# 2AC

## Platforms Adv

#### Objectivity key

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Rita Floyd, “Introduction” in The Morality of Security, Cambridge Core, April 2019, pp 10-12, <https://doi.org/10.1017/9781108667814>.

Securitization has been heavily debated in the scholarly community. Among other things much discussion has focused on the issue of whether securitization is satisfied simply by audience acceptance of the securitizing move, or whether it has to involve extraordinary measures (Balzacq, Le´onard and Ruzicka, 2015). All securitization scholars accept, however, that security threats are socially and politically constructed, or in other words that: ‘Security issues are made security issues by acts of securitization’ (Buzan et al., 1998: 204). This has allowed scholars to recognize what Jef Huysmans calls ‘the political force of security’ whereby ‘[s]ecurity is a practice not of responding to enemies and fear but of creating them’ (2014: 3). An exclusive focus on the constructedness of security means, however, that securitization scholars tend to ignore whether or not the threats that inform securitization are real or otherwise. And as Thierry Balzacq argues, this has had the disadvantage of securitization scholars overlooking the fact that securitizing moves that refer to ‘brute threats’ are more likely to succeed because, ‘to win an audience, security statements must, usually, be related to an external reality’ (2011b: 13). Balzacq’s observation is important in the context of this book as it goes some way towards paving the way for the inclusion of objective existential threats into securitization analysis. As I will argue in this book, real threats are important for the purposes of just securitization theory as only these may constitute a just reason19 for securitization.

The Copenhagen School’s refusal to ‘peek behind [threat construction] to decide whether it is really a threat’ (Buzan et al., 1998: 204) and the just war tradition’s insistence on real threats as just causes, appear to suggest insurmountable differences at the meta-theoretical level between the two theories. Importantly, however, the Copenhagen School’s unwillingness to, as they put it, ‘peek behind’ threat construction, does not stem from a denial that real threats exist (after all Wæver (2011: 472) recognizes that ‘lots of real threats exist’),20 but from the belief that the study of threat construction is ultimately more fruitful than pondering the presence of real threats (Buzan and Hansen, 2009: 213; Buzan et al., 1998: 204). Beyond this, the decision not to try and examine whether security threats refer to real threats is also – at least in part – driven by a strong normative conviction. Thus by focusing on the political force of security as opposed to whether or not threats are real, Wæver and the Copenhagen School highlight the fact that securitization is/was not inevitable; things could have been treated in a different way (for example, perceived threats could have been criminalized or simply politicized). This enables scholars following this logic to highlight that securitizing actors bear responsibility for framing things in this way. Wæver calls this ‘the politics of responsibility’ (2011: 472), which he explains as follows: ‘The securitization approach points to the inherently political nature of any designation of security issues and thus it puts an ethical question at the feet of analysts, decisionmakers and activists alike: why do you call this a security issue? What are the implications of doing this – or of not doing it?’ (Wæver 1999 cited in Wæver, 2011: 468; emphasis added).

The significance of the fact that securitization is a political choice cannot be overstated; however, it is also the case that decision-makers are likely to consider securitization the right political choice when they believe that they are in fact dealing with a real threat. In other words, the possibility of framing the issue differently will not be tempting if they believe that there is a real threat. Given that the Copenhagen School and their followers cannot tell them anything about the actual objective existence of the threat, the framework seems of limited persuasiveness here; it is simply the securitizing actor’s belief against the scholar’s argument that things could and perhaps should be different. Indeed the Copenhagen School recognizes ‘our inability to counter securitization (say, of immigrants) with an argument that this is not really a security problem or that the environment is a bigger security problem’ as the securitization approach’s ‘main disadvantage’ (Buzan et al., 1998: 206). I propose that if the ethical goal of securitization analysis is that securitizing actors take responsibility for their actions, then a better strategy is to begin by (helping them in) judging the objective existence of a threat, because unless there is a real threat, securitization is most definitely the wrong political and ethical choice. Importantly, however, as I argue in this book, the existence of a real threat does not automatically necessitate securitization (indeed this remains a political choice), neither does it – by itself – render it morally permissible; the presence of real threats is rather one important requirement for securitization to be justified. In other words, just securitization is informed by the idea that securitizing actors are not only responsible for choosing to securitize, they ought to be responsible for securitizing in an ethical manner. In my view, the fact that the original variant of securitization theory excludes objective existential threats not on ontological, but at least partially on normative grounds means that a variant of securitization theory that includes real threats is at least permissible, provided, of course, that a theoretical framework that shows how we can know that threats are real is delivered. In this book, such a framework is set out in Chapter 2. 21

[FOOTNOTE 21 BEGINS

1 Some scholars may object to the possibility of combining insights of opposed theories on the grounds of inconsistency – for example, critical security studies, with its postmodern roots, with insights gained from analytical, moral and political philosophy. Interestingly, Wæver has faced similar charges of inconsistency for combining elements that ordinarily don’t go together (notably, Wæver refers to himself as a poststructural realist). To these critics Wæver offers this persuasive riposte: ‘This criticism presupposes that these larger groups are internally consistent and mutually isolated. On the contrary, we all know numerous examples of internally consistent theories that draw on several traditions – and many more examples of theories that stay within their “box” and yet are horribly inconsistent. Therefore, investigations of the internal consistency and productivity of research traditions should focus on distinct theories, not loose collections hereof’ (Wæver, 2015:124). Generally speaking, I am critical of the tendency to confuse theory with ideology, and thus disallowing and discounting anything outside of one’s perceived and tightly regulated theoretical remit. In the past in IR such thinking has led to bad scholarship; thankfully now scholars are working to dispel artificially imposed dichotomies, such as that on the relationship between causation and discourse (Kurki, 2008).

FOOTNOTE 21 ENDS]

#### Extinction outweighs

Burke et al., Associate Professor of International and Political Studies @ UNSW, Australia, ‘16

(Anthony, Stefanie Fishel is Assistant Professor, Department of Gender and Race Studies at the University of Alabama, Audra Mitchell is CIGI Chair in Global Governance and Ethics at the Balsillie School of International Affairs, Simon Dalby is CIGI Chair in the Political Economy of Climate Change at the Balsillie School of International Affairs, and, Daniel J. Levine is Assistant Professor of Political Science at the University of Alabama, “Planet Politics: Manifesto from the End of IR,” Millennium: Journal of International Studies 1–25)

8. Global ethics must respond to mass extinction. In late 2014, the Worldwide Fund for Nature reported a startling statistic: according to their global study, 52% of species had gone extinct between 1970 and 2010.60 This is not news: for three decades, conservation biologists have been warning of a ‘sixth mass extinction’, which, by definition, could eliminate more than three quarters of currently existing life forms in just a few centuries.61 In other words, it could threaten the practical possibility of the survival of earthly life. Mass extinction is not simply extinction (or death) writ large: it is a qualitatively different phenomena that demands its own ethical categories. It cannot be grasped by aggregating species extinctions, let alone the deaths of individual organisms. Not only does it erase diverse, irreplaceable life forms, their unique histories and open-ended possibilities, but it threatens the ontological conditions of Earthly life.

IR is one of few disciplines that is explicitly devoted to the pursuit of survival, yet it has almost nothing to say in the face of a possible mass extinction event.62 It utterly lacks the conceptual and ethical frameworks necessary to foster diverse, meaningful responses to this phenomenon. As mentioned above, Cold-War era concepts such as ‘nuclear winter’ and ‘omnicide’ gesture towards harms massive in their scale and moral horror. However, they are asymptotic: they imagine nightmares of a severely denuded planet, yet they do not contemplate the comprehensive negation that a mass extinction event entails. In contemporary IR discourses, where it appears at all, extinction is treated as a problem of scientific management and biopolitical control aimed at securing existing human lifestyles.63 Once again, this approach fails to recognise the reality of extinction, which is a matter of being and nonbeing, not one of life and death processes.

Confronting the enormity of a possible mass extinction event requires a total overhaul of human perceptions of what is at stake in the disruption of the conditions of Earthly life. The question of what is ‘lost’ in extinction has, since the inception of the concept of ‘conservation’, been addressed in terms of financial cost and economic liabilities.64 Beyond reducing life to forms to capital, currencies and financial instruments, the dominant neoliberal political economy of conservation imposes a homogenising, Western secular worldview on a planetary phenomenon. Yet the enormity, complexity, and scale of mass extinction is so huge that humans need to draw on every possible resource in order to find ways of responding. This means that they need to mobilise multiple worldviews and lifeways – including those emerging from indigenous and marginalised cosmologies. Above all, it is crucial and urgent to realise that extinction is a matter of global ethics. It is not simply an issue of management or security, or even of particular visions of the good life. Instead, it is about staking a claim as to the goodness of life itself. If it does not fit within the existing parameters of global ethics, then it is these boundaries that need to change.

9. An Earth-worldly politics. Humans are worldly – that is, we are fundamentally worldforming and embedded in multiple worlds that traverse the Earth. However, the Earth is not ‘our’ world, as the grand theories of IR, and some accounts of the Anthropocene have it – an object and possession to be appropriated, circumnavigated, instrumentalised and englobed.65 Rather, it is a complex of worlds that we share, co-constitute, create, destroy and inhabit with countless other life forms and beings.

The formation of the Anthropocene reflects a particular type of worlding, one in which the Earth is treated as raw material for the creation of a world tailored to human needs. Heidegger famously framed ‘earth’ and ‘world’ as two countervailing, conflicting forces that constrain and shape one another. We contend that existing political, economic and social conditions have pushed human worlding so far to one extreme that it has become almost entirely detached from the conditions of the Earth. Planet Politics calls, instead, for a mode of worlding that is responsive to, and grounded in, the Earth. One of these ways of being Earth-worldly is to embrace the condition of being entangled. We can interpret this term in the way that Heidegger66 did, as the condition of being mired in everyday human concerns, worries, and anxiety, to prolong existence. But, in contrast, we can and should reframe it as authors like Karen Barad67 and Donna Haraway68 have done. To them and many others, ‘entanglement’ is a radical, indeed fundamental condition of being-with, or, as Jean-Luc Nancy puts it, ‘being singular plural’.69 This means that no being is truly autonomous or separate, whether at the scale of international politics or of quantum physics. World itself is singular plural: what humans tend to refer to as ‘the’ world is actually a multiplicity of worlds at various scales that intersect, overlap, conflict, emerge as they surge across the Earth. World emerges from the poetics of existence, the collision of energy and matter, the tumult of agencies, the fusion and diffusion of bonds.

Worlds erupt from, and consist in, the intersection of diverse forms of being – material and intangible, organic and inorganic, ‘living’ and ‘nonliving’. Because of the tumultuousness of the Earth with which they are entangled, ‘worlds’ are not static, rigid or permanent. They are permeable and fluid. They can be created, modified – and, of course, destroyed. Concepts of violence, harm and (in)security that focus only on humans ignore at their peril the destruction and severance of worlds,70 which undermines the conditions of plurality that enables life on Earth to thrive.

## Conduct Adv

No cards

## Adv CP

#### Antitrust key—investment is ex ante regulation, which is extremely dangerous in platform markets—ex post litigation minimizes costs

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

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

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

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

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

#### Regulatory programs cannot address all platform conduct

Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School, ‘21

(Herbert, “Antitrust and Platform Monopoly,” 130 Yale L.J. 1952)

If action is needed, the alternative to antitrust is some form of regulation. But broad regulation is ill-suited for digital platforms because they are so disparate. By contrast, regulation in industries such as air travel, electric power, and telecommunications targets firms with common technologies and similar market relationships. This is not the case, however, with the four major digital platforms that have drawn so much media and political attention—namely, Amazon, Apple, Facebook, and Google. These platforms have different inputs. They sell different products, albeit with some overlap, and only some of these products are digital. They deal with customers and diverse sets of third parties in different ways. What they have in common is that they are very large and that a sizeable portion of their operating technology is digital. To be sure, increased regulatory oversight of individual aspects of their business—such as advertising, acquisitions, or control of information—is possible and likely even desirable. But the core of their business models should be governed by the antitrust laws.

This Article argues that sustainable competition in platform markets is possible for most aspects of their business. As a result, the less intrusive and more individualized approach of the antitrust laws is better for consumers, input suppliers, and most other affected interest groups than broad-brush regulation. It will be less likely to reduce product or service quality, limit innovation, or reduce output. Where antitrust law applies, federal judges should be given a chance to apply the law.

#### Aff reinvigorates EU-US digital democratic alliance—big tech antitrust key

Muscolo, Commissioner, Italian Competition Authority, Rome, and Massolo, Economic advisor of Commissioner Gabriella Muscolo, Italian Competition Authority, Rome, ‘21

(Gabriella and Alessandro, “Will the Biden Presidency Forge a Digital Transatlantic Alliance on Antitrust?” Concurrences, Issue 1, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>)

5. Finally, the deterrence principle will catalyse the third pillar. Democracy will in fact be the main criterion for choosing US partners in order to consolidate the West against the expansion of the East.

6. Within this context, the digital economy represents an extremely important battlefield for the US to regain world leadership. The USA is well placed when it comes to digital competition—indeed, almost all the prominent Western online platforms are American.

7. However, over the last decade, Google, Amazon, Facebook, Apple and Microsoft (hereinafter “GAFAM”) have come under severe antitrust and regulatory scrutiny, starting in the European Union and ending in the United States. A “break-up” sentiment is spreading on both sides of the Atlantic and this will certainly represent one of the main issues on Biden’s agenda. Indeed, GAFAM’s huge market power is perceived as a threat to Western democracies and has been accused of hampering competition and innovation. Both the USA and the EU know that it is fundamental to shape global standards in order to face security and privacy concerns posed by the rise of Eastern tech giants. [247] Moreover, there is a growing feeling that the growth of big tech, combined with non-democratic governments, could lead to “techno-authoritarianism.” [248]

8. Therefore, will there be a transatlantic unity when clamping down on online giants in the name of protecting and strengthening Western “techno-democracies?” A digital transatlantic alliance shall not be taken for granted.

9. Indeed, over the last decade, the EU has markedly shaped its own way of building a European data market and of facilitating the emergence of European tech companies.

#### That’s key to various geopolitical threats—hybrid war, cyber estalation

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(Marietje, “How democracies can claim back power in the digital world,” September 29, <https://www.technologyreview.com/2020/09/29/1009088/democracies-power-digital-social-media-governance-tech-companies-opinion/>

Today, technology regulation is often characterized as a three-way contest between the state-led systems in China and Russia, the market-driven one in the United States, and a values-based vision in Europe. The reality, however, is that there are only two dominant systems of technology governance: the privatized one described above, which applies in the entire democratic world, and an authoritarian one.

The laissez-faire approach of democratic governments, and their reluctance to rein in private companies at home, also plays out on the international stage. While democratic governments have largely allowed companies to govern, authoritarian governments have taken to shaping norms through international fora. This unfortunate shift coincides with a trend of democratic decline worldwide, as large democracies like India, Turkey, and Brazil have become more authoritarian. Without deliberate and immediate efforts by democratic governments to win back agency, corporate and authoritarian governance models will erode democracy everywhere.

Does that mean democratic governments should build their own social-media platforms, data centers, and mobile phones instead? No. But they do need to urgently reclaim their role in creating rules and restrictions that uphold democracy’s core principles in the technology sphere. Up to now, these governments have slowly begun to do that with laws at the national level or, in Europe’s case, at the regional level. But to bring globe-spanning technology firms to heel, we need something new: a global alliance that puts democracy first.

Teaming up

Global institutions born in the aftermath of World War II, like the United Nations, the World Trade Organization, and the North Atlantic Treaty Organization, created a rules-based international order. But they fail to take the digital world fully into account in their mandates and agendas, even if many are finally starting to focus on digital cooperation, e-commerce, and cybersecurity. And while digital trade (which requires its own regulations, such as rules for e-commerce and criteria for the exchange of data) is of growing importance, WTO members have not agreed on global rules covering services for smart manufacturing, digital supply chains, and other digitally enabled transactions.

What we need now, therefore, is a large democratic coalition that can offer a meaningful alternative to the two existing models of technology governance, the privatized and the authoritarian. It should be a global coalition, welcoming countries that meet democratic criteria.

The Community of Democracies, a coalition of states that was created in 2000 to advance democracy but never had much impact, could be revamped and upgraded to include an ambitious mandate for the governance of technology. Alternatively, a “D7” or “D20” could be established—a coalition akin to the G7 or G20 but composed of the largest democracies in the world.

Such a group would agree on regulations and standards for technology in line with core democratic principles. Then each member country would implement them in its own way, much as EU member states do today with EU directives.

What problems would such a coalition resolve? The coalition might, for instance, adopt a shared definition of freedom of expression for social-media companies to follow. Perhaps that definition would be similar to the broadly shared European approach, where expression is free but there are clear exceptions for hate speech and incitements to violence.

Or the coalition might limit the practice of microtargeting political ads on social media: it could, for example, forbid companies from allowing advertisers to tailor and target ads on the basis of someone’s religion, ethnicity, sexual orientation, or collected personal data. At the very least, the coalition could advocate for more transparency about microtargeting to create more informed debate about which data collection practices ought to be off limits.

The democratic coalition could also adopt standards and methods of oversight for the digital operations of elections and campaigns. This might mean agreeing on security requirements for voting machines, plus anonymity standards, stress tests, and verification methods such as requiring a paper backup for every vote. And the entire coalition could agree to impose sanctions on any country or non-state actor that interferes with an election or referendum in any of the member states.

Why Facebook’s political-ad ban is taking on the wrong problem

A moratorium on new political ads just before election day tackles one kind of challenge caused by social media. It’s just not the one that matters.

Another task the coalition might take on is developing trade rules for the digital economy. For example, members could agree never to demand that companies hand over the source code of software to state authorities, as China does. They could also agree to adopt common data protection rules for cross-border transactions. Such moves would allow a sort of digital free-trade zone to develop across like-minded nations.

China already has something similar to this in the form of eWTP, a trade platform that allows global tariff-free trade for transactions under a million dollars. But eWTP, which was started by e-commerce giant Alibaba, is run by private-sector companies based in China. The Chinese government is known to have access to data through private companies. Without a public, rules-based alternative, eWTP could become the de facto global platform for digital trade, with no democratic mandate or oversight.

Another matter this coalition could address would be the security of supply chains for devices like phones and laptops. Many countries have banned smartphones and telecom equipment from Huawei because of fears that the company’s technology may have built-in vulnerabilities or backdoors that the Chinese government could exploit. Proactively developing joint standards to protect the integrity of supply chains and products would create a level playing field between the coalition’s members and build trust in companies that agree to abide by them.

The next area that may be worthy of the coalition’s attention is cyberwar and hybrid conflict (where digital and physical aggression are combined). Over the past decade, a growing number of countries have identified hybrid conflict as a national security threat. Any nation with highly skilled cyber operations can wreak havoc on countries that fail to invest in defenses against them. Meanwhile, cyberattacks by non-state actors have shifted the balance of power between states.

Right now, though, there are no international criteria that define when a cyberattack counts as an act of war. This encourages bad actors to strike with many small blows. In addition to their immediate economic or (geo)political effect, such attacks erode trust that justice will be served.

## States CP

#### CP is a de facto patchwork—majority of states bound by federal precedent

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Will State Courts Follow Leegin? https://www.faegredrinker.com/webfiles/leegin\_article.pdf

This article explores yet another barrier to widespread adoption of RPM programs, one that is particularly applicable to franchisors seeking to negotiate national account pricing or to establish nationwide minimum pricing: state antitrust laws. Nearly all states have antitrust statutes, and those few that do not have such laws regulate anticompetitive conduct through consumer protection statutes or common law theories. The good news, at least for those who favor uniform national economic regulation, is that most state courts follow federal antitrust precedent, either because of statutory command or a decisional preference for uniform operation of state and federal antitrust laws. However, a significant minority of states feel themselves relatively unbound by federal precedent, and even those that do follow federal decisional law generally leave themselves an escape route if federal law varies from state statute or putative state policy goals.

This article reviews the current statutory and decisional law on RPM in the fifty states and the District of Columbia, and offers some predictions on which are likely to continue to prohibit RPM. Because this area of the law is now rapidly changing, it is also foreseeable that state legislatures will attempt to pass new statutes prohibiting RPM in reaction to Leegin. Twenty-five states did just that to permit “indirect purchasers” to sue for monetary damages after the Supreme Court held in Illinois Brick Co. v. Illinois that such purchasers lacked standing to sue under federal antitrust law. 7 Ultimately, Leegin does offer significantly greater leeway to suppliers to regulate their customers’ pricing behavior and for national account pricing programs in particular to flourish. However, during the transition to the post-Leegin world, franchisors must still take care when designing sales and distribution programs to assess the likely response of individual states to restraints on resale prices.

State Levels of Adherence

Most states have antitrust statutes containing provisions analogous to, or the same as, Section 1 of the Sherman Act. In fact, only four states—Arkansas, Vermont, Georgia, and Pennsylvania—do not. 8 Consistent with the manner in which many state statutes parallel the language of federal antitrust provisions, the majority of states also give deference to federal decisional law when interpreting their state antitrust statutes. There are exceptions for instances in which the state statutory language differs significantly from that of the Sherman Act or when the state legislature has expressed a policy interest at odds with federal precedent.

#### Rogue state DA—CP creates mass uncertainty that chills all business

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When states file antitrust cases under state statutes rather than under the Clayton or Sherman Acts, the likelihood of inconsistent and conflicting antitrust precedent is even higher. As a result, state action affects not only current cases, but can also affect future firm behavior. With mergers, the possibility of a challenge from any of the fifty states, each with its own standard of evaluation, could prevent companies from even attempting a beneficial transaction. As Lande points out, "it is confounding enough for antitrust counselors to have to contend with two potential federal enforcement agencies.

Even if state laws were identical, the interpretation and application of those laws would differ "since enforcers with divergent philosophies necessarily will interpret ambiguous terms differently in various factual contexts." Philosophical differences in approaches to antitrust enforcement are likely to stem from many sources, such as political affiliation, educational training, and personal experience. The National Association of Attorneys General (NAAG) Merger Guidelines for the states explicitly allow for this, noting that the general policy can be supplemented or varied in light of differing precedents, and "in the exercise of [the AGs'] individual prosecutorial ... discretion." While differing views can be helpful in some areas of law, such as when different states provide a testing ground for new regulations appropriate for federal adoption, this kind of experimentation is likely to be wasteful in the antitrust arena.

#### CP impliedly preempted—conflicts with federal precedent

Victoria Graham, Bloomberg Law, Ohio Rethinks State Antitrust Laws to Confront Facebook, Google (1), October 17, 2019, <https://news.bloomberglaw.com/antitrust/ohio-rethinks-state-antitrust-laws-to-confront-facebook-google>

Ohio Rethinks State Antitrust Laws to Confront Facebook, Google (1)

Ohio legislators are considering whether to rewrite antitrust laws to reflect the growth of big tech in the latest sign of growing bipartisan state-level interest in confronting Alphabet Inc.’s Google and Facebook Inc.

Most state antitrust laws directly mirror U.S. competition law and Ohio could only go so far with antitrust revisions before they potentially conflict with federal law or interfere with how companies do business.

“Given the global and national footprints for the digital technology companies, state legislative carve-outs for the sector could affect companies’ ability to do commerce across states and regions,” said Diana Moss, president of the American Antitrust Institute.

States do have some room to maneuver in areas where the U.S. Congress hasn’t expressly enacted legislation, similar to how California enacted its own privacy law in the absence of a federal statute.

“Just because certain conduct is legal under federal law doesn’t mean the state couldn’t outlaw it,” Ralph Breitfeller, of counsel at Kegler, Brown, Hill & Ritter Co. in Columbus, Ohio, said.

State Scrutiny

Ohio lawmakers discussed a possible rethink of the state’s antitrust laws Oct. 17 during a legislative hearing in Cleveland examining the impact of Google and Facebook. The hearing featured several academics and Yelp Inc. executive, Luther Lowe, who has emerged as an outspoken critic of Google’s power to control the internet.

Legislators should consider changing state antitrust laws to allow regulators to assess factors other than price, such how much data one firm controls, when reviewing a merger, Dennis Hirsch, a professor at The Ohio State University Moritz College of Law, said during the hearing.

Current merger analysis, at both the state and federal level, doesn’t factor in data aggregation since it’s mostly concerned on how consumer prices are impacted by a merger.

A second hearing will follow in Cincinnati on Oct. 28.

The probe—the first of its kind by any U.S. state legislature—is led by state Sen. John Eklund, a Republican who represents a district east of Cleveland and practiced competition law for more than 40 years.

Ohio’s Attorney General Dave Yost (R) is among state attorneys general in both parties that have emerged as some of the most vocal critics of big tech’s power. Multi-state investigations into Facebook and Google’s dominant market power have positioned the states as potentially more aggressive enforcers than federal regulators.

At the federal level, Justice Department and Federal Trade Commission officials have been hesitant to call for new antitrust legislation, while Congress contemplates whether modifications need to be made to address the unique challenges of big tech.

The antitrust laws that date back as late as 1890 during the breakup of Standard Oil don’t need major changes since they are flexible enough to deal with new technology changes, such as the rise of Amazon.com Inc. and Apple Inc., most federal enforcers argue.

Yost, who is involved in both a Google and Facebook multi-state antitrust investigation, said during a September press conference that these hearings will “help inform” the state’s investigation and the discovery it conducts into both tech companies.

Ohio has played a pivotal role in shaping the history of U.S. antitrust law.

The nation’s first antitrust legislation which is still the current federal statute that prohibits monopolistic conduct, the Sherman Antitrust Act, was introduced by Senator John Sherman (R-Ohio).

After the Sherman Act’s passage, it was then Ohio’s Attorney General David Watson who first sued Standard Oil, which eventually lead the U.S. Supreme Court to force a breakup of the corporate trust in 1911.

Workarounds

States have to ensure that any new antitrust statutes don’t directly conflict with existing federal law since courts generally strike state laws as invalid if they clash with the federal government, John Newman, a former attorney at the DOJ’s antitrust division, who is now an antitrust professor at The University of Miami School of Law, said.

#### Even if the CP results in uniform LAW, patchwork ENFORCEMENT kills solvency

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State-to-State Conflicts

When states file antitrust cases under their own statutes, rather than under the Clayton or Sherman Acts, the likelihood the cases will be governed by Inconsistent or even conflicting antitrust precedents runs high. Even if state laws were uniform, with enforcers in each state coming from different backgrounds and holding divergent philosophies, legal Interpretations are bound to differ. While diverse views can be helpful in some areas of law-for example, varying state rules can provide a natural test for the efficacy of new regulations at the federal level-this kind of experimentation is likely to be wasteful in the antitrust arena.

A Case Study

The problems cataloged above are not mere theoretical possibilities, United Stales v. Microsoft provides a real-world example. Throughout the course of the lawsuit, the parties lobbied state attorneys general, federal antitrust authorities, and even the courts ." Thus, California Attorney General Bill Lockyor chose to reject an early settlement attempt, noting that "his resolve was hardened after listening over the weekend to advice from technical technical experts and officials from Microsoft's competitors, such as IBM, AOL Time Warner Inc., Sun Microsystems Inc., and Novell Inc. "24 California subsequently took the lead in continuing the litigation on behalf of the non-settling states and even provided the bulk of the funding."

Comments made by officials at the Justice Department suggest that federal authorities are a much tougher sell for lobbyists. Assistant Attorney General for Antitrust Charles James emphasized his concern over special Interests. "The number of requests for meetings with me immediately after my nomination but before my confirmation became so daunting," he wrote, "that I adopted the posture of refusing to meet personally with any third parties in the Microsoft case. . ."?n While lobbying on Individual antitrust cases certainly occurs at the federal level, the magnitude of Issues and the probability that competing views will neutralize arguments make it far more costly to gain influence.

In addition to derailing early settlement talks,;" the states created uncertainty that the settlement finally reached by the Department of Justice would stick. Nine states agreed to settle along with the DOJ, but nine others proposed a radically different remedy. Those nine states, which included California and Massachusetts are home of some of Microsoft's most vocal rivals,'6 Not surprisingly, their remedy proposal neatly dovetailed with the Interests of Microsoft's competitors.

For example, the states that refused to settle demanded that Microsoft license large amounts of valuable intellectual property for little or no compensation." The Initial effect of weakening the protection of intellectual property after It has been developed Is always positive for consun'ers, who need not compensate the innovator to get the benefit. The long-term effects, however, are decidedly negative, even for consumers: Innovation could decline because firms will have less Incentive to Invest in R&D if they cannot prevent others from using the fruits of their efforts and will not receive any compensation for the expropriation." Under the litigating states' remedy, competitors would have gained access to Microsoft's software code at no cost, but consumers could have suffered In the long term because the disclosure requirements would have left Microsoft with little incentive to improve Windows or many of the company's software applications.

One of the litigating states' requirements would have forced Microsoft to auction off the right to adapt its Office business applications suite to three non Windows operating systems. In return, Microsoft would have received only the one-time auction fees and no royalty payments. As part of the auction, Microsoft would have had to provide the winning bidders with code for any future upgrades to Office, plus access to any Windows source code (the program's "blueprints") at no charge.

Another of the litigating states' proposals would have required Microsoft to release its Web browser software (Internet Explorer and MSN Explorer) under "open source" licenses. To comply, Microsoft would have had to publish the underlying source code, making it available at no charge to all (that is, not just to three winners of the Office auction). Indeed, most of the Intellectual property disclosure rules proposed by the litigating states seemed designed to prevent Microsoft from recouping the value of R&D investments through licensing. Thus, under the states' alternative remedy, technology companies stood to gain a great deal of Microsoft's Intellectual property at little or no cost. Still other provisions would have raised Microsoft's costs with little apparent benefit to consumers.

#### McAuliffe wins Virginia’s governor race now, but it’s close

Wilson 8/23 – Reporter for the Richmond Times-Dispatch.

Patrick Wilson, “Virginia’s governor’s race remains competitive, new VCU poll shows,” *Richmond Times-Dispatch*, 23 August 2021, https://roanoke.com/news/state-and-regional/virginias-governors-race-remains-competitive-new-vcu-poll-shows/article\_466c61f0-13b5-5020-a717-70a12f6c567b.html.

Former Gov. Terry McAuliffe and Glenn Youngkin are in a close contest in Virginia’s race for governor, with Democrat McAuliffe receiving 40% and Republican Youngkin 37% among likely voters in a new Virginia Commonwealth University poll.

The margin of error was plus or minus 5.23 percentage points, making the race about even.

The poll was done by landline and mobile phone numbers of 823 adults and was conducted between Aug. 4 and Aug. 15.

It was conducted by the L. Douglas Wilder School of Government and Public Affairs.

Wilder, the nation’s first elected Black governor, said in a news release that this year’s governor’s race is a dead heat, but factors that will influence it include upcoming debates and how the COVID-19 pandemic affects turnout and enthusiasm.

McAuliffe leads Youngkin in Northern Virginia, 51% to 24%, while Youngkin leads 52% to 32% in western parts of the state.

The survey found that 23% of those polled were undecided or unwilling to vote for either candidate. Liberation Party candidate Princess Blanding also is on the Nov. 2 ballot in the race for governor but was not included in the poll.

#### Pro-business stance is key

Leonor and Martz 9/2 – Mel Leonor is a Virginia politics reporter for the Richmond Times-Dispatch. Michael Martz is a general assignment reporter for the Richmond Times-Dispatch.

Mel Leonor and Michael Martz, “Virginia’s gubernatorial candidates share sharpy opposing views on business, economy,” *Richmond Times-Dispatch*, 2 September 2021, https://fredericksburg.com/news/state-and-regional/virginias-gubernatorial-candidates-share-sharply-opposing-views-on-business-economy/article\_9d3f56e3-0cab-54b2-8302-ad852ea09640.html.

Democrat Terry McAuliffe and Republican Glenn Youngkin are relying on their pro-business credentials in the battle to become Virginia’s next governor, but they posed sharply different visions on how to make the state better for business in appearances before an influential business advocacy group on Wednesday.

McAuliffe, a former governor seeking a second term, said progressive policies — such as protecting women’s access to abortion and banning discrimination based on sexual orientation — will be critical to attracting and expanding businesses in Virginia.

Youngkin, a former private equity executive seeking office for the first time, promised to protect the state’s right-to-work status, and vowed to ease regulations on business and create 400,000 jobs as the “jobs governor of Virginia.”

The candidates spoke at an event hosted by Virginia FREE, a pro-business advocacy group that exerts influence over Virginia’s elections through its members, who traditionally have favored Republicans. It was only the second time both candidates have appeared together.

The best way to wash your windows, step by step

McAuliffe came into the room with an incumbent’s advantage, garnering a cheery welcome from the crowd of Virginia business leaders, and praise from the event’s host, Executive Director Chris Saxman, a former GOP lawmaker, who described McAuliffe as the “one of the best pro-business governors Virginia has ever had.”

Youngkin’s remarks were somber and at times religious, urging prayer for the 13 U.S. service members killed by a terrorist bombing in Afghanistan, Americans and Afghan allies left behind after the military withdrawal and people in the hurricane-battered American South.

McAuliffe immediately raised the threat posed to Virginia and its attractiveness to business by laws to restrict access to abortion, such as the one that was just allowed to take effect in Texas. The U.S. Supreme Court declined to take up a request to halt the law, which essentially bans abortions after six weeks of pregnancy.

“I can’t tell you how damaging that is,” McAuliffe said. “It’s crippling for business.”

McAuliffe reminded the audience how he had vetoed 120 bills passed by the Republican-controlled General Assembly that he said would have discriminated against women and other people based on sexual orientation and gender identity.

“I could not build a new Virginia economy unless we were an open and welcoming state,” he said.

Youngkin tried to side-step the issue in remarks to the media after the luncheon that attempted to depict McAuliffe’s views on abortion as “extremist.”

“I am pro-life,” he said, explaining that he opposes abortion except in cases of rape, incest or when the mother’s life is in danger.

McAuliffe also played to his strength with the Northern Virginia business audience, reminding them that he had, working with Republican legislators, bolstered the Port of Virginia and Washington Dulles International Airport, sealed a deal to widen Interstate 66 outside of the Capital Beltway at no cost to the state, and provided funding to rebuild the Metro system.

He also extolled Virginia’s status as the best state for business by cable television CNBC for the second consecutive time, while Youngkin questioned whether the state had earned the status.

“Virginia has not and is not performing like the best,” the Republican nominee said.

But on a key issue for business groups, the state’s “right-to-work” policy, McAuliffe was mum.

Youngkin seized on the issue during his remarks, taking a jab at McAuliffe and energetically vowing to protect the policy.

“If we lose our fight to hold onto Virginia’s right-to-work status, it will absolutely torpedo our business climate,” Youngkin said to enthusiastic applause from the business crowd.

After the event, pressed by reporters, McAuliffe sidestepped the question of whether he supports repealing right-to-work, saying it’s moot because it doesn’t have political support in the legislature. Del. Hala Ayala, D-Prince William, the Democratic candidate for lieutenant governor, also wouldn’t commit to a position on the repeal of right-to-work.

Youngkin pitched himself as the right leader to grow Virginia’s economy, vowing to wield the power of the governor’s office to attract new jobs and lower the cost of doing business here. He contends Virginia lagged the country in creating new jobs and replacing jobs lost during the pandemic over the past two Democratic administrations.

#### CP is perceived as anti-business

Nylen and Lima 6/23 – Leah Nylen is a technology reporter that covers antitrust and investigations for POLITICO. Cristiano Lima is a technology reporter covering politics and policy for POLITICO.

Leah Nylen and Cristiano Lima, “Progressives, moderate Democrats tussle over tech antitrust package,” *POLITICO*, 23 June 2021, https://www.politico.com/news/2021/06/23/democrats-tech-antitrust-package-495644.

A package of antitrust bills to rein in the biggest U.S. tech companies is proving divisive not just for Republican lawmakers, but also for Democrats who are split on whether the legislation goes too far.

The six bills being marked up Wednesday by the House Judiciary Committee speak to an oft-repeated goal of many Democrats: curbing the power of Silicon Valley. Four of the bills would zero in on Apple, Amazon, Facebook, Google and Microsoft for greater regulation, limiting their ability to buy up promising startups that could grow into rivals and prohibiting them from using their platforms to discriminate against competitors.

The push to crack down on those tech giants has drawn support from a broad coalition of lawmakers fed up with Silicon Valley, from progressive leaders like Reps. Pramila Jayapal (D-Wash.) and David Cicilline (D-R.I.) to outspoken allies of former President Donald Trump like Reps. Ken Buck (R-Colo.) and Matt Gaetz (R-Fla.). On the Republican side, it has also prompted public rebukes by party detractors who call the legislation an affront to conservative values.

But a growing number of moderate Democrats are also voicing concern about the proposals under consideration this week, which they warn could have a vast impact on the U.S. economy. That includes at least two key California Democrats that sit on Judiciary, Zoe Lofgren and Lou Correa, who will have a say Wednesday on which bills make it out of the panel and which don’t.

“My concern is that this legislation will essentially push away investment in this area, it will stifle the economics behind it, the job creation,” Correa, whose district includes parts of Orange County, said in an interview Tuesday.

Correa said he plans to back one of the proposals under consideration Wednesday that would increase the amount of money federal regulators get from companies filing for mergers (H.R. 3843 (117)). But he said he has concerns about the other bills and has not yet decided how he’ll vote on them.

Lofgren, whose district includes the San Jose area, has “major concerns” about the measures, a Democratic staffer said. While Lofgren agrees with the goals of bills to make it easier for users to switch between platforms (H.R. 3849 (117)) and prevent the tech giants from preferring their own products (H.R. 3816 (117)), she has some proposals to improve the legislation, said the staffer, who spoke on condition of anonymity to discuss internal deliberations. But the merger ban (H.R. 3826 (117)) and a measure that would force the companies to sell-off lines of business (H.R. 3825 (117)) would, in her view, “unnecessarily rip apart these companies, not responsibly regulate them,” the staffer said.

“It is a concern within the California delegation,” Correa said.

But Democratic apprehension isn’t limited to California, which is home to three of the five tech giants. Last week, Rep. Suzan DelBene (D-Wash.) and seven other moderate Democrats urged House leaders and the panel to delay the markup, warning that the legislation could weaken privacy protections, increase cybersecurity risks and further the spread of misinformation, as first reported by Bloomberg.

#### McAuliffe is key to climate change – extinction

Jaffe 6/18 – Director of the Environmental Law and Community Engagement Clinic at the University of Virginia Law School.

Cale Jaffe, “Opinion: Who will be Virginia’s climate governor?” *The Washington Post*, 18 June 2021, https://www.washingtonpost.com/opinions/2021/06/18/terry-mcauliffe-glenn-youngkin-climate-change-virginia-governor-election/.

That assessment might seem counterintuitive. Climate change is obviously a global problem. Defense Secretary Lloyd Austin has emphasized that it poses an existential national security risk. And President Biden recently promised that his administration would “cut greenhouse gases in half by the end of this decade.”

Yet federal politicians have failed for decades to lock in meaningful reductions in greenhouse gas pollution. President George H.W. Bush signed on to the Rio Earth Summit in 1992 but insisted on voluntary targets and refused to commit to any timetable for action. President Barack Obama shepherded the Paris climate agreement into being but failed to win Senate support for his comprehensive plan to limit carbon emissions.

It has always been one step forward, two steps back when it comes to national climate policy. So forgive me if I look away from Washington in our planet’s hour of need. My eyes are firmly fixed on Richmond.

And in Richmond, there is reason for optimism.

In 2020, the General Assembly passed a Virginia Clean Economy Act, one of the most sweeping climate laws in the nation. Adopting a carrot-and-stick approach, it combines fossil-fuel retirements with renewable energy innovations. It also carves out space for existing, carbon-free nuclear power plants to remain a part of the energy mix.

These pieces come together to set Virginia on a path to meeting 100 percent of our electricity needs from zero-carbon sources by 2050. McAuliffe has campaigned on a plan to speed up that timeline by fifteen years, to 2035.

Indeed, McAuliffe begins the general-election campaign with a clear advantage on climate. As governor, he created a Climate Change and Resiliency Update Commission, on which I served, to brainstorm solutions.

In stark contrast, Youngkin has pledged to “change direction from the clean energy plan that was passed.” Believing that a renewable energy boom is not “doable,” Youngkin seems to welcome a long-term reliance on fossil fuels. But such a reversal embraces a head-in-sand approach that fails on two fronts.

First, it ignores the urgent need to decarbonize at the state level. Second, it fails to appreciate that Virginia’s climate law is already intertwined with the Regional Greenhouse Gas Initiative, a compact that brings together 11 Northeast and Mid-Atlantic states to work collaboratively on reducing global warming pollution.

Twenty-five — from Louisiana to Michigan to Pennsylvania — have also joined the U.S. Climate Alliance. Roughly half of Americans now live in a state that has adopted a greenhouse gas reduction target.

Still, the remarkable successes in Virginia and many other states will amount to nothing if progress is not sustained. That is why the focus needs to remain on state policy.

Tackling an unprecedented crisis such as climate change requires developing an enduring, zero-carbon economy. We need to build on today’s pollution reductions with broader decarbonization efforts in the near future. The policies we enact now and over the next four years will determine whether we are able to meet the moment.

## Debt Ceiling DA

#### No link – decision is announced in June

**Think Progress**, Everything You Need to Know About Why The DC Circuit Delayed Arguments On Obama’s Climate Plan, May 17, 20**16**, https://thinkprogress.org/everything-you-need-to-know-about-why-the-dc-circuit-delayed-arguments-on-obamas-climate-plan-d172bc032359#.pq6syhcy5

So Monday evening the D.C. Circuit Court of Appeals announced it is bypassing its planned June 2 oral arguments over the Obama administration’s signature climate policy. “It is ORDERED, on the court’s own motion, that these cases, currently scheduled for oral argument on June 2, 2016, be rescheduled for oral argument before the en banc court on Tuesday, September 27, 2016 at 9:30 a.m.,” the D.C. Circuit’s announcement read. “It is FURTHER ORDERED that the parties and amici curiae provide 25 additional paper copies of all final briefs and appendices to the court by June 1, 2016. A separate order will issue regarding allocation of oral argument time.” What does this mean? The court thinks it’s important First, the D.C. Circuit thinks this is an important case — important enough to merit the attention of the full panel — and they understand that the Supreme Court can’t decide a close case following the passing of Justice Antonin Scalia. A win for the industry or for the administration is significant, with the D.C. Circuit functioning as something of a court of last resort with the Supreme Court likely to deadlock 4–4. **The decision won’t be an election issue** Second, **now it is clear that the court’s decision will come after the November election, instead of before it.** This impacts the case should it see an almost-certain appeal to the Supreme Court. Scalia’s replacement is likely to hinge on the result of the 2016 presidential election, which throws more uncertainty into the mix. **It’s already become a political issue in Congress**, with hundreds of conservative members (all Republicans except Sen. Joe Manchin (D-WV)) filing a brief opposing the rule, and hundreds of current and former legislators filing a brief in support.

#### Courts Shield

Keith E. **Whittington 5**, Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

Political leaders in such a situation will have reason to support or, at minimum, tolerate the active exercise of judicial review. In the American context, the presidency is a particularly useful site for locating such behavior. The Constitution gives the president a powerful role in selecting and speaking to federal judges. As national party leaders, presidents and presidential candidates are both conscious of the fragmented nature of American political parties and sensitive to policy goals that will not be shared by all of the president’s putative partisan allies in Congress. We would expect political support for judicial review to make itself apparent in any of four fields of activity: (1) in the selection of “activist” judges, (2) in the encouragement of specific judicial action consistent with the political needs of coalition leaders, (3) in the **congenial reception** of judicial action after it has been taken, and (4) in the public expression of generalized support for judicial supremacy in the articulation of constitutional commitments. Although it might sometimes be the case that judges and elected officials **act in** more-or-less **explicit** **concert** to shift the politically appropriate decisions into the judicial arena for resolution, it is also the case that judges might act independently of elected officials but nonetheless in ways that elected officials find congenial to their own interests and are **willing** and able **to accommodate**. Although Attorney General Richard Olney and perhaps President Grover Cleveland thought the 1894 federal income tax was politically unwise and socially unjust, they did not necessarily therefore think judicial intervention was appropriate in the case considered in more detail later (Eggert 1974, 101– 14). If a majority of the justices and Cleveland-allies in and around the administration had more serious doubts about the constitutionality of the tax, however, the White House would hardly feel aggrieved. We should be equally interested in how judges might exploit the political space open to them to render **controversial decisions** and in how elected officials might anticipate the utility of future acts of judicial review to their own interests.¶ [CONTINUES]¶ There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to **circumvent a paralyzed legislature** and **avoid the political fallout** that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, **shifting blame** for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### Antitrust not controversial, and court doesn’t affect politics

Franklin 19 – Professor of law and public policy at Marquette and director of the Marquette Law School Poll.

Charles H. Franklin, “Public Views of the Supreme Court,” 21 October 2019, pp. 2-3, https://law.marquette.edu/poll/wp-content/uploads/2019/10/MULawPollSupremeCourtReportOct2019.pdf.

At the same time, the Court is also the least-well-known branch. While the Court has often been caught up in intense legal and political questions, it is shielded from direct election, and lifetime tenure further insulates sitting justices from political pressure. The subject matter of the Court is far from the ordinary experience of citizens. While written decisions of the Court provide the explicit bases of rulings (and of dissenting views), few among the mass public ever read those decisions, and news accounts can at best provide a simplified summary. This barrier to public understanding derives from the Court’s subject matter and structure but also ensures that citizens rarely are exposed to legal arguments and instead are most likely to judge decisions based on the outcomes, not the reasoning behind those decisions.

The public work of the Court is also episodic in comparison to that of the other branches. The actions of the president and Congress are the subject of numerous daily news stories, public events, and explicit efforts to persuade the public. In contrast, the Court accepts written briefs and hears oral arguments, only a few of which are covered in the general interest news media; deliberates privately; and hands down decisions on a handful of days a year, with a rush near the end of the term in June. These characteristics further separate the Court from the public eye and attention span.

#### If court decisions trigger the link, then Texas thumps – the decision was BONKERS

Sarat and Aftergut 9/6 – Austin Sarat is the William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College. Dennis Aftergut is a former federal prosecutor who has successfully argued before the Supreme Court.

Austin Sarat and Dennis Aftergut, “Supreme Court trashed its own authority in a rush to gut Roe v. Wade,” *The Hill*, 6 September 2021, https://thehill.com/opinion/judiciary/570958-supreme-court-trashed-its-own-authority-in-a-rush-to-gut-roe-v-wade?rl=1.

But in addition to the harms to women’s rights in this law, the court’s Sept. 1 decision in Whole Women’s Health v. Jackson reveals something dangerous to lawful society writ large: the 5-4 ultra-partisan, conservative majority has, in its haste to gut Roe, eviscerated the rule of law it is supposed to stand for and diminished the court’s own authority.

The decision adds fuel to the already strong arguments for reforming the Supreme Court and urgency to the work of President Biden’s Commission on the Supreme Court.

It concedes, perhaps even celebrates, the fact that states, and individuals, can engage in legally questionable action and evade judicial scrutiny. By allowing Texas to flout Roe’s clear meaning, the court undermines an ordered society and may be paving the way for authoritarian rule.

The decision is a radical departure from the institutional history of the Supreme Court, which previously has been marked by efforts to assert and preserve the court’s exclusive prerogative to “say what the law is.” That was the crux of Chief Justice John Marshall’s famous 1803 opinion in Marbury vs. Madison, the case that established the Supreme Court as the ultimate arbiter of the Constitution’s meaning.

Over time, the court has jealously guarded its authority against those who have challenged it. It is the court’s right to have the last word on constitutional questions that has secured for it a central place in our system of government. As Supreme Court Justice Robert Jackson once explained, “We are not final because we are infallible. We are infallible only because we are final.”

And the court has time and again insisted that everyone abide by its rulings no matter how much they might disagree with them.

This was vividly demonstrated in the civil rights era during the middle of the last century when southern states refused to respect the court’s constitutional decisions and when demonstrators took to the streets to promote racial integration in defiance of court orders. The court responded by insisting to both sides: obey the laws first, and only then can you challenge our views of what the Constitution means.

When Dr. Martin Luther King and other civil rights activists ignored an Alabama state court injunction in the belief that the order to desist from a planned protest was unconstitutional, the Supreme Court upheld their arrest and conviction.

In his majority opinion in the 1967 case of Walker v. Birmingham, Supreme Court Justice Potter Stewart recognized the “substantial constitutional questions” that a challenge to that injunction would have raised. But he firmly rejected the marchers’ contention that they were free to ignore a law they believed to be unconstitutional and condemned their decision to take the law into their own hands:

“This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law…. [I]n the fair administration of justice, no man can be [the] judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.”

And the U.S. Supreme Court has not been alone in that view nor has it been alone in striking down attempts by citizens or governments to disobey existing law.

In 2004, the California Supreme Court invalidated then-San Francisco Mayor Gavin Newsom’s declaration that the city would marry same sex couples in defiance of an existing voter-approved law that declared “Marriage shall be restricted to a man and a woman.”

Justice Sotomayor’s dissent in Whole Women’s Health makes precisely the same point about courts’ exclusive role in deciding on the law’s meaning. Calling the Texas anti-abortion law a “breathtaking act of defiance,” she labelled the court’s failure to act “stunning.” In her view, it “rewards tactics designed to avoid judicial review and inflicts significant harm on the applicants and on women seeking abortions in Texas.”

Until last week, defense of the judiciary’s role in saying what the law is and insisting that others defer to its judgments has united conservative and liberal justices.

But, in Whole Women’s Health, only one conservative, Chief Justice Roberts, joined with the court’s three liberal justices in standing up for such nonpartisan jurisprudential principles. His five conservative colleagues seem so eager to gut Roe that they are willing to disembowel the judiciary’s own authority.

The risk of legal chaos from the Supreme Court’s inaction on Sept. 1 may soon be realized in a kind of Cold War between the states.

Imagine blue states reacting to Whole Women’s Health with laws permitting private lawsuits against anti-vaxxers who help someone evade a business’s COVID vaccination mandate, or against owners of banned guns whose prohibition is the subject of federal court challenges.

When the current conservative majority on the Supreme Court trashes its own authority to tilt the scales in the current culture wars, it endangers the liberty of all, no matter which side of the cultural wars they are on.

#### Anti-monopoly action is bipartisan

Christopher Cadelago and Meridith Mcgraw, Politico, ‘It’s ceding a lot of terrain to us’: Biden goes populist with little pushback, 7/19/21, <https://www.politico.com/news/2021/07/19/biden-populist-antimonopoly-500100>

“If you're against competition, then what are you for?” said Bharat Ramamurti, deputy director of the National Economic Council. “Big business charging people whatever they want. You’re for businesses being able to offer workers low wages because there's no other competitor in town to offer something better. I mean, it's very hard to be against competition.”

The right’s muted response to Biden’s orders underscores the remarkable ideological shift that’s occurring in Washington, D.C. A Republican Party once closely allied with corporate America finds itself increasingly less so in the Donald Trump era. Indeed, in the aftermath of Biden’s orders, even officials in Trump’s orbit were saying the politics were smart.

“Both [Biden and Trump] have elements in their constituencies that want this, and, by the way, they’re on solid ground with the rest of America,” said a Trump adviser. “America has a love-hate relationship with these companies.”

But, so far, much of the GOP’s newfound economic populism has been delivered in words rather than action. And that’s given Democrats space to pursue an agenda that, even just five years ago, likely would have sparked massive blowback.

“People will understand who's on their side and who's not,” said Cedric Richmond, a senior White House adviser and director of the Office of Public Engagement. “There will be Democrats who are on the side of working families, and not Republicans. For them, I think it's a terrible mistake.”

The executive order Biden issued earlier this month included 72 initiatives in all. Among the most consequential were his moves calling for greater scrutiny of tech acquisitions, bolstering competition for generic drug makers and importers from Canada, allowing hearing aids to be sold over the counter, standardizing plans for health care shoppers trying to compare insurance options, and protecting certain meat-packing workers from what are seen as artificially low wages.

It was another prong in what economic observers view as an increasingly populist White House agenda. Earlier, Biden had stated his commitment to waiving intellectual property rights for Covid-19 vaccines and nominated Amazon critic and anti-monopoly advocate Lina Khan to chair the Federal Trade Commission.

Some of Biden’s actions came on issues that already had Republican support, including the effort to bring down the price of hearing aids, discouraging agricultural consolidation and limiting so-called noncompete agreements that harm U.S. workers, among others. Twenty-one Republicans backed Khan’s nomination.

The cross-partisan appeal around anti-monopoly policies traces back even further. During the 2016 election, Trump ran on promises to combat big mergers and take on massive corporations that he said posed a “huge antitrust problem.” Following Trump’s loss, Sen. Josh Hawley (R-Mo.) and Rep. Ken Buck (R-Colo.) have called for sweeping antitrust reform in Congress that at times echoes Democratic efforts. Fox News’ Tucker Carlson, one of the most influential voices to the right, cheered the choice of Khan to lead the FTC.

## Econ DA

#### Competition is better for economic growth and resilience – transnational case studies and dozens of studies prove

OECD 20

OECD, “2: Insights from previous crises,” *The role of competition policy in promoting economic recovery*, 2020, pp. 11-13, https://www.oecd.org/daf/competition/the-role-of-competition-policy-in-promoting-economic-recovery-2020.pdf.

Suspension of antitrust laws holds back recovery

Some studies have shown that the suspension of some key provisions of antitrust laws may have prolonged the US Great Depression (Crane, 2010[5]). As a result, claims have been made that the depression may have lasted seven years longer than otherwise (Waller, 2004[6]; Cole and Ohanian, 2004[7])).

In the early 30s, the National Industrial Recovery Act (NIRA) was passed by the Roosevelt administration. The goal of the NIRA was to limit competition and restrict production in the expectation that it would keep prices at a reasonable level, sustain higher wages, stimulate consumer spending thus fostering business investment (Waller, 2004[6]; Cole and Ohanian, 2004[7]).

Industrial and trade associations were allowed to establish industry-wide minimum wage rates and other working conditions. Industries that abided by such codes would then be exempt from cartel prohibitions. This led to widespread collusion.7 Industries took advantage of the exemption to regulate prices and output, turning formerly competitive industries into cartels.

The NIRA policy continued to have consequences even after it was considered unconstitutional by the Supreme Court in 1935. Industries continued to follow the informal guidance set out in the codes and enforcement by the Department of Justice (DOJ) remained limited until 1938 (Waller, 2004[6]).

Wholesale prices in 1935 were estimated to be 24% higher than they would have been and remained 14% higher still in 1939. Collusive pricing as a result of NIRA contributed to inflation, at a time when output was substantially below trend resulting in an impact similar to a supply shock (Romer, 1999[8]). Real output remained 25% below trend (Cole and Ohanian, 2004[7]), (Taylor, 2002[9]) 8 and the policy may have reduced consumption and investment by approximately 14% compared to a competitive scenario.

The suspension of the antitrust rules under the NIRA policy can thus be said to have held back economic recovery following the US Great Depression. The permissive approach to cartels in the US during 1933 to 1939 was considered as the main cause of the weaker economic recovery during that period (Cole and Ohanian, 2004[7]), (Weinstein, 1982[10]).

Another example of the negative consequences from undue relaxation of competition enforcement is the Hawaiian airline market case in the aftermath of the 9/11 tragedy. A temporary exemption from the application of competition law was granted to allow for capacity rationalisation, through an agreement to co-ordinate capacity between two Hawaiian airlines. This led to price increases during and for two years after the end of the immunity period, see Kamita (2010[11]) quoted by Rose (2020[12]).

Lax merger control in times of crisis does not improve long-term resilience

The Global Financial Crisis led to massive state support for the banking industry and consolidation to high levels in certain markets and jurisdictions (Independent Commission on Banking, 2011[13]). Some of the findings from this period were that, for markets to work well, competition was considered to be part of the solution, including through a reduction in switching costs, together with a better and more solid regulatory framework. Competition can also contribute to financial stability.

In 2009, during the global financial crisis, the Lloyd’s and Halifax Bank of Scotland (HBOS) merger in the UK is an often–mentioned example of the risks entailed by waiving the application of merger control rules. The Office of Fair Trading (OFT) considered that the merger raised competition concerns and referred it to the Competition Commission. A new public interest consideration test relating to the ‘stability of the UK financial system’ was however introduced by the Secretary of State. This new test was introduced based on fears of collapse of HBOS, which was, at the time, the UK’s biggest mortgage lender and a big provider of current account services. The test enabled the government to allow the merger.9

However, the Lloyd’s and HBOS merger is seen as not having accomplished its role of achieving financial stability. A subsequent bail-out by the government was required, leading to severe losses in the share value of Lloyd’s. More importantly, the merger was seen to harm competition, by irreversibly creating a powerful player facing fewer rivals (Vickers, 2008, p. 9[14]; Lyons, 2009, p. 39[15]; Stephan, 2011[16]).

Similarly, the big banks mergers of the late 90s and 2000’s in Japan yielded limited efficiencies and in general did not improve the financial soundness of the banks involved (Harada and Ito, 2011[17]). In a crisis that led to a constant erosion of capital by losses from nonperforming loans (NPLs) and declining stock prices, mergers of very large banks were seen as a way to enhance capital by taking advantage of operational synergies and scale economies. Whilst some mergers were genuinely seeking to achieve scale economies, others were simply giving priority to getting bigger. In general, empirical evidence suggests that these mergers failed to achieve the intended scale economies and did not reduce the probability of failure

Anti-competitive policies can hinder economic recovery

During the economic crisis of the 1990s, Japan followed policies that contributed to restrict competition in some industries, with regulatory and import barriers as well as price controls, with wide-spread cartelisation (Porter and Sakakibara, 2004[18]). The targeted sectors were mainly those in which Japan was not successful internationally.

The depression in Japan in the 1990s highlights the importance of competition for productivity (Kehoe and Prescott, 2007[19]). In those sectors where domestic competition in Japan was strong, the Japanese firms were successful on the international level showing the importance of competition to exit a crisis (Hayashi and Prescott, 2002[20]; Porter and Sakakibara, 2004[21]). Government policies that restricted competition together with other policies with a negative impact on total factor productivity (Kehoe and Prescott, 2007[19]), were major factors in prolonging the recession in Japan (Fingleton in (UK House of Commons, 2009[22])) 10 .

Crises may strengthen the case for pro-competitive structural reforms

Many regulations are introduced in times of economic disruptions and crisis to deal with short-term issues, but leave a long term legacy. This strengthens the case for the role of competition advocacy to ensure that regulations adopted in times of crisis are pro-competitive or developed with the least negative impact on competition.

A cited example is the regulation of the aviation industry in the US in the 1930s during the Great Depression. Following the introduction of aircraft that allowed for the expansion of commercial passenger air service, following claims from the airline industry of protection from “the destructive competition”, the US Congress enacted regulation in 1938. This regulated entry, price and routes (Borenstein and Rose, 2014[23]). The industry only moved to a more market-based industry with the Airline Deregulation Act of 1978. The latter eliminated price and entry regulation of the domestic airline industry, delivering benefits to consumers.

In general, pro-competitive reforms can contribute to an economy’s resilience to economic shocks. The reforms implemented in Australia in the 1990s contributed to higher productivity and growth, but also to the economy‘s resilience to the Asia financial crisis of 1997-98. As the Australian Treasury noted: “(...) the ability of the Australian economy to adjust to the reduced export demand and lower commodity prices brought on by the Asian crisis illustrates the benefits of an economy made more responsive, flexible and resilient through microeconomic and regulatory reforms and a sound macroeconomic policy framework.” cited in (Corden, 2009[24]).

Following the Great Financial Crisis of 2008-2009, and in the context of an international financial assistance programme in 2010, Greece agreed to a comprehensive policy package aiming to restore fiscal sustainability and promoting sustainable growth.

Several wide-ranging initiatives were taken to reduce the barriers to competition created by product market regulation. These ranged across the main sectors of the economy, including the manufacturing, retail trade, wholesale trade, tourism and construction services sectors. The sectors were chosen for their contribution to help Greece recover from the crisis, because of their significant impact on employment or valued added on the economy.

The pro-competitive reforms were undertaken with the assistance of the OECD in co-operation with the Greek competition authority (HCC). Three competition assessment projects were undertaken in 2013, 2014 and 2016, following the methodology set out in the OECD Competition Assessment Toolkit (OECD, 2019[25]). The joint OECD-HCC projects resulted in more than 700 recommendations, the vast majority of them implemented by the Greek government. Economic benefits were estimated to amount to around EUR 5.2 billion, or about 2.5% GDP (OECD, 2014[26]).

Market forces left alone may not always lead to an efficient allocation of resources

Economic recovery can be much slower when the zombie firms11 are maintained operational. Zombie firms are less productive, more leveraged and not able to invest. Misdirected government support or additional bank lending to avoid write-offs which could impair banking institutions, can prevent the exit of these firms.

The significant presence of zombie firms also contributed to Japan’s “lost decade” in the 1990s. Research by (Ricardo Caballero et al., 2006[27]) shows that banks, not willing to recognise losses, given the implications on their regulatory capital limits, extended credit to these otherwise insolvent firms.

A similar story is also found following the global financial crisis. Research by (Fabiano Schivardi et al., 2017[28]) shows – on a basis of a bank-firm relationship database in Italy in the period 2008-2013 - that under-capitalised banks misdirected credit in a manner that contributed to the survival rate of zombie firms and to the bankruptcy of otherwise healthy firms.

Market forces may not guarantee that finance will necessarily flow to viable and efficient firms facing temporary financial difficulties. Well-designed state support may therefore be important in such instances.

#### Pounder—antitrust policy creates a harsh environment

Dashefsky, Co-Chair of Antitrust & Trade Practices Group, Bass Berry Sims, ‘8/9/21

(Michael G., “Be Prepared: Aggressive Antitrust Enforcement Is Back,” <https://www.bassberry.com/news/aggressive-antitrust-enforcement-is-back/>)

This summer has seen a flurry of bold antitrust announcements from the Biden administration. By issuing a sweeping executive order calling for numerous changes to antitrust enforcement and by naming progressive favorites and prominent Big Tech critics to head the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ), President Biden has signaled that federal antitrust policy is entering a new era.

The FTC has already begun carrying out its mandate to reshape antitrust policy. Under the leadership of new Chairwoman Lina Khan, the FTC has moved quickly to eliminate checks on its antitrust enforcement powers. A majority of the FTC’s commissioners have expressly disavowed the agency’s longstanding approaches to policing antitrust violations and have given the new chair unprecedented authority over investigations and rulemakings.

Collectively, the Biden administration and the FTC have sent a clear message to the business community: aggressive antitrust enforcement is back. Companies should expect to see an increase in antitrust investigations, stiffer penalties for violations, more burdensome merger reviews, and new rules targeting a range of industry practices. In this environment, effective antitrust counseling and compliance programs are more important than ever.

#### Turn—Amex is so absurd it makes broad legislation *more likely*

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(Herbert, “Platforms and the Rule of Reason: The American Express Case,” Faculty

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But the theory never lived up to anything remotely resembling its expectations, although it did provide some valuable lessons. Even in the airline industry, thought to be a prime target for contestability, competition among incumbent carriers remains an important determinant of price and output. The theory of platform markets will pursue much the same course. After a brief period of exaggeration, industrial organization theory will be enriched, but will remain fundamentally the same. The *Amex* majority opinion serves to highlight what happens when a Court abandons fundamental economics in its haste to encounter something new. The decision that seems to come closest to Amex as an economic “misfire” is the Supreme Court’s 1992 ruling in Eastman Kodak Co. v. Image Technical Services, in which the Court held that sufficient power to condemn a tie of parts and service by a nondominant firm could be inferred from consumer “lock in.”230 Kodak was a six to three decision, but the reaction to Kodak was so strongly critical that subsequent lower court decisions went to great lengths to limit it.231 It has had little impact on antitrust outcomes even though lock-in is more prevalent today in our modern networked world than it was in 1992.

Other consequences could be on the horizon. This decision will encourage more legislation and regulation as more decision makers lose confidence in judge-made antitrust rules to promote competition. As Justice Breyer noted in his dissent, several jurisdictions around the world have acted against high interchange fees and antisteering rules, mostly by statute or agency rule.232 The United States legal system has historically relied less on regulation and more on antitrust law, which can be much less intrusive. But what this decision describes as “steering” is actually among the most ordinary and essential of competitive functions: encouraging people to acquire information and giving them the option to choose. This process protects the competitive process, both improving product quality and driving prices to the competitive level. For example, a common concern about healthcare costs is that they are so high because patients are indifferent to prices. First, medical bills are paid indirectly by insurers. Second, most patients do not even pay the insurance premium; rather, it is paid by either an employer or a government agency. As a result, the patient bears only a small portion of the cost and is inclined to spend too much. The antisteering rule operates in much the same way: it makes the cardholder indifferent to merchant costs and thus diminishes the consumer incentive to reduce them.

#### COVID-induced economic decline thumps – created unprecedented economic problems on multiple fronts

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Lauren Bauer, Kristen Broady, Wendy Edelberg, and Jimmy O’Donnell, “Ten facts about COVID-19 and the U.S. economy,” *The Brookings Institution*, 17 September 2020, https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/.

The coronavirus 2019 disease (COVID-19) pandemic has created both a public health crisis and an economic crisis in the United States. The pandemic has disrupted lives, pushed the hospital system to its capacity, and created a global economic slowdown. As of September 15, 2020 there have been more than 6.5 million confirmed COVID-19 cases and more than 195,000 deaths in the United States (Johns Hopkins University n.d.). To put these numbers into context, the pandemic has now claimed more than three times the American lives that were lost in the Vietnam War (Ducharme 2020; authors’ calculations). The economic crisis is unprecedented in its scale: the pandemic has created a demand shock, a supply shock, and a financial shock all at once (Triggs and Kharas 2020).

On the public health front, the spread of the virus has exhibited clear geographic trends, starting in the densely populated urban centers and then spreading to more-rural parts of the country (Desjardins 2020). Figure A shows the weekly number of deaths caused by COVID-19 in each U.S. region from late February to late August 2020. Early on, COVID-19 cases were concentrated in coastal population centers, particularly in the Northeast, with cases in New York, New Jersey, and Massachusetts peaking in April (Desjardins 2020). By April 9 there had been more COVID-19–related deaths in New York and New Jersey than in the rest of the United States combined (New York Times 2020). COVID-19–related deaths then peaked in the New England and Rocky Mountain regions during the third week of April, followed by the Great Lakes region in the fourth week of April, and the Mideast (excluding New York and New Jersey) and the Plains regions during the first week of May. The Southeast, Southwest, and Far West regions all experienced their peaks at the end of July and first week of August.

The COVID-19 crisis has also had differential impacts among various racial and ethnic groups. Inequities in the social determinants of health—income and wealth, health-care access and utilization, education, occupation, discrimination, and housing—are interrelated and put some racial and ethnic minority groups at increased risk of contracting and dying from COVID-19 (Centers for Disease Control and Prevention [CDC] 2020c). Inequities in infectious disease outcomes are the byproduct of decades of government policies that have systematically disadvantaged Black, Hispanic, and Native American communities (Cowger et al. 2020). For example, as a result of policies that have helped to determine the location, quality, and residential density for people of color, Black and Hispanic people are clustered in the same high-density, urban locations that were most affected in the first months of the pandemic (Cowger et al. 2020; Hardy and Logan 2020). In addition, Black people and Native American people disproportionately use public transit, which has been associated with higher COVID-19 contraction rates (McLaren 2020).

Relatedly, those demographic groups came into the crisis with a higher incidence of preexisting comorbidities including hypertension, diabetes, and heart disease, which also increase one’s risk of contracting and dying from COVID-19 (Yancy 2020; Ray 2020). Compared to white, non-Hispanic Americans, Black Americans are 2.6 times more likely to contract COVID-19, 4.7 times more likely to be hospitalized as a result of contracting the virus, and 2.1 times more likely to die from COVID-19–related health issues (CDC 2020b). While non-Hispanic white people are dying in the largest numbers (CDC 2020a), Black and Hispanic people are dying at much higher rates relative to their share of the U.S. population (see figure B1); moreover, this disparity is true for every age group (figure B2).

While voluntary social distancing and lockdowns that took effect in March 2020 worked initially to isolate and drive down infections, those actions precipitated a severe economic downturn. The demand shock resulting from quarantine, unemployment, and business closures dealt a blow to consumer services (Bartik, Bertrand, Cullen, et al. 2020). Lockdown measures and social distancing reduced the economy’s capacity to produce goods and services (Brinca, Duarte, and Faria-e-Castro 2020; Gupta, Simon, and Wing 2020).

The National Bureau of Economic Research (NBER) determined that a peak in monthly economic activity occurred in the U.S. economy in February 2020, marking the end of the longest recorded U.S. expansion, which began in June 2009 (NBER n.d.). Figure C shows the percent difference in real (inflation-adjusted) gross domestic product (GDP) from the peak of a business cycle through the quarter when GDP returned to the level of the previous business cycle peak for recent recessions. From the most recent peak in the fourth quarter of 2019, the United States experienced two consecutive quarters of declines in GDP; it even recorded its steepest quarterly drop in economic output on record, a decrease of 9.1 percent in the second quarter of 2020 (Bureau of Economic Analysis [BEA] 2020a; authors’ calculations). To put this contraction into historical context, quarterly GDP had never experienced a drop greater than 3 percent (at a quarterly, nonannualized rate) since record keeping began in 1947 (Routley 2020).

Figure D shows the percent change in employment relative to business cycle peaks. COVID-19–related job losses wiped out 113 straight months of job growth, with total nonfarm employment falling by 20.5 million jobs in April (BLS 2020b; authors’ calculations). The COVID-19 pandemic and associated economic shutdown created a crisis for all workers, but the impact was greater for women, non-white workers, lower-wage earners, and those with less education (Stevenson 2020). In December 2019 women held more nonfarm payroll jobs than men for the first time during a period of job growth; by May 2020 that relationship was reversed, in part reflecting job losses in the leisure and hospitality industry, where women account for 53 percent of workers (Stevenson 2020).

The COVID-19 crisis also led to dramatic swings in household spending. Retail sales, which primarily tracks sales of consumer goods, declined 8.7 percent from February to March 2020, the largest month-to-month decrease since the Census Bureau started tracking the data (U.S. Census Bureau 2020a). Although some areas (e.g., grocery stores, pharmacies, and non-store retailers) saw increases in demand as lockdown measures began, others (e.g., clothing stores, furniture and appliances stores, food services and drinking places, sporting and hobby stores, and gasoline stations) saw declines. In early May, as some states lifted social distancing restrictions, sales began to recover in most goods sectors (U.S. Census Bureau 2020a). Overall, U.S. retail sales increased 17.7 percent from April to May, the largest monthly jump on record, recouping 63 percent of March and April’s losses (U.S. Census Bureau 2020a). Growth in retail sales continued through the summer: by August, retail sales were 2.6 percent above their August 2019 level (U.S. Census Bureau 2020a).To help put those swings in such spending into historical context, figure E shows the percent change in real advance retail and food sales from the peak of a business cycle during recessions between 1980 and 2020.

In addition to consumer spending, the COVID-19 crisis has damaged the nation’s industrial production (i.e., output in the manufacturing, mining, and utility sectors). As shown in figure F, U.S. industrial production dropped sharply in March and has since only partially rebounded. This decline poses a host of challenges for the U.S. manufacturing sector, which employs nearly 13 million workers (Federal Reserve Bank of St. Louis [FRED] 2020a), especially those that depend on workers whose jobs cannot be carried out remotely.

#### U.S. economy is structurally resilient to shocks – service-based economy and monetary/fiscal policy

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Philipp Carlsson-Szlezak, Paul Swartz, and Martin Reeves, “Preparing for the Next Macroeconomic Cycle – and Its Risks,” *Harvard Business Review*, 12 February 2021, https://hbr.org/2021/02/preparing-for-the-next-macroeconomic-cycle-and-its-risks.

The life cycle of an expansion is best viewed through the lens of the labor market. In the so-called “young” stage of the expansion, high unemployment from the preceding recession fuels the expansion. But once labor markets tighten, the cycle enters the “old” stage with fundamentally different characteristics: Hiring is more difficult, growth is scarcer, and vulnerabilities, such as inflation or bubbles, are larger.

In the early innings of the post-Covid cycle, we can see that it is on a truly unique path to looking old at a young age. As shown in the below chart, elevated levels of unemployment typically point to many years of expansion before the labor market turns tight, but the post-Covid path has a much steeper slope. When exactly the post-Covid expansion will cross into a tight labor market is unknown, but the U.S. economy is generally thought to be tight at an unemployment rate of around 4.5%. Getting there from current levels of 6.3% could happen before the end of 2022.

That said, reaching the older stage of an expansion is not a sign of risk on its own. Rather the risks arise from the cycle’s longevity, when there is time for pressures to build into macroeconomic imbalances, particularly when policy pushes for more growth.

A Lengthy Post-Covid Expansion?

A confluence of three drivers makes the post-Covid cycle resilient and thus predisposed to be long lived:

The rise of services: It may seem counterintuitive that services help longevity given that Covid is mostly a services recession. Yet lockdowns and social distancing are unique to the Covid shock and outside of a pandemic, services are far less volatile than physical goods consumption. The fact that services have gradually displaced physical production has already strengthened cyclical resilience. Consider the fracking bust of 2015, which could have ended other post-war cycles. While it sent the energy sector into recession, it was not big enough, relative to the economy, to derail the expansion.

Easy monetary policy: Classically when cycles turn tight, they become vulnerable to aggressive rate hikes to prevent overheating. Today, not only does well-anchored inflation enable policy makers to move very slowly, but too low inflation has compelled them to keep rates low until inflation actually moves above their target. This makes it less likely that rate hikes end the cycle and gives ample room to provide stimulus aiding longevity and imbalances.

Aggressive fiscal policy: Unlike monetary policy, fiscal policy is politically controlled and is mostly guided by the instinct to extend the expansion. What will be different going forward is a more daring policy culture, plausibly fueled by the Covid stimulus experience, where aggressive stimulus is more accepted, assisting cycle longevity and imbalances.

#### Econ decline doesn’t cause war – multiple warrants

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Stephen M. Walt, “Will a Global Depression Trigger Another World War,” *Foreign Policy*, 13 May 2020, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/.

For these reasons, the pandemic itself may be conducive to peace. But what about the relationship between broader economic conditions and the likelihood of war? Might a few leaders still convince themselves that provoking a crisis and going to war could still advance either long-term national interests or their own political fortunes? Are the other paths by which a deep and sustained economic downturn might make serious global conflict more likely?

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose.

This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too.

Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure.

I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do.

Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely.

Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible.

If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished.

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

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

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

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

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

# 1AR

## Platforms adv

Kicked

## Conduct adv

No cards

## Adv CP

#### Ex ante enforcement isn’t targeted enough – regulators can’t fill gaps in market oversight

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(Howard, “The Case for Rebalancing Antitrust and Regulation,” 109 Mich. L. Rev. 683)

When changes in technology, consumer preferences, or other market conditions alter or weaken the rationale for regulation, changes and the means and objectives of regulatory agencies are likely to follow. Harm to consumers through the exercise of monopoly power may diminish in magnitude while harm to consumers through anticompetitive conduct, either in collusion with or against emerging competitors, becomes an increasing concern. Rules that specify or limit conduct as a whole ex ante may give rise to standards for judging conduct on a case-by-case basis ex post. But this transition may leave regulators with the challenge of managing potential gaps in market oversight. Leaving a market with a dominant player and emerging entrants to its own competitive devices might work in some settings, but in others it will allow the dominant firm to maintain its market position and exclude rivals. Some regulatory statutes may give agencies the authority to intervene in a more targeted way to punish or enjoin anticompetitive behavior ex post, thereby freeing the agency to eliminate costly ex ante rules without losing regulatory leverage altogether. But often such authority will not exist or, in the case of the Communications Act, be ambiguous at best.' 9 The natural backstop at such a point is antitrust enforcement.

#### Cost of regulation is extremely high, and error is more likely

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(Howard, “The Case for Rebalancing Antitrust and Regulation,” 109 Mich. L. Rev. 683)

After several years of experience trying to set UNE rates based on forward-looking cost and successfully defending the rate setting mechanism in court, the FCC declared the enterprise to be counterproductive. First, the commission found that the pricing rules "have proven to take a great deal of time and effort to implement. . .. The drain on resources for the state commissions and interested parties can be tremendous."'8' The FCC further observed that "these complicated and time-consuming proceedings may work to divert scarce resources from carriers that otherwise would use those resources to compete in local markets."' Second, the commission found the costly proceedings to produce inconsistent results:

[F]or any given carrier there may be significant differences in rates from state to state, and even from proceeding to proceeding within a state. We are concerned that such variable results may not reflect genuine cost differences but instead may be the product of the complexity of the issues, the very general nature of our rules, and uncertainty about how to apply those rules.'

Finally, the FCC found that "[t]he lack of predictability in UNE rates is difficult to reconcile with our desire that UNE prices send correct economic signals."'84 As the commission's observation about incorrect economic signals indicates, the rate-setting function of monopoly regulation is costly not only in its administrative burdens, but in its effects on economic incentives of market participants.

The FCC example shows that one cannot presume that regulatory processes are more accurate or efficient than antitrust. Just as mistaken antitrust enforcement can deter innovation or other beneficial conduct, regulatory errors can be costly to consumers and the regulated firm alike. If regulators set rates too high, then price regulation is not protecting consumers very well, yet is still incurring administrative costs and distorting incentives. Consumers might be better off with competition that, although perhaps less efficient from a cost standpoint, does a better job of disciplining pricing behavior. If, on the other hand, regulators set prices too low, then the regulated firm might have trouble attracting the financial investment necessary to maintain, develop, and deploy capital in the way that best benefits consumers in the long run.

Even if one assumes there is no industry capture and no political or economic distortion of individual regulators' incentives, regulation is unlikely to be error-free. Just like errors in antitrust enforcement, regulatory errors have potentially serious consequences for consumer welfare and firms' incentives. There are likely to be substantial costs incurred through agency oversight and firms' compliance with regulation as well. There thus seems little basis to presume, as the Court appears implicitly to do in Trinko, that the costs of regulation are of lesser concern than are the costs of antitrust enforcement. There are, however, reasons why the costs of regulation relative to those of antitrust are likely to rise as an industry moves from the concentrated structures that originally motivated regulation to competition.

#### Here’s more ev antitrust harmonization key to revitalize alliance

Financial Times, Editorial Board, December 28, 2020, "Biden has a chance to revive America’s alliances," https://www.ft.com/content/d711765f-5b41-46cc-8581-631c9adcc925

Fortunately, the new president is pushing at an open door. After four years of Mr Trump, America’s allies in both Europe and Asia are eager to embrace a new era of co-operation with the US. The EU has already taken the striking step of setting out its own agenda for transatlantic co-operation, even before Mr Biden has been sworn in. The priorities identified by the Europeans look like the basis for a new era of engagement. They include global health, climate change, trade, technology and security.

Each of these areas offer the possibility for productive co-operation. With the pandemic still raging, Mr Biden has promised to take the US back into the World Health Organization. If and when he does, he should accept the EU suggestion to work together on reform of the global health system. The need for an organisation such as the WHO is unarguable. But the pandemic has revealed a whole new set of urgent issues — including the strengthening of early-warning systems, and the production and distribution of vaccines.

The Biden administration’s decision to re-engage in global climate talks — combined with a UN summit, chaired by the UK, this year — provides another opportunity for Europeans and Americans to work together. Both Washington and Brussels are now talking about linking the trade and climate agendas. Unilateral action by either side would risk carbon-border taxes sparking a transatlantic trade war. But if the EU and US co-ordinate their approaches, they could help to raise global environmental standards — without giving a boost to protectionism in the process.

There are similar opportunities and risks in technology policy. There is now a strong feeling on both sides of the Atlantic that the big tech firms need much heavier regulation. But America and Europe have different approaches to privacy. US policy is also inevitably coloured by the fact that so many of the world’s tech behemoths are American. Both sides, however, are increasingly conscious of the need to shape global standards — partly to deal with the security and privacy concerns raised by the rise of Chinese tech giants. Once again, discussion and co-ordination between Washington and Brussels would be in both sides’ interests.

#### Strong Internet de-escalates and prevents future conflicts

Ralston, 14

(Policy Analyst-World Bank, “Can the Internet Solve Conflict,” 2014, http://blogs.worldbank.org/futuredevelopment/can-internet-solve-conflict

Over the past decade there has been growing interest in using the internet and other communication **technologies for conflict management and peacebuilding**. Two key areas have emerged: (1) using publicly available data on events and social dynamics to monitor and predict escalations of tensions or violence, and (2) harnessing the increased access to the **internet and mobile telephones to promote positive peace**. In both areas exciting innovations have developed as well as encouraging results. In the first area, perhaps the most comprehensive information source is Kalev Leetaru’s “Global Database of Society” or GDELT Project that “monitors the world's broadcast, print, and web news from nearly every corner of every country in over 100 languages and identifies the people, locations, organizations, counts, themes, sources, and events driving our global society”. The event database alone covers 300 categories of peace-conflict activities recorded in public media since January 1979, while the identification of people, organizations and locations enables network graphing of connections in media records. Another widely used open data source is the Armed Conflict Location and Event Data Project (ACLED) that covers political violence and events in Africa since 1997 and releases weekly updates to provide close to real time coverage. ACLED releases its own monthly conflict trends report and its data has been used in almost 300 research projects to date. Making data easily accessible and available is only part of the solution: there is still the task of using the data to understand how conflict and violence emerge and whether predictions can be made to mitigate escalations. USAID and Humanity United recently ran a modelling competition for applicants to develop algorithms to predict mass atrocities. The winning application put forward an algorithm that could predict atrocities in regions with limited or no past history of mass violence. One problem in the forecasting literature is the trade-off between “false positives” – predicted episodes that do not actually occur—and “false negatives” – unexpected episodes that do occur. If we know many of our predictions of conflict may not materialize this will surely influence our planned policy responses to these predictions. In another application of publicly available data, Chris McNaboe of the Carter Center has been tracking the development of opposition groups in Syria from social media sites such as Facebook, Twitter and YouTube. Through mapping out factions and defectors he hopes to better equip parties working to resolve the conflict as well as help humanitarian groups work more safely in the region. Another technological innovation is Dlshad Othman’s app that aims to warn Syrians of approaching SCUD missiles. Experts watch for SCUD missiles and when one is spotted, phone messages are automatically sent to Syrians at risk of being affected. Separate from these efforts to use publicly available data to monitor, predict and forewarn of violence and security threats, there is a growing cluster of new methods to communicate information to and among individuals and groups affected by violence. Sisi Ni Amani and Una Hakika have both used SMS technology to address tensions and mitigate violence in Kenya. Following the 2013 elections, Sisi Ni Amani used mass SMS to de-escalate tensions by communicating messages that aimed to help Kenyans realize their common needs irrespective of political divides, while Una Hakika, which translates to “Are you sure?” in Swahili, was used to interrupt the spreading of false rumors. A recent workshop at the Media Lab at MIT brought together peace-tech innovators to share ideas on how to build peace. Some of the ideas that caught my eye included: masterpeace.org – an online community to share news about peacebuilding activities across the world; Libyan Youth Voices – a forum to fill the media void on information relating to youth issues in Libya; using SMS for participation in peacebuilding in Mali; provision of open data on elections in MENA; Naqueshny - an online forum to enable peaceful discussion and debating on Egypt. The internet alone is unlikely to solve conflict – something that Vint Cerf, Chief Evangelist for Google, makes clear in an excellent discussion with Jane Holl Lute, a former UN Peacekeeping and US Government Official. However, the use of technology to promote positive peace is gathering momentum and is adding to every peacebuilders’ toolkit. The ability to tap into large swathes of data to monitor tensions **should help us pre-empt violence before it has the opportunity to escalate, while the increasing global connected-ness of individuals across the world can bridge gaps between cultures and identities, helping us to peacefully learn about our commonalities as well as our differences.**

#### Accesses every impact

Genachowski 13

(Chair-FCC, 4/16, "The Plot to Block Internet Freedom", http://www.foreignpolicy.com/articles/2013/04/16/plot\_block\_internet\_freedom?page=full)

The Internet has created an extraordinary new democratic forum for people around the world to express their opinions. It is revolutionizing global access to information: Today, more than 1 billion people worldwide have access to the Internet, and at current growth rates, 5 billion people -- about 70 percent of the world's population -- will be connected in five years. But this growth trajectory is not inevitable, and threats are mounting to the global spread of an open and truly "worldwide" web. The expansion of the open Internet must be allowed to continue: The mobile and social media revolutions are critical not only for democratic institutions' ability to **solve the collective problems of a shrinking world**, but also to a dynamic and innovative global economy that depends on financial transparency and the free flow of information. The threats to the open Internet were on stark display at last December's World Conference on International Telecommunications in Dubai, where the United States fought attempts by a number of countries -- including Russia, China, and Saudi Arabia -- to give a U.N. organization, the International Telecommunication Union (ITU), new regulatory authority over the Internet. Ultimately, over the objection of the United States and many others, 89 countries voted to approve a treaty that could strengthen the power of governments to control online content and deter broadband deployment. In Dubai, two deeply worrisome trends came to a head. First, we see that the Arab Spring and similar events have awakened nondemocratic governments to the danger that the Internet poses to their regimes. In Dubai, they pushed for a treaty that would give the ITU's imprimatur to governments' blocking or favoring of online content under the guise of preventing spam and increasing network security. Authoritarian countries' real goal is to legitimize content regulation, opening the door for governments to block any content they do not like, such as political speech. Second, the basic commercial model underlying the open Internet is also under threat. In particular, some proposals, like the one made last year by major European network operators, would change the ground rules for payments for transferring Internet content. One species of these proposals is called "sender pays" or "sending party pays." Since the beginning of the Internet, content creators -- individuals, news outlets, search engines, social media sites -- have been able to make their content available to Internet users without paying a fee to Internet service providers. A sender-pays rule would change that, empowering governments to require Internet content creators to pay a fee to connect with an end user in that country. Sender pays may look merely like a commercial issue, a different way to divide the pie. And proponents of sender pays and similar changes claim they would benefit Internet deployment and Internet users. But the opposite is true: If a country imposed a payment requirement, content creators would be less likely to serve that country. The loss of content would make the Internet less attractive and would lessen demand for the deployment of Internet infrastructure in that country. Repeat the process in a few more countries, and the growth of global connectivity -- as well as its attendant benefits for democracy -- would slow dramatically. So too would the benefits accruing to the global econom**y**. Without continuing improvements in transparency and information sharing, the innovation that springs from new commercial ideas and creative breakthroughs is sure to be severely inhibited. To their credit, American Internet service providers have joined with the broader U.S. technology industry, civil society, and others in opposing these changes. Together, we were able to win the battle in Dubai over sender pays, but we have not yet won the war. Issues affecting global Internet openness, broadband deployment, and free speech will return in upcoming international forums, including an important meeting in Geneva in May, the World Telecommunication/ICT Policy Forum. The massive investment in wired and wireless broadband infrastructure in the United States demonstrates that preserving an open Internet is completely compatible with broadband deployment. According to a recent UBS report, annual wireless capital investment in the United States increased 40 percent from 2009 to 2012, while investment in the rest of the world has barely inched upward. And according to the Information Technology and Innovation Foundation, more fiber-optic cable was laid in the United States in 2011 and 2012 than in any year since 2000, and 15 percent more than in Europe. All Internet users lose something when some countries are cut off from the World Wide Web. Each person who is unable to connect to the Internet diminishes our own access to information. We become less able to understand the world and formulate policies to respond to our shrinking planet. Conversely, we gain a richer understanding of global events as more people connect around the world, and those societies nurturing nascent democracy movements become more familiar with America's traditions of free speech and pluralism. That's why we believe that the Internet should remain free of gatekeepers and that no entity -- public or private -- should be able to pick and choose the information web users can receive. That is a principle the United States adopted in the Federal Communications Commission's 2010 Open Internet Order. And it's why we are deeply concerned about arguments by some in the United States that broadband providers should be able to block, edit, or favor Internet traffic that travels over their networks, or adopt economic models similar to international sender pays. We must preserve the Internet as the most open and robust platform for the free exchange of information ever devised. Keeping the Internet open is perhaps the most important free speech issue of our time.

## Econ DA

#### False negatives outweigh false positives—our market power internal link is more durable than erroneous precedent

Baker, JD, PhD, Research Professor of Law at American University Washington College of Law, former FCC Chief Economist, former Senior Economist on Presidential Council of Economic Advisors, Jerry S. Cohen Award for Antitrust Scholarship, ‘19

(Jonathan, *The Antitrust Paradigm: Restoring a Competitive Economy*, Chapter 6, Harvard University Press)

In arguing that the costs of false positives outweigh those of false negatives, antitrust conservatives often highlight the supposed durability of erroneous judicial precedents. "If the court errs by condemning a beneficial practice," Easterbrook writes, "the benefits may be lost for good" through the precedential effect of the judicial decision.67 Easterbrook expresses particular concern with erroneous Supreme Court decisions,68 presumably because lower courts' errors of law are frequently corrected on appeal.69

It is hard to credit the claim that bad precedents systematically outlive market power .7° Erroneous precedents may not disappear overnight, but neither do cartels nor single-firm dominance. It took seven years for the Supreme Court implicitly to overrule the erroneous precedent of Appalachian Coals7,1 which had allowed coal producers to cartelize during the Great Depression, and ten years explicitly to overrule Schwinn, 72 which had made vertical intrabrand non price agreements illegal per se. Yet these lengths of time are comparable to the typical duration of cartels cut short by antitrust enforcement and, in consequence, less than the cartels' likely duration if market forces were the sole mechanism for correction. 73

Furthermore, even before the Court overrules an erroneous precedent, a number of circumstances may limit its practical effect. Precedents may be undermined by lower courts,74 abrogated by legislative action,75 or narrowed, procedurally or substantively, by the Court itself.76 The instances in which the Supreme Court has overruled its own antitrust decisions, the range of mechanisms available for correcting bad court decisions, and the Supreme Court's thoroughgoing adoption of the Chicago school's critique all call into question Easterbrook's claim that erroneous judicial precedents, even from the Supreme Court, are more durable than monopolies and cartels.77

#### Net better for innovation

Portuese, director of antitrust and innovation policy at ITIF, adjunct professor of law at the Global Antitrust Institute of George Mason University, ‘21

(Aurelien, “Principles of Dynamic Antitrust: Competing Through Innovation,” June 14, <https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation>)

Judicial review is instrumental to the efficiency of antitrust laws. It underpins the ability of these laws to govern antitrust dynamically. Some populists seek to take antitrust away from the courts, or, alternatively, to prevent antitrust cases from being judicially appealed. These gross encroachments into the rule-of-law principles need to be seen for what they are: dangerous calls to undermine the democratic foundations of our society. These calls would encroach upon every litigant’s constitutional right to access justice and seek judicial remedy. The role of the judge must, on the contrary, be preserved as the ultimate arbitrator of antitrust cases. The need to preserve the role of the judge is twofold: basic principles of the rule of law and the fundamental right to access courts.

Also, the evolutionary perspective inherent to judge-made law enhances the efficiency of the law thanks to incremental improvements. Beyond the mere hypothesis of the efficiency of common law due to its evolutionary process, judge-made law allows for a trial-and-error process. It spurs a debate of ideas through the multiplication of cases, increasing society’s knowledge regarding specific cases. In complex matters such as antitrust cases, “learning by doing” being inherent to the evolutionary aspect of judge-made law is a quality, not a pitfall, of the law.

A case-by-case judicial approach proves to be a better approach to complex cases than indiscriminate, broad regulatory compliance rules that are subject to little or no judicial review. To further develop this dynamic approach, the rule of reason must be better protected as a legal standard that is more respectful to the dynamic view of competition.

Rule of Reason for Dynamic Antitrust

Per se prohibitions must be abandoned, given the need to engage in a case-by-case analysis of each litigated behavior’s pro- and anticompetitive effects.65 Tying agreements (or tie-in sales), horizontal group boycotts, ancillary horizontal market division, and even horizontal price fixing, for example, are currently per se prohibited. A discussion of both the pro-competitive effects and the balancing exercise inherent to the rule of reason would help better distinguish the practices that are improving competition and innovation overall from those that deplete competition and innovation.

The objective is to ensure the pro-efficiency and pro-innovative effects are lower than the positive effects in order to enable the sanctioning of conduct.66 Antitrust enforcement requires a balancing exercise between positive and negative consequences for every conduct. In light of legal and economic evidence submitted, only a judicial authority can embark on this necessary balancing exercise.

#### High bar for plaintiffs makes the case for SWEEPING legislation stronger

David McLaughlin, Bloomberg, Antitrust Crusader Lina Khan Faces a Big Obstacle: The Courts, June 23, 2021, <https://www.bloomberg.com/news/articles/2021-06-23/tech-antitrust-lina-khan-faces-courts-as-challenge-to-ftc-s-progressive-agenda>

The FTC has suffered some stinging defeats recently. Last year, the agency lost a major monopoly case filed against chipmaker Qualcomm. In April, a unanimous Supreme Court eliminated a tool used by the FTC to recover money for defrauded consumers. Later this month, a federal judge in Washington is expected to rule on whether the agency’s monopoly lawsuit against Facebook can proceed.

Still, there’s widespread agreement that the status quo is no longer tenable. Over the last two decades, concentration has risen in industries across the economy. Some economists say dominant companies can use their market power to suppress wages, for example, exacerbating inequality. The worries are bipartisan. Republicans and Democrats alike are pushing for antitrust reforms to rein in the biggest tech platforms, and Khan was confirmed by the Senate with significant Republican support.

Big losses in the courts would eventually hurt Khan’s authority and demoralize her staff, says William Kovacic, a former FTC chairman who now teaches at George Washington University Law School. “You become like a sports team that is known to its opponents as unable to win,” he says. But defeats also could provide the foundation for the kind of sweeping antitrust legislation that Khan and her supporters want.

“If you want to change the world, at some point it goes to the courts or it goes to the legislature,” Kovacic says. “But you can’t do it by yourself.”

Lawmakers in Congress are already moving to give antitrust enforcers new authority to take on companies. A package of bills introduced earlier this month in the House would toughen merger reviews for tech firms, change how they treat businesses that depend on their platforms, and prohibit certain products and services. Many of the ideas are modeled on the recommendations in the House antitrust report that Khan helped write.

#### Agency INABILITY to win creates a slippery slope

Portuese, director of antitrust and innovation policy at ITIF, adjunct professor of law at the Global Antitrust Institute of George Mason University, ‘21

(Aurelien, “Principles of Dynamic Antitrust: Competing Through Innovation,” June 14, <https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation>)

Indeed, the constantly insecure regulatory environment within which entrepreneurs would evolve may generate risk-averse attitudes that contradict the culture inherent to the entrepreneurial adventure.

Also, the reversal of the burden of proof may constitute a gross violation of constitutional rights. It would single out antitrust cases (wherein such a reversal would take place) as opposed to other areas of law (where no such reversal would occur).

Beyond the imperative to retain the burden of proof on antitrust enforcers to demonstrate possible antitrust violations, the standard of proof must not be lowered for superficial reasons. Some argue that antitrust enforcers should find antitrust violations with decreased evidentiary thresholds regarding the standard of proving a violation because of the complexity of today’s economy.68

These claims are misguided: The economy’s complexity has always come together with the refinement and expertise of antitrust enforcers. Indeed, antitrust enforcement adapts to the economy, and antitrust enforcers have traditionally brought forward complex cases in light of the technology and complexity of their times. Antitrust enforcers could investigate railroad companies more than a hundred years ago inasmuch as they can investigate a social media platform today. Tools adapt as the situation evolves.

The standard of proving responsibility must be preserved; otherwise, such a slippery slope may pervert not only antitrust enforcement but also any areas of law wherein the difficulty for administrative agents to find guilt may constitute the basis of, not of the absence of responsibility for, the lowered standard of proof. In other words, the agencies may almost always win cases, as seemingly advocated by Neo-Brandeisians.

Consequently, dynamic antitrust would enhance the rule-of-law principles and strengthen the role of the courts in the evolutionary process of antitrust laws. Dynamic antitrust enforcement would generalize the rule of reason with traditional evidentiary standards. These simple but fundamental premises upon which rests the rule of law are foundational principles for dynamic antitrust enforcement.