “a bunch of lazy blacks that wants the government to give them everything – so be it,” but also that “the law is going to kick the Democrats in the butt.”53

The “Race or Party?” question is an artificial way of dividing up a world that has been dictated by American law and the Supreme Court. Why artificial? Part of the reason that the Democratic Party appeals to minority voters is that it supports policies that benefit minority voters. It is hard to think of discrimination against Democrats as having a mere “incidental” effect on minority voters, given the significant overlap between the two groups. On the flip side, part of the Republican opposition to Democratic policies is that they are more redistributive, and that redistribution helps racial minorities who are disproportionately poor.

Republican operative Lee Atwater explained in 1981 how the Republican Party could appeal to racists without appearing racist itself by moving from explicit racial appeals to talking about forced busing, cutting taxes, and supporting other economic policies in which “blacks get hurt worse than whites.”54 Things have changed for the better, but perhaps not enough. A Republican strategist recently told the New York Times that the “Republican party needs to stop pandering to” racism.55 A recent report on focus groups conducted with committed Republican voters by Democratic pollster Stan Greenberg found that “while few explicitly talk about Obama in racial terms, the base supporters are very conscious of being white in a country with growing minorities. Their party is losing to a Democratic Party of big government whose goal is to expand programs that mainly benefit minorities. Race remains very much alive in the politics of the Republican Party.”56

IV. A NEW STANDARD BEYOND RACE OR PARTY

As the earlier sections demonstrated, race and party are intertwined, especially in the South, but the legal standard is bifurcated. If a plaintiff can raise a statutory Voting Rights Act or constitutional race-based claim under the Fourteenth or Fifteenth Amendments, the claim may well succeed. But claims of party discrimination go unchecked. In Crawford v. Marion County Election Board57, a voter identification case, for example, Judge Posner held that the Democratic Party had standing to contest Indiana’s law because the law was going to make it harder to get Democratic voters to the polls – but that the discrimination did not render the law unconstitutional.58 It did not matter to the Seventh Circuit majority, or later to the Supreme Court, that this was a law was aimed at Democrats. As Judge Evans declared in dissent, “Let’s not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”59

This bifurcation puts courts to an either/or choice: in the redistricting cases, if “partisan” factors predominate in the legislature then those challenging the proposed district lines lose, but if “racial” factors predominate they win. In the case of North Carolina’s new voter law, even if opponents can prove a bad “partisan” intent in passage of the law, they likely will still lose if the court accepts North Carolina’s posited-but-not-proven state interests, but if opponents can prove “racial” intent, they likely will win.

Worse, the focus on race requires courts to make decisions about what is in legislators’ hearts: is there a racist intent? That question puts off some people who would otherwise be sympathetic to the argument that states should not impose laws which make it harder to register and vote for no good reason. A search for racist intent is not the most productive way to think of these issues. Instead, we need to question the assumption that it is permissible outside the redistricting context to discriminate on the basis of party.

It is understandable why the Supreme Court has been reluctant to set out a workable standard for policing partisan gerrymandering claims in cases from Bandemer to Vieth to Easley: it is legitimate to have some consideration of party in drawing district lines, if only to make sure that those drawing district lines group together people with similar views and outlooks. But it is not so difficult to separate permissible from impermissible consideration of party outside the redistricting context. When it comes to the rules for running our elections (as opposed to rules for constructing our legislative districts), there is a neutral standard against which we can judge election laws: election rules should be crafted so that all eligible voters – but only eligible voters – can easily register and cast a vote which will be accurately counted.

In reviewing laws which impose burdens on voters, courts should adopt something along the lines of the “strict scrutiny light” standard which Judge Evans advanced in his Seventh Circuit Crawford dissent.60 When a legislature passes an election-administration law discriminating against a party’s voters or otherwise burdening voters, courts should read the Fourteenth Amendment’s Equal Protection Clause to require the legislature to produce real and substantial evidence that it has a good reason for burdening voters and that its means are closely connected to achieving those ends. This approach would not require delving into the motives of legislators to determine if they were merely self-interested and had passed laws to hurt the other party,61 as opposed to being motivated by a desire to prevent fraud, save money, or instill voter confidence. Instead, evidence of such intent should prompt courts to look skeptically upon asserted state interests unsupported by actual evidence.

When it comes to state voter identification laws, for example, the state would have to show that impersonation voter fraud is a real problem, that a photo identification requirement is a reasonably necessary means to solve the problem, and that voters would not be overburdened by the requirement given the nature and extent of the state’s interest. A law limiting absentee balloting, for example, would be easier to sustain than a voter identification law, because of the more extensive evidence of vote buying connected with the use of such ballots.62

#### 1 – Key to democracy

Killian 17Linda Killian is a Washington journalist. Her most recent book is "The Swing Vote: The Untapped Power of Independents." She is studying early American history and the founding period in American University’s doctoral program. Follow her on Twitter: @lindajkillian Democracy on the Line https://www.usnews.com/opinion/thomas-jefferson-street/articles/2017-10-04/supreme-court-holds-democracys-fate-in-gill-v-whitford-gerrymandering-case

American democracy itself was on trial Tuesday at the Supreme Court. At least that's what Paul M. Smith, the Washington attorney representing challengers to Wisconsin's extremely gerrymandered legislative redistricting plan, was arguing.

If the Supreme Court does not step in and act now to put a halt to extreme partisan gerrymandering like that practiced in Wisconsin (and many other states), Smith warned, there will be a "festival of copycat gerrymandering," "one party control will be guaranteed" in many states indefinitely and "the country is going to lose faith in democracy" because people will come to believe their vote doesn't matter.

Many Americans may believe this is true already, thanks in no small part to a previous Supreme Court decision – the Citizens United campaign finance case. In that 5-4 ruling, the Court majority in 2010 equated money with free political speech and refused to place any restrictions on political spending by corporations or other groups. The flood of campaign cash which has followed has dominated the political process and seriously undermined the influence of individual voters. Now the Court is being asked again to decide whether to protect the power of the individual ballot or allow politicians to effectively render many elections moot by creating such perfectly engineered and gerrymandered districts that their party cannot possibly lose and the other party cannot possibly win.

In the 2016 campaign, Donald Trump frequently used the charge of a rigged system as a rallying cry, but in fact the legislative redistricting system is most decidedly rigged against the voters. If politicians don't think they can ever lose – or if one party holds an ironclad control over government – what has happened to the fundamental democratic ideas that government should be representative and elected officials accountable to the voters on which this nation was founded?

### AT: Delay

#### No delay or uncertainty:

#### 1 – 1 – should is immediate – if it’s not we get durable implementation

#### 2 – 2 – court ruling spills into antitrust implications which allows suits

#### 3 – 3 – no uncertainty – court ruling inevitable, just question of grounds – no ev. says no ground

## Conduct

### Offense – 2NC

#### Antitrust enforcement turns the AFF: A – False positives: [ ], that’s Katyal [shoutout Dartmouth debate!] B – Gradualism: [ ], that’s Wheeler.

### XT---Precedents Bad---2NC

#### Precedents are bad

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

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

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

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

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

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

### XT---Precedent Link---2NC

#### Flips precedent

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

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

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

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

### XT---Consumers Link---2NC

#### Key to prevent antitrust against actions that significantly benefit consumers.

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

Conclusion

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

### ---Big Tech Fine---

#### Big Tech is O.K. – their evidence is speculative and doesn’t assume that every CS major worth their salt goes to FAANG after college. Larger firms acquire as opposed to competing with smaller firms and incorporate their ideas into a scale of production, that’s Kennedy.

#### 1 – Allensworth evidence is bad – it’s rife with speculation from a law professor who has never seen the inside of a businesses or an economics course – no reason to trust their opinion on the private sector.

#### 2 – Hemphill – firms don’t get emotionally jealous – if they see an innovation that disrupts their model they’ll adopt it to get on the new wave – Apple acquired firms with its Macintosh money to make the iPhone.

### 2NC---AT: I/L---Platform Abuse/Innovation

#### Zero empirical evidence supports the link between dominant platforms and reduced innovation

Patrick F. Todd 20, Trainee Solicitor, Herbert Smith Freehills LLP, London, 3/3/20, ““You don’t get to be the umpire and have a team”: should we regulate the activities of digital platforms in neighboring markets?,” <https://truthonthemarket.com/2020/03/03/you-dont-get-to-be-the-umpire-and-have-a-team-should-we-regulate-the-activities-of-digital-platforms-in-neighboring-markets/>

2. Widespread harm in adjacent markets

To ban platform owners from leveraging anti- and pro-competitively, one would expect there to be cogent evidence of harm to competition across a multitude of adjacent markets that depend on the platforms for access to consumers. However, as Feng Zhu and Qihong Liu note, there is a dearth of empirical evidence on the effects of platform owners’ entry into complementary markets. Even studies that support the proposition that such entry dampens or skews innovation incentives of firms in adjacent markets conclude that the welfare effects are ambiguous, and that consumers may actually be better off (see e.g. here and here). Other studies show that third-party producers can benefit from platform entry into adjacent markets (see e.g. here and here). It is therefore clear that this criterion, which should also be a prerequisite to imposing blanket regulation to control the behavior of platform owners, has not been satisfied.

#### 1 – Innovation and competition are high---concentrated markets don’t imply a lack of competition

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, 2020, “ARTICLE: Antitrust Without Romance,” 13 NYU J.L. & Liberty 326

The first risk created by the moralization of antitrust law is economic disorganization. At this point, it appears worth returning to the reasons moral concepts are thriving in antitrust law. We have seen that the moralization of antitrust, made possible by a populist discourse arguing that the system is broken by elites, serves personal interests. Moralists play on fears and predict a dark future in the absence of governmental action. 228

[\*388] By doing so, they ignore positive tendencies which undermine the role they would like to play in order to save "the people." Several studies suggest that the U.S. economy is, overall, more concentrated today at the national level than it was in the early 2000s. 229 This concentration does not, however, imply a corresponding decrease in competition. Concentrated markets may show great dynamism because of strong competitive pressure between the players. 230 For that reason, in 2018, the United States regained a first place ranking as the world's most competitive economy. 231 The country is also [\*389] ranked first in the annual ranking of the Global Competitiveness Report, 232 standing out in particular for its "business dynamism" as well as its "innovation capability." 233

In the Eurozone, although it would be useful to distinguish between countries, the overall level of concentration has been stable over the last ten years. 234 On average, the Herfindahl-Hirschman Index has remained relatively constant at a level of 330 since the Great Recession. 235 Entry and exit of firms in the evaluated industries stayed close together and at similar levels in recent years. 236 Moreover, markups, an indication of market power, have not increased significantly and have yet to reach pre-crisis levels. 237 Competitiveness remains high, with Germany ranking as the world's third most competitive economy, Switzerland the fourth, the

Netherlands the sixth, the United Kingdom the eighth, Sweden the ninth, Denmark the tenth, and Finland the eleventh. 238 There has [\*390] been no noticeable change in the trend of economic dynamism in the Eurozone over the last twenty years or so. 239

In short, as the Global Competitiveness Report indicates, "Europe and North America are, combined, home to seven of the ten most competitive economies." 240 The 2018 IMD World Ranking shows similar results. 241 Most importantly, examining the U.S. economy since the creation of the Sherman Act in 1890, and the European economy since the Rome Treaty in 1958, growth and wealth have increased more than in the history of humankind, benefiting society as a whole. 242 Some economists go even further, arguing that our prosperity is understated because our metrics to measure growth lead us to miss around half a percentage point per year. 243 While it is easy to identify individual adverse events (generally, anticompetitive practices or mergers), it is much harder to take notice of positive trends, as they are usually not embodied in a single, easily noticeable event.

These tendencies do not indicate antitrust law should not be improved, or suggest the absence of market failures, but they do indicate that antitrust law, as currently applied, produces good results, or at least does not hinder good results. 244 In short: antitrust law is not broken; it works rather effectively. This conclusion calls into question the merits of drastic changes to antitrust policy on the grounds that economies must be restored or revamped when, in fact, [\*391] they are already competitive. 245 The same goes for integrating new concepts and objectives into antitrust law to address problems raised by tech giants; micro-legal analyses of anticompetitive practices must not oust macroeconomic trends. 246 As pointed out by the OECD, the "simplicity" of the rationale for more oppressive antitrust law, based on the analysis of a handful of practices, raises questions. 247

# 1NR

## FTC

### OV

#### ai bias causes inifnite s-risk that outweighs and causes extinction---re-creates fascism, human suffering, extreme inequality, and genocide, that’s thomas

#### **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.

#### Turns case---

#### 1---innovation, fintech and software---has faulty code---can’t be produced to solve impacts

2---iran, cyber, and china---us looks weak in crisis---take advantage to crackdown

### 2ac 1

#### “Overstretch now” is non-responsive:

#### 1---leadership change---new ftc chair pivots to privacy now---companies perceive it, that’s butler--- Jones says might expand, not that it is and isn’t about the aff---cx even said it doesn’t mention cases now

#### 2---It’s our brink argument---the FTC’s managing its caseload, but only barely---the aff is a bolt from the blue that forces tradeoff with privacy

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

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

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

#### 3---Current enforcement is streamlined to enable focus on algorithmic bias

Brian Fung 12/17/21. Technology reporter who covers the intersection of business and policy @ CNN. “FTC considers drafting new regulations on data and algorithms to protect consumer privacy and civil rights.” https://www.cnn.com/2021/12/17/tech/ftc-algorithm-regulation/index.html

The Federal Trade Commission says it's considering drafting new rules for US businesses that would more strongly regulate how they can use data and algorithms, in the latest move to clamp down on technology companies run amok.

The effort could lead to "market-wide requirements" targeting "harms that can result from commercial surveillance and other data practices," agency chair Lina Khan announced in a letter to Sen. Richard Blumenthal dated Dec. 14, and shared by the senator's office Friday.

For years, regulators presumed that consumers could protect themselves from predatory practices by revoking their consent to being tracked. But it has become increasingly obvious that that so-called "notice-and-consent" approach has "serious shortcomings," wrote Khan, a vocal tech industry critic who has led the charge on reining in giants like Amazon, Apple, Google and Facebook (now Meta). In particular, she said, many Americans feel they have no choice but to have their data harvested and used in ways they disagree with, simply to participate in modern life.

The announcement of a potential rule making is a shot across the bow not just of Silicon Valley, which pioneered the use of data to drive business decisions, but of the growing number of companies and industries that have turned data mining into lucrative revenue streams — ranging from entertainment to insurance to retail.

Khan's letter follows a September request by nine Senate Democrats for an agency rule making that would set guardrails on the use of consumer data.

#### 4---FTC actions so far are only table-setting

Ashley Gold 12/20/21. Tech and policy reporter at Axios. “Six months with Lina Khan's FTC.” https://www.axios.com/lina-khan-ftc-six-months-4a5c4ba6-cef1-4a1f-b1dc-a528b2b41471.html

Why it matters: As Biden's first year ends, many are watching Khan's FTC to see whether it really can fundamentally change how the U.S. regulates big companies and how tech should treat consumers.

Entering the role, the 32-year-old, known for her scholarship in antitrust and competition policy, targeted what she sees as monopolistic behavior in Big Tech and beyond. Under her, the agency re-filed its case accusing Facebook of buying up competitors to maintain dominance.

It sued to block a $40 billion semiconductor chip merger between Nvidia and Arm, arguing it would stifle competing next-generation technologies.

It launched an investigative study into supply change disruptions, targeting retailers like Walmart and Amazon.

It reached a settlement agreement with an ad platform that allegedly violated the Children's Online Privacy Act.

The big picture: Khan's tenure so far has seen more table-setting for future actions than major high-profile antitrust cases.

#### 5---There are no major cases

Jacob Carpenter 12/3/21. Writer for Fortune. “Lina Khan targets low-hanging fruit for first big antitrust move.” https://fortune.com/2021/12/03/nvidia-arm-lina-khan-antitrust/

But Khan, perhaps smartly, isn’t exactly taking a big swing here.

From the moment that Nvidia announced its planned acquisition in September 2020, analysts and competitors have been skeptical the deal would go through. In subsequent months, some of the U.S.’ most prominent tech companies cried foul about the merger, including Google parent Alphabet, Microsoft, and Qualcomm, Bloomberg reported early this year.

Khan also has momentum at her back, with European Union and United Kingdom regulators already lining up an antitrust case. A top UK official teed up Thursday’s announcement by telling Bloomberg last month that “there is a lot of collaboration” on each side of the Atlantic with regard to Nvidia and Arm.

In addition, the FTC’s case has bipartisan support, with the organization’s two Republican commissioners joining their two Democratic counterparts in support of the case.

The true test of Kahn’s mettle lies farther down the road, as the FTC ponders whether to throw its weight behind challenges to acquisitions with more divided support and more complicated facts.

### 2ac 2

#### Yes trade off---

#### 1---legislative obligation---FTC’s responsible, that’s Reinhardt---resources are finite and trade off with privacy---empirics prove case trade off---that’s mcginnis

#### 2---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.”

#### 3---Limited resources force tradeoffs in enforcement decisions

Asker et al 21. Nathaniel L. Asker, partner in the Antitrust Department at Fried Frank Antitrust & Competition Law Alert, serves on the Antitrust & Trade Regulation Committee of the Association of the Bar of the City of New York and is a member of the Antitrust Sections of the American Bar Association and the New York State Bar Association; with Bernard (Barry) A. Nigro and Aleksandr B. Livshits. “Managing Antitrust Risk in the Biden Administration.” Fried Frank Antitrust & Competition Law Alert, January 5, 2021. 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.

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

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

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

#### 4---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.

### 2ac 3

#### No thumpers:

#### 1. None of their ev disproves that the FTC’s going after AI and privacy now---our uniqueness evidence indicates that algorithmic bias is an enforcement priority

#### 2. Algorithmic bias is the top priority:

#### A. Reports from the FTC

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

On September 13, the Federal Trade Commission (FTC) released a report to Congress that highlights the agency’s recent efforts to protect Americans’ privacy, announces the agency’s priorities for future data security and privacy protection efforts, and urges Congress to allocate more resources to the agency so it can expand its data security and privacy protection efforts.

As explained in the report, the FTC intends to focus its data security and privacy protection efforts via four key initiatives:

Integrating Competition Concerns. The FTC will focus its enforcement and rulemaking activities on the relationship of digital market dominance to consumer protection violations. The FTC’s report argues that “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 user data.” And it suggests that “violations of consumer protection laws may be enabled by market power, and consumer protection violations, in turn, can have a detrimental impact on competition.” Moreover, the FTC believes it has a “structural advantage” in comparison to other federal and state agencies because, unlike those agencies, it focuses on both competition and consumer protection issues. And, accordingly, the FTC intends to look “with both privacy and competition lenses at problems that arise in digital markets” and will, in some consumer protection cases, seek to impose “competition-based remedies.”

Advancing Remedies. The FTC will focus on crafting strong remedies that protect consumers and deter harmful data security and privacy practices. To protect consumers, it will require companies to disclose data breaches and data misuse. It will also negotiate redress funds for consumers harmed by data breaches and, where necessary, partner with other agencies in order to obtain redress for consumers. Additionally, the FTC will expand nonmonetary relief for affected consumers, for example, by requiring companies to provide identity verification services. As for deterrence, the FTC intends to penalize companies in violation by depriving them of the tools that caused the harm, such as requiring deletion of an algorithm. Per the report, the FTC will implement these remedies through orders issued in enforcement actions.

Focusing on Digital Platforms. The FTC will keep a close eye on the data practices of market-dominant digital platforms by focusing on order enforcement and conducting additional compliance reviews. Indeed, the FTC’s report notes that the agency “will shift resources to order compliance and enforcement especially against the largest respondents.”

Expanding Understanding of Algorithms. The FTC will develop greater understanding of algorithms and the consumer protection and competitive risks they may pose. The FTC will also provide more in-depth guidance for businesses on using algorithms and artificial intelligence fairly and equitably. In particular, the FTC would like to understand the ways that algorithms may create racial bias and prevent such uses of algorithms. It will also act to encourage companies to comply with its previously issued recommendation that they “test their algorithms, both at the outset and periodically thereafter, to make sure it doesn’t create a disparate impact on a protected class.”

#### B. Expressed plans

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.

#### Big Tech suits don’t thump:

#### 1. Legislation won’t pass

Jacob Silverman 21. Staff writer and Author, The New Republic. “Biden Wants to Tame Big Tech with a Thousand Paper Cuts,” July 9. <https://newrepublic.com/article/162940/biden-executive-order-big-tech-monopoly>

On Friday, the White House [announced](https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/) a potentially important, if modest, effort to further tamp down the power of the technology industry. This time the instrument is an executive order—the kind of wide-ranging declaration that often gets called “sweeping” or “major,” though its efficacy may take years to gauge—that covers everything from competition in the economy to drug prices to reforming a tech sector that is defined by a handful of seemingly unstoppable titans. Offering a mix of general recommendations, requests for action from other government agencies, and new administration policies, the Executive Order on Promoting Competition in the American Economy may be just what our overconsolidated economic system needs. But in tackling the power of a tech sector that has not only wrested control of the economy but remade it in its own data-hungry image, the Biden administration is still throwing pebbles at its enemy’s parapets. The tech industry has had 20 years to establish a stranglehold over our personal data, attention, and consumer choice. To tackle these problems, we need more, much more.

Despite promising to take on the power of Big Tech, President Joe Biden and his administration have so far taken a cautiously incrementalist approach. He’s [appointed tough industry critics](https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html) like Lina Khan to be commissioner of the Federal Trade Commission, but he has yet to name a head of the Justice Department’s antitrust division, a key role for any future enforcement action. In Congress, Democrats have introduced six smallish antitrust bills, but their path out of the House is [murky](https://www.cnbc.com/2021/06/24/-big-tech-antitrust-debate-odd-alliances-form-and-party-fractures-show.html), as ongoing disputes between [Republicans](https://www.cnbc.com/2021/07/07/house-republicans-lay-out-tech-antitrust-agenda.html) and Democrats over how to fight this legislative battle mean that the final bills could look much different than they did in committee—if they make it to a floor vote at all. (It doesn’t help that some Silicon Valley–adjacent Democratic politicians, like Representative Ted Lieu and Representative Ro Khanna, have been less than supportive of the bills.)

As federal and congressional leadership lag, states have forged ahead, with dozens of attorneys general coming together in lawsuits like one, filed this week, accusing Google of [anti-competitive practices](https://www.vox.com/recode/2021/7/7/22567656/google-play-store-states-antitrust-suit-letitia-james-utah-new-york-north-carolina). Other ongoing antitrust suits include one [against Amazon](https://www.washingtonpost.com/technology/2021/05/25/dc-ag-antitrust/) over pricing issues; another lawsuit (this one with DOJ participation) [against Google](https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws); and two others against Facebook that a judge recently threw out. In this proliferating legal war against Big Tech—premised on a lack of competition and companies’ abusing their monopoly status—any of these cases could yield billion-dollar fines for one of the tech giants. But fines are easily paid. Whether these suits can lead to meaningful reform, to breaking up companies and redirecting business practices away from the current dominant model of user surveillance and bulk data collection—that is far less clear. As with proposed legislation in the House, bipartisan legal efforts may be sundered on the altar of competing partisan priorities, with Republicans focusing on [alleged censorship](https://newrepublic.com/article/162299/josh-hawley-gops-fake-war-big-tech) and Democrats more focused on [economic competition and user rights](https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting).

With the stage set for legislative gridlock, drawn-out lawsuits, and [bickering](https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386) over the FTC’s legitimacy, a small opening has emerged for the Biden administration to take meaningful action on its own. And there are some measures in the executive order worth celebrating. One section aims to improve internet service by eliminating early termination fees and providing transparent pricing to help drive competition. Another proviso calls for gadget users—from farmers working on tractors to people tinkering with their own cell phones—to have what’s often [referred to](https://www.theverge.com/2021/7/9/22569869/biden-executive-order-right-to-repair-isps-net-neutrality) as “the right to repair,” a right that tech companies have suppressed by discouraging DIY or third-party work on broken items. (Forcing customers to take their doddering laptop to Apple’s Genius Bar helps the company maintain control over its products and ensures that repairs, and the money they generate, stay in-house.) Other relevant orders call for the restoration of net neutrality and applying more scrutiny to corporate mergers, which may prevent a tech giant from swallowing up the next WhatsApp or Slack, formerly insurgent chat/social media platforms that were absorbed by Facebook and Salesforce.

In the last year, tech companies have shifted their rhetoric, [claiming](https://newrepublic.com/article/162509/facebook-big-tech-nick-clegg-regulation-policy) that they are in favor of regulation—just on their terms. To that end, they’ve deployed armies of lobbyists to woo elected officials, making companies like Google and Facebook some of the most profligate spenders on K Street. With the potential for major legislative action still up in the air—a divided Senate doesn’t augur well, unless tech-critical Republicans like Senator Josh Hawley line up behind the Democratic legislative agenda, which seems unlikely—executive action may be the most promising way forward. Call it death by a thousand regulations. It’s also—as the executive order’s many prompts for action by the Federal Communications Commission, the FTC, and DOJ show—a plea for the government to do its damn job.

Even sympathetic observers may survey this latest initiative with some well-earned cynicism. [Regulatory capture](https://newrepublic.com/article/149438/big-pharma-captured-one-percent), in which regulatory agencies become beholden to the companies and industries they oversee, is a well-known feature of the land, and the families of leading politicians like Representative Nancy Pelosi periodically trade stocks based on what appears to be insider information. And as demonstrated by the measure to treat all internet traffic equally by restoring net neutrality (something that the Trump administration [did away with](https://newrepublic.com/article/146305/loses-war-net-neutrality)), the Biden administration is still playing catchup, fighting many of yesterday’s battles. For instance, the order “calls on the leading antitrust agencies, [the DOJ and FTC], to enforce the antitrust laws vigorously and recognizes that the law allows them to challenge prior bad mergers that past Administrations did not previously challenge.”

While divesting WhatsApp and Instagram from Facebook are worthwhile efforts, there’s also a sense that would-be tech reformers are struggling to deal with the mistakes and oversights of a previous generation of politicians (i.e., pushing for the enforcement of existing laws is yet another call for the government to do its job). Even the order’s directive that the FTC “establish rules on surveillance and the accumulation of data” seems incredibly belated. We are 20-odd years into a surveillance economy, in which consumers have become the main source to be mined for value. The resulting inequities are vast, as the tech giants have had decades to strengthen their positions. It will take far more than an executive order to undo all this, much less to ensure a more equitable future. The question is: Does the Biden administration understand this grim state of play, or is this the best we’re going to get?

#### 2. Which means no major action

Joshua D. Wright 21. Executive Director of the Global Antitrust Institute at the Antonin Scalia Law School, former commissioner of the U.S. Federal Trade Commission from 2013 to 2015, interviewed by James Pethokoukis, senior fellow at AEI, “Will US antitrust law break up Big Tech? My long-read Q&A with Joshua D. Wright,” 2/9/21, <https://www.aei.org/economics/will-us-antitrust-law-break-up-big-tech-my-long-read-qa-with-joshua-d-wright/>

[Italics denote questions from Pethokoukis]

*Do you think that, if we have this conversation in four years, we will have seen any major action against any of the largest technology companies that involves them selling off a significant business?*

That’s a great question. I bet the under, and here’s why. The US antitrust doctrine is what it is right now, and we still have meaningful judicial review. And on the left and the right, you see all of the attention paid to legislative change — they’re not going to win in the court. The DOJ will bring its case against Google, the FTC has a Facebook case where they might be able to convince a court to spin off WhatsApp or Instagram. I’m skeptical that those are good cases, but neither of them are the big-breakup, affect-the-business-model case that proponents of a new antitrust are looking for. For what it’s worth, my money is that the government loses both of those cases, but those cases exist. But overall, I think that the hope for the antitrust reformers lies, not in the courts, but in Congress.

Maybe I’ve been in DC too long, but I always bet the under if someone tells me that the revolution is coming from Congress. I don’t think we’re going to see legislation that undoes the consumer welfare standard. I do think that you’ll see some antitrust legislation. You’ll get bigger budgets for the agencies, and maybe you’ll get tinkering around the margins with the presumption here or presumption there. But I don’t think that you’re going to see a regulatory antitrust revolution via Congress.

I think it’s going to have to be done through the courts, and I’m skeptical. My silver lining of hope when watching some of these discussions happen is that you’ve got to win in the Article III courts, and that means you’ve got to have proof, not just political grievances. I don’t think they’ve got that.

#### 3. At worst, they’ll be minor tweaks---the link outweighs

Michael Hirsh 21. Senior correspondent at Foreign Policy, “Big Talk on Big Tech—but Little Action,” 4/6/21, https://foreignpolicy.com/2021/04/06/big-tech-regulation-facebook-google-amazon-us-eu/

Problem is, that’s just about where the consensus ends. And even if you add more lawyers, antitrust cases move glacially, and federal judges are extremely cautious about punishing behavior deemed anti-competitive, especially in an era when antitrust experts disagree vehemently about remedies. Plus, now every case faces the prospect of being squelched by a very conservative Supreme Court.

Despite the documented actions of Facebook and other companies in crushing would-be competitors, there is also good reason for judicial caution. Consider the irony that Microsoft—itself the target of a major antitrust action a quarter century ago—now considers itself the aggrieved party in the recent Department of Justice case against Google, since it is trying to raise the profile of its Bing search engine, which has a meager 2.5 percent of the market. Or that Facebook’s own dominance may someday fall victim—without any help from government at all—to new blockchain technology that could allow users to run their own web services and applications. (Ironically, among the key innovators pushing for that are Zuckerberg’s old antagonists from Harvard University, Tyler and Cameron Winklevoss, who famously claimed that he stole the social network idea from them.) Even today, many antitrust experts say it’s probably a judicial and legislative bridge too far for the government to try to proactively promote competition in the tech world; let the markets take care of that instead.

But so changed is the political environment that U.S. President Joe Biden and some of his top regulators, such as Lina Khan, a Yale Law School wunderkind who was recently nominated to the FTC, might seek to break up the big tech firms. Biden, on the campaign trail, said that breaking up tech quasi-monopolies such as Facebook is “something we should take a really hard look at.”

That is almost certainly not going to happen: The political will simply isn’t there, even among many Democratic legislators influenced by Khan and other progressive thinkers.

“I don’t think Biden has the stomach for that,” said Herbert Hovenkamp, an antitrust expert at the University of Pennsylvania. The reason is simple: Today’s monopolistic abuses are quite unlike the monopoly power of old, when big cartels like John D. Rockefeller’s Standard Oil inflicted predatory high prices on consumers and political will was high to “bust trusts.” On the contrary: Most consumers love the fact that they can buy all kinds of inexpensive stuff on Amazon and have it delivered the next day, and that Facebook doesn’t charge them a cent, even as it makes a mint selling their private information to advertisers and market manipulators.

“The Democrats need to be cautious here,” Hovenkamp said. “Consumers are their constituency. And these companies are among the biggest producers of growth in the U.S. Biden certainly doesn’t want to ruin that.” Instead, the administration may well decide to focus more on smaller fish in other industries, as the FTC did last week by challenging Illumina’s $7 billion purchase of cancer test developer Grail. In a sign of how aggressive the FTC might be under Biden, it was the first time in decades that the commission sought to block a so-called vertical merger, alleging that ownership of Grail would incentivize Illumina, a gene-sequencing company, to raise costs on Grail’s competitors.

Indeed, though the United States and the European Union agree that new solutions are needed to curtail the dominance of Big Tech, the approaches remain very different. For years, the EU has led the way in filing antitrust cases, but late last year it did an about-face—deciding on a regulatory rather than lawsuit-based approach. After Brussels released a draft of its Digital Markets Act, EU competition minister Margrethe Vestager tweeted that the new rules would establish “do’s & don’t to gatekeepers” of our digital world. If passed, the act could levy stiffer penalties than ever before, including a demand for a percentage of earnings.

On the other side of the Atlantic, the FTC is also mulling ways to amp up its regulatory power. Khan and other progressives advocate rules that prevent a tech platform from favoring its own products in search results or pressing its own technologies on users, as Google allegedly does with Android, a mobile operating system. Violation of such rules could subject companies to substantial fines. According to a report last fall by Democratic members of the House Subcommittee on Antitrust—and partially written by Khan—Google has used “a series of anti-competitive contracts” that pushed Google search for users of Android phones.

Yet in many areas huge disagreement remains about how to contain Big Tech. Republicans and Democrats both want to do so, for different reasons; the former believe that Silicon Valley is biased against the right politically, while the latter tend to worry about anti-competitive behavior. Klobuchar has sponsored a monster bill, the Competition and Antitrust Law Enforcement Reform Act, which is intended not only to give federal enforcers more resources but also to strengthen prohibitions on anti-competitive conduct and mergers, among other reforms. As yet, however, she has no Republican co-sponsors, and Democrats in the House are leery of going the same route with a sprawling omnibus bill, according to a legislative aide with knowledge of the process. “If you have a big bill it creates a honey pot” for opponents, he said, noting that Big Tech’s pockets are much deeper than those of their antitrust counterparts. House leaders will instead try to introduce a slew of specifically targeted separate bills.

### 2ac 4

#### Group the brody and the turn part of jones card---no turn---

#### 1---CP solves---prevents cases from being brought---they’re no longer antitrust so not FTC authority

#### 2---their ev is bad---

#### a---jones is about cases writ large---not about big tech---no reason plan is uniquely resource intensive

#### b---brody says “could” cosyt, not is. It’s about one google suit, doesn’t overwhelm---uq disproves.

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

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

The top antitrust lawyer at the Department of Justice said Tuesday that he doesn't think a Supreme Court ruling earlier this week would make it more difficult to take on the biggest online platforms over competition concerns. Why it matters: Critics of large tech companies worry the ruling in a case concerning credit card providers might offer Silicon Valley companies like Google, Facebook, Amazon and Uber protection from antitrust prosecution because they use so-called two-sided marketplaces to connect parties, such as buyers and sellers. Speaking at the Aspen Ideas Festival, DOJ antitrust chief Makan Delrahim said he saw the ruling as a "sound decision" overall. ""I was more worried the Supreme Court would come up with a test [that would] cause harm to new business models like Uber and Airbnb," he said, saying that would have been a greater hardship to the economy than just losing this case. Impact on Big Tech: Responding to a question from Axios, Delrahim said he didn't think the ruling would make it harder to go after Facebook and Google over competition concerns "for a couple of reasons." First, he said, each case is specific to the facts. Second, the ruling doesn't treat all two-sided marketplaces alike. While it might help protect Uber and Airbnb, which directly connect two parties, Delrahim said he wasn't sure that Google and Facebook would see their businesses similarly affected. Other companies, like Amazon, might find some parts of their business protected and others not. "I think to the extent that it creates that transaction and you bring in third party sellers and buyers, they could benefit from that, but not in other areas of their business," he said. Yes, but: Delrahim did say he thought that the ruling could limit antitrust enforcers' ability to take on Uber, Lyft, and Airbnb, but would not protect the companies in the case of criminal behavior, like price fixing. The backdrop: The court ruled that, when considering an antitrust case involving some two-sided markets, authorities need to weigh whether there is competitive harm on all sides of the market. Allegedly anticompetitive behavior on one side of a business model wouldn't be actionable in some cases, Justice Clarence Thomas wrote in the court's opinion, if the whole picture wasn't anticompetitive.

#### 4---Per se illegality links---

#### a---costs resources---legality is comparatively cheaper.

Ramsi A. Woodcock 21. Assistant Professor, University of Kentucky Rosenberg College of Law, Secondary Appointment, Department of Management, University of Kentucky Gatton College of Business and Economics. “The Hidden Rules of a Modest Antitrust”. Minnesota Law Review https://deliverypdf.ssrn.com/delivery.php?ID=659113087090031104014103108065077095007085007037003090100006007104097067091127069102026056048010010036110095109031088087113005104006091005020071012081030119066078004004007050007009107022066112100025112012088078019022090126007103004117086019091002026081&EXT=pdf&INDEX=TRUE

Because per se rules of illegality are more costly than per se rules of legality, it follows that a given budget will be able to afford fewer rules of reason when per se rules of illegality are used than when per se rules of illegality are not used and so the intersection of the budget line with ab, the line that shows points attainable without use of rules of per se illegality, will be closer to the origin than the intersection of the budget line with dc. As a result, the intersection points of the budget line with dc and ab will not be symmetrical, and so the budget line will not lie at a 45-degree angle to the axes. (This is a bit difficult to see in the figure as drawn.)

#### b---per se legality is key to save resources.

Ramsi A. Woodcock 21. Assistant Professor, University of Kentucky Rosenberg College of Law, Secondary Appointment, Department of Management, University of Kentucky Gatton College of Business and Economics. “The Hidden Rules of a Modest Antitrust”. Minnesota Law Review https://deliverypdf.ssrn.com/delivery.php?ID=659113087090031104014103108065077095007085007037003090100006007104097067091127069102026056048010010036110095109031088087113005104006091005020071012081030119066078004004007050007009107022066112100025112012088078019022090126007103004117086019091002026081&EXT=pdf&INDEX=TRUE

The new per se rules of legality created by the Court cannot be expected to have paid for the rules of reason, however, because most of those per se rules of legality replaced per se rules of illegality, which are cheap to enforce relative to rules of reason, so the savings generated by the rules of per se legality were likely lower than the enforcement cost increases created by the new rules of reason and therefore are unlikely to have fully offset the cost increases.163 Indeed, unless the enforcement cost of per se rules of illegality is closer to the enforcement cost of rules of reason than it is to the enforcement cost of per se rules of legality, which seems unlikely in light of anecdotal evidence regarding the enforcement cost of rules of reason, the savings from the conversion of per se rules of illegality to per se rules of legality with respect to a given amount of conduct cannot equal the enforcement cost created by the conversion of rules of per se illegality to rules of reason for an equal amount of conduct. 164 If—to choose a few figures at random—the rule of reason costs $11 to enforce with respect to a particular amount of conduct, and the rule of per se legality costs $1 to enforce with respect to that amount of conduct, then converting a rule of per se illegality to a rule of per se legality with respect to a given amount of conduct will create enough enforcement cost savings to offset the cost of converting a rule of per se illegality to a rule of reason for an equal amount of conduct only if the rule of per se illegality costs $6 or more to enforce. It is likely, however, that a rule of per se illegality would cost $3 or $4—an amount much closer to the $1 cost of enforcing a per se rule of legality, because neither rule requires a costly inquiry into consumer harm.

One caveat is that if the amount of conduct converted from per se illegality to per se legality is larger than the amount of conduct converted from per se illegality to rules of reason, then the savings from the former change could offset the enforcement cost of the latter because enforcement costs increase per unit of conduct to which a rule is applied. If enforcers save $2 or $3 per unit of conduct on the conversion from per se illegality to per se legality, but incur a cost increase of $5 per unit of conduct on the conversion from per se illegality to rules of reason, then, although, unit for unit, costs rise as a result of these rule changes, if the conversion from per se illegality to per se legality affects three units of conduct and the conversion from per se illegality to rules of reason affects only one unit of conduct, then the savings will be $6 to $9, which does offset the $5 increase in costs for the one unit of conduct affected by the conversion of rules of per se illegality to rules of reason.

#### 5---Enforcement costs are high even if zero litigation costs

Ramsi A. Woodcock 21. Assistant Professor, University of Kentucky Rosenberg College of Law, Secondary Appointment, Department of Management, University of Kentucky Gatton College of Business and Economics. “The Hidden Rules of a Modest Antitrust”. Minnesota Law Review https://deliverypdf.ssrn.com/delivery.php?ID=659113087090031104014103108065077095007085007037003090100006007104097067091127069102026056048010010036110095109031088087113005104006091005020071012081030119066078004004007050007009107022066112100025112012088078019022090126007103004117086019091002026081&EXT=pdf&INDEX=TRUE

Reform of the rule of reason, through a shifting of part of the burden of proof to the defendant, can eliminate this bias. 239 But rule of reason reform cannot eliminate the separate problem that lies at the heart of this Article: the enforcement costs that the rule of reason adds to the process of identifying which cases to bring, as opposed to the litigation costs of winning cases once they are brought.240 Enforcement costs would remain even were the entire burden of proof to be placed on defendants and litigation costs for plaintiffs consequently to go to zero: enforcers would still need to worry about the serious reputational harms associated with losing cases and so they would still need to invest in deciding which cases to bring.241 Moreover, the rule of reason would still be costlier to enforce than per se rules. Enforcers would still need to know enough about consumer harm in any potential rule of reason case to determine whether defendants would be able to meet their burden of disproving the existence of consumer harm, and so enforcers would still need to investigate consumer harm in rule of reason cases. But enforcers would not need to do so for cases involving per se rules, which have no harm requirement. The conversion of rules of per se illegality to rules of reason would therefore still drive up enforcement costs. And so, as this Article has shown, enforcers would still be forced to reduce enforcement and potentially to increase error costs.242 A fortiori, the enforcement cost problem would also not go away were the rule of reason to be reformed to place the burden of proof equally on plaintiffs and defendants; the continued existence of litigation costs for plaintiffs in this case would just make the enforcement budget constraint even tighter. Indeed, this entire Article has been built around demonstrating the enforcement cost problem in precisely this case. When burdens of proof are shared equally, the rule of reason should be unbiased: it should be just as good at identifying good conduct as it is at identifying bad conduct. But we saw in Part VII that converting rules of per se illegality to rules of reason increases error costs under an enforcement budget constraint when the rule of reason is unbiased.243 Thus enforcement costs will continue to pose a problem even after rule of reason reform is complete and regardless of the form that rule of reason reform takes. 244

#### We have a short term link---per se in the first instance requires classification---it has the same budget impacts as rule of reason.

Geoffrey A. Manne 21. President and Founder of the International Center for Law and Economics and Distinguished Fellow at the Northwestern University Center on Law, Business, and Economics. “Response: The Rule of Reason as a Discovery Procedure: A Response to Ramsi Woodcock’s Hidden Rules of a Modest Antitrust.” https://minnesotalawreview.org/wp-content/uploads/2021/05/Manne\_Final.pdf

In any field of law, the cases that make it to court are the relatively novel ones. And especially for antitrust, that often means novel business conduct. If you present the court with novel conduct or a novel setting, virtually by definition, it will not meet the standard for per se review. Even under the most stringent per se standard, a court will still be forced to determine in the first instance whether to apply the per se rule.38 ---FOOTNOTE 38 STARTS, MID PARAGRAPH--- 38. See Meese, supra note 29, at 93 (discussing the Standard Oil test, in which the “first step—per se analysis—requires characterization and then classification of a restraint. Here courts inquire into the nature of the agreement and decide whether it is unlawful per se or instead subject to further scrutiny.”). ---FOOTNOTE 38 ENDS, PARAGRAPH CONTINUES--- In any case where that was clear, the parties either would have settled or wouldn’t have undertaken the conduct in the first place. As a result, “per se” is far from a blanket ban, nor should it be. That also means that the move toward rule of reason has not obviously harmed enforcement agencies’ relatively stagnant budgets, because it is not clear they could escape a rule of reason analysis in virtually any cases.

Because the Sherman Act does not (and, without destroying the economy, could not) outlaw all agreements that in any way reduce rivalry between firms, the law itself—whether enforced by a per se rule or a rule of reason—outlaws only undue restraints of trade. “Undue” is not inherently a bright line. To determine whether a practice should be condemned per se, it must first be determined that it is the sort of conduct that courts know always or almost always unduly constrains competition. Barring the vanishingly rare case where both the conduct at issue and the economic circumstances surrounding it are the same as those of conduct previously condemned by courts, this is not an automatic, costless, and certain assessment.

#### Businesses try to circumvent on the edges---causes functional rule of reason cases.

Geoffrey A. Manne 21. President and Founder of the International Center for Law and Economics and Distinguished Fellow at the Northwestern University Center on Law, Business, and Economics. “Response: The Rule of Reason as a Discovery Procedure: A Response to Ramsi Woodcock’s Hidden Rules of a Modest Antitrust.” https://minnesotalawreview.org/wp-content/uploads/2021/05/Manne\_Final.pdf

Further, just as litigation efforts will shift to take advantage of the relative pressure points in any given case, potential defendants’ conduct will shift, as well. This does not necessarily mean that there will be less problematic conduct; only that the character of the conduct will shift. In an efficiently functioning regime, this shift will entail a shift to conduct less likely to harm consumers. Certainly, per se rules are better at deterring the conduct proscribed by such rules. But as long as there remains any scope of indeterminacy and any possibility that conduct not clearly proscribed may be beneficial to the actor, there will be business conduct that may run afoul of the antitrust laws. And as long as this level of activity exceeds the budget constraint of the enforcement agencies, the budget constraint will always be a limiting factor.

This is not to say that more legal certainty cannot serve to improve the legal regime. But it does mean that we should be careful before pointing to the level of enforcement budgets as outcome determinative. Indeterminacy can come in many places. And while, at a high level of generality, it may be true that the general arc of cases has (or had) been from per se illegality to rule of reason treatment, when the concern is litigation costs, it is not a nominal per se rule or rule of reason but, rather, the law’s overall indeterminacy that is relevant.

Again, this is not to say that the standard of review and the availability of evidentiary presumptions are irrelevant—far from it. But both are consistent with per se and rule of reason approaches. Litigants will apply pressure wherever there is indeterminacy. Woodcock’s argument that courts should eschew the rule of reason, on account that it is too indeterminate, is thus off the mark.

### 2ac 5

#### Pretty sure they didn’t read the no internal link card---buut zidao included a marked version in the doc---I’ll answer it rq---new answers bc it wasn’t read

#### FTC does solve---only our ev is specific--- deterrence: attention from FTC chair causes companies to react, but only if they percieve it’s serious, that’s butler

#### Actualizing scrutiny to bias is key

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

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

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#### New funding and resolution is irrelevant---our uq postdates---proves it’s still on brink

#### 1. Even if it happens, it doesn’t prevent tradeoffs

Cristiano Lima 9/16/21. Business reporter and author of The Washington Post's Technology 202 newsletter. “Why Democrats are rallying around creating a new FTC privacy bureau to police Big Tech.” https://www.washingtonpost.com/politics/2021/09/16/why-democrats-are-rallying-around-creating-new-ftc-privacy-bureau-police-big-tech/?outputType=amp

At the session, lawmakers lamented that, beyond lacking will, the FTC has lacked the resources and staffing to effectively oversee the conduct of the tech sector’s trillion-dollar behemoths. That’s long been a knock on the FTC’s track record policing the tech sector, from both Democrats and Republicans.

While the proposed funding boost may not even the odds entirely, Democrats are largely aligned behind the idea that any added firepower for regulators is a positive step.

#### 2. Staff are constrained and trade off

Alison Jones & William E. Kovacic 20. Professor at King’s College London, and Global Competition Professor of Law and Policy at The George Washington University Law School. “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, vol. 65, no. 2, SAGE Publications Inc, 06/01/2020, pp. 227–255

B. Augmenting the Human Capital of the Enforcement Agencies

Measures to expand federal antitrust intervention dramatically—through the prosecution of lawsuits or the promulgation of trade regulation rules—will face arduous opposition from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (again, we assume that legislation to change the doctrinal status quo will not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies will create a serious gap between the teams assembled for the prosecution and defense, respectively. Although therefore the public agencies can match the private sector punch for the punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases, seeking powerful remedies upon global giants.

An enhanced litigation program will therefore go only as far as the talent of the agencies will carry it. We propose three steps to build and retain the human capital—attorneys, economists, technologists, and administrative managers133—to undertake a more ambitious litigation program. The first is to use antitrust as a prototype for a program to raise civil service salaries. The second two steps consist of cautions about the dangers of (a) denigrating the skills and accomplishments of existing agency personnel and (b) attempting to shut the revolving door through which professionals move between the public and private sectors. We discuss all three of these steps below.

1. Resources and compensation

To accomplish the desired expansion of enforcement, we see a need for more resources.134 Nonetheless, budget increases that simply allow the enforcement agencies to hire additional staff, while useful, are not enough. We would use more resources to boost compensation for agency employees. This means taking the antitrust agencies out of the existing civil service pay scale. The need is not simply to hire more people. It is to attract a larger number of elite personnel who are equal to the tasks that the ambitious reform agenda will impose. We do not see how the public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to case handlers and to senior managers. It surprises us that none of the proposals for bold reform mention compensation for civil servants.

#### 3. Budget increase is neg uniqueness---it means the FTC can handle what it’s currently doing, not an expansion---proves the staffing link

Kiran Stacey 8/10/21 – Washington Correspondent for the Financial Times, 8/10/21. “Washington vs Big Tech: Lina Khan’s battle to transform US antitrust.” https://www.ft.com/content/eba8d3d7-dba7-4389-858c-5406c31b413d

Even if Khan does win some of the landmark cases she is likely to bring, some worry the FTC will not have the capacity to write new competition rules and rewrite merger guidelines at the same time. “The FTC can put together legal teams that can match the best in the bar, punch for punch, in a major case,” says Kovacic. “But the number of those teams is a couple, it is not 10.” For years the commission’s budget and staffing levels have been chipped away. It now has roughly 50 per cent of the staff it had in 1980 and is currently trying to review a record number of mergers. In the first nine months of this fiscal year, the FTC received 2,573 notifications ahead of a large merger — already 50 per cent more than were received in the whole of last year. Last week, the commission published a statement warning that it would not be able to review all mergers within 30 days of a notification being made, as required by law. Instead, the FTC said, if it had not had time to review a merger before it took place, it would reserve the right to take action even after it had been completed. “This year, the FTC has been hit by a tidal wave of merger filings that is straining the agency’s capacity to rigorously investigate deals ahead of the statutory deadlines,” the commission said in a statement. The commission is also facing an uphill battle to retain staff. Some people say they feel demoralised by the pace of change and irritated they have not yet met their new chair — something Khan’s allies say is an unfortunate result of the pandemic. “There are only so many times you can hear that your institution has failed for years before you start to doubt your place in it,” says one staff member. But a bigger problem is that companies and private law firms are gearing up for a more aggressive FTC by trying to poach its talent. “I usually have to place a couple of FTC people in any given year,” says Lauren Drake, a partner at the Washington-based recruiting firm Macrae. “So far this year I have had 10.”

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#### No enforcement funding:

#### 1---Insufficient: Congress never gives the full package, recent tech funding proves. Political dogfights hurt credibility.

#### 2---their ev is bad---doesn’t say funding accompanies legislation---not ab the aff

#### 3---It’s not topical or normal means. Violates “scope.”

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

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

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#### Merger review doesn’t thump:

#### 1. It’s streamlined now to preserve resources

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

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

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

Expanded information requests for in-depth reviews

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

#### 2. They won’t pass

Christopher Holding et al. 21 Christopher, Paul Jin, Andrew Lacy, Arman Goodwin; July 15; Experts at JD Supra, a daily source of legal intelligence on all topics business and personal, distributing news, commentary, and analysis from leading lawyers; JD Supra, “Biden Executive Order Calls for Heightened Antitrust Scrutiny,” <https://www.jdsupra.com/legalnews/biden-executive-order-calls-for-7783960/>

Key Implications

Revised horizontal and vertical merger guidelines are expected, which will likely implement a much more aggressive approach to deals. Note, however, that agency merger guidelines are not binding on courts and merger challenges under more aggressive theories may be met with skeptical courts;

Anticipate delays in HSR review especially for deals in industries singled out by the Order (e.g., tech, pharma, healthcare, among others), even if competitive overlaps are minimal;

Deals not subject to HSR filing requirements, even when purchase prices are relatively low, should be reviewed by antitrust specialists to assess risk, especially in the sectors identified in the Order;

#### Merger wave doesn’t thump:

#### 1. It’s not actually a wave

Kirk Arner 8/10/21. Legal fellow at the Hudson Institute, with Harold Furchtgott-Roth. “The Harmful Death of Modern Merger Review.” https://www.realclearmarkets.com/articles/2021/08/10/the\_harmful\_death\_of\_modern\_merger\_review\_789287.html

But is the FTC’s assertion actually true? Has the FTC been hit by an unprecedented “tidal wave” of merger filings?

No, it hasn’t.

According to the FTC’s own 2019 report, the number of HSR transactions requiring filings roughly doubled between 2010 and 2017, growing from a little over 1,100 transactions in 2010 to just north of 2,000 in 2017. Between 2017 and 2020, transactions stabilized at roughly 2,000 to 2,100 per year.

The available data through 2021 do suggest an uptick in filings. Between January and July of this year, there were 2,067 total transactions filed. Over 7 months, that’s an average of 295 per month. Projecting this average out over 12 months would result in 3,540 total transactions filed for the entirety of 2021.

This increase may seem stark. But when viewed in the proper historical context, it’s hardly a “tidal wave.”

We need only look to historical data for proof—in particular, data from 1995 through 2000. During these years, there was only one month with fewer than 300 transactions filed. The vast majority of months during this period had 400, 500, or more transactions filed per month. This stands in stark relief to the 295 transactions per month in 2021 to date.

The year 1998 is particularly instructive. That year, the month with the fewest transactions was January, with 614 filed. Transactions peaked in June, with 862 filed that month. In only 2 months of that year were there fewer than 700 transactions filed. The end result? An astonishing 9,264 transactions were filed that year—more than triple the projected rate for 2021.

#### 2. No increase in 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.

#### 3. 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."