# 1AC Platforms

### 1AC – Plan

#### The United States federal government should remove plaintiffs’ heightened burden of proof for antitrust cases in platform markets.

### 1AC – Platform Adv

#### Platform companies facilitate transactions between two sets of users – the *Amex* decision made it extremely difficult to challenge anticompetitive conduct in those markets

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)

A. Against Platform Exceptionalism

In *Amex*, the Supreme Court disregarded a basic principle about markets, which is that they consist of close substitutes.212 Instead, it lumped production complements into the same market, and in the process, it stymied coherent economic analysis of the problem. To be sure, power in one side of a two-sided market cannot be assessed without determining what is occurring on the other side. But one does not need to group the two sides into the same “market.” Rather, a relevant market should be determined by reference to the side where anticompetitive effects are feared. Then, assessing power requires the fact finder to consider offsetting effects, some of which may occur on the other side.213

Second, the Court ignored an important distinction between fact and law. Disputes about market boundaries involve questions of fact. Nevertheless, the majority wrote—as a matter of law—that two-sided platforms compete exclusively with other two-sided platforms. These dicta have already produced mischief in lower-court decisions. For example, it led one court to conclude that a merger between a two-sided online flight-reservation system and a more traditional system could not be a merger of competitors.214

Third, without argument or evidence, the Court required litigants to show market power indirectly in vertical restraints cases by reference to a relevant market, even though superior techniques are available. Direct measures are particularly useful in digital markets, where the necessary data are easy to obtain and product differentiation makes traditional market definition unreliable.215 This was another breach of the boundary between fact and law.

Fourth, the Court misunderstood the economics of free riding, ignoring the fact that when a firm is able to recover the value of its investments through its own transactions, free riding is not a problem.

Fifth, the Court failed to perform the kind of transaction-specific factual analysis that has become critical to economically responsible antitrust law. Rather, it simply assumed, without examining the actual transactions before it, that losses on one side of a two-sided market are inherently offset by gains on the other side.216 Amex’s antisteering rule produced immediate losses for both the affected cardholder and the affected merchant. The only beneficiary was Amex, the operator of a platform able to shelter itself from competition. That competition, in turn, would have benefitted both cardholders and merchants.

Markets differ from one another.217 This is why we apply mainly antitrust law to some markets, regulation to others, and some mixture of the two to yet others. It is also why antitrust is so fact intensive, particularly on issues pertaining to market power or competitive effects. Indeed, the biggest advantage that antitrust has over legislative regulation is its fact-driven methodology. Antitrust courts do and should avoid speaking categorically about market situations that are not immediately before them and avoid making cursory conclusions based on inadequate facts. Within the antitrust framework, there is no reason to think that digital platforms are unicorns whose rules as a class differ from those governing other firms. Every market has its distinct features, but the ordinary rules of antitrust analysis are adequate to consider them. The *Amex* decision is a cautionary tale about what can happen when a court is so overwhelmed by a market’s idiosyncrasies that it makes grand pronouncements, abandoning well-established rules for analyzing markets in the process.

#### Specifically, *Amex* set super high burdens for Plaintiffs – forcing them to prove harm to users on both sides of the platform

Krikwood, Professor of Law, Seattle University School of Law; American Law Institute; Executive Committee, AALS Antitrust and Economic Regulation Section; Advisory Board, American Antitrust Institute, ‘20

(John, “Antitrust and Two-Sided Platforms: The Failure of *American Express*,” Cardozo L. Rev. Vol. 41)

In sum, the Court's most fundamental error in *American Express* was its ruling that in a two-sided platform case, the plaintiff must show, in the first step of the rule of reason, that the defendant's conduct caused net harm to customers on both sides of its platform combined. This requirement, unprecedented in the Court's decisions, is not only substantively wrong, it will force plaintiffs in two-sided platform cases to address market power, anticompetitive effects, and justification all at once, at the beginning of their cases. This is inefficient and will result in more false negatives.75 To take advantage of this new framework, moreover, numerous defendants are likely to claim that they operate twosided platforms, further inhibiting antitrust enforcement.76

[Begin fn76]

76 See Hovenkamp, supra note 9, at 48 ("[U]nder the AmEx standard, we can expect an

outpouring of defendants emphatically claiming to be two-sided .... ).

[End fn76]

The Court overlooked all of these problems. 77

#### Amex’s platform rule is theoretical nonsense—that spills over to stymie enforcement in numerous sectors

Rozga, JD, Counsel, Davis Wright Tremaine LLP, former Federal Trade Commission attorney, Guest Lecturer, Boston University School of Law, ‘20

(Kaj, “Antitrust After American Express: Down a Competitive Effects Rabbit Hole,” September 21, <https://techlawdecoded.com/antitrust-after-american-express-down-the-competitive-effects-rabbit-hole/>)

What does make American Express unique, and the reason it has pushed the trajectory of antitrust even further into a competitive effects abyss, are the implications on the modern tech-based economy of the Supreme Court’s views on the proof that is required in cases involving two-sided markets.

Two-sided platforms are at the core of wide swaths of the online ecosystem, including retail (Amazon’s marketplace), social media (Facebook), online advertising (Google Ads), the internet of things (Apple’s HomePod), search (Microsoft’s Bing), and the gig economy (Uber), to name a few examples. The American Express decision has significantly raised the evidentiary bar for proving up an antitrust case in such markets. It will no longer be enough to show that a platform harmed competition on one side of the market—as difficult and burdensome as that task already is. Now “substantial anticompetitive effects” must be shown across both sides of the market, accounting for all the participants and users of a multi-sided platform in something akin to the “credit card transactions” market proposed in American Express.

But the logic underlying the American Express decision does not stop at multi-sided platforms. It is not difficult to imagine how creative defendants and laissez faire-inclined judges could spin a web of ever-increasing complexity in any case about a sprawling market with interconnections and interrelationships among different users, partners, and participants. This is a natural consequence of falling down the competitive effects rabbit hole. If it is not reined in, the competitive effects machinery tends towards entropy, especially in complex digital markets where a single player can be interacting with various segments of a broader digital ecosystem.

#### Inability to effectively contest platform conduct kills innovation

Allensworth, Professor of Law at Vanderbilt Law School, ‘21

(Rebecca, “Antitrust’s High-Tech Exceptionalism,” 130 Yale L.J. 588)

American competition policy has a big problem. Actually, it has four big problems: Amazon, Apple, Facebook, and Google. What was once a dynamic pool of smaller start-ups, the high-tech sector has now coalesced around just four companies that together reported over $773 billion of revenue in 2019.1 Each reigns over its own segment of the high-tech marketplace: Amazon controls the retail sector, Apple dominates devices and apps, Facebook owns social media, and Google virtually governs the internet itself. To the extent Silicon Valley still churns out a steady stream of startups, it is more to feed these beasts by acquisition than to produce meaningful rivals to their empires.2

Of course, not everyone agrees that this state of affairs is a problem at all. To some, the size of these firms is merely a symptom of their success. Relentless innovation, a customer-is-king mentality, network effects that benefit consumers, and economies of scale have made these firms ever larger and their products ever better for American consumers. Some even contest the idea that they are large at all by arguing that in a properly defined market, each firm faces significant rivalry and thus lacks market power. Some think that American antitrust law should pat itself on the back for fostering the competitive conditions that let these innovative companies thrive.3

However, this view is increasingly unpopular, and for good reason. Each of these companies, in its own way, holds the keys to competitive entry in many important online markets. To bring an app to market, a developer must deal with Apple; to reach online shoppers, retailers must use Amazon, and so on. Without a meaningful choice between platforms, independent sellers, developers, and websites must pass through a privately maintained bottleneck often on unfavorable terms. These restrictions on competition harm consumers by reducing the output and raising prices for goods that must pass through the bottleneck, and by reducing firms’ incentives to innovate—if they know a large portion of their profits will be appropriated by the platform, they have less incentive to bring new products to market. And by controlling the throttle of technological innovation, each dominant firm can stave off the possibility that one of these nascent companies will build a rival network—a platform that can break the bottleneck itself.4 Long-term, stable platform dominance means consumers likely will not see the kind of Schumpterian innovation associated with great technological leaps forward.5 Rather, consumer welfare depends on these platforms’ internal incentives to innovate, which are weakened in the absence of true rivalry.6 In short, there is a growing recognition that as much as these companies have innovation to thank for their success, their current tactics are making it hard for the next generation of disruptive innovators to take over. If antitrust law continues to stand by, consumers will pay the price.

#### Tech concentration creates downward productivity shocks throughout the economy, structurally limits business dynaimsm

Decker et al., PhD, Board of Governors of the Federal Reserve System, University of Maryland and NBER, ‘17

(Ryan A., John Haltiwanger, Ron S. Jarmin, and Javier Miranda, “Changing Business Dynamism and Productivity: Shocks vs. Responsiveness,” June, <http://econweb.umd.edu/~haltiwan/Shocks_06_30_17.pdf>)

A hallmark of market economies is the continual reallocation of resources from less-valued or less-productive activities to more-valued or more-productive ones. Business dynamics—the process of business birth, growth, decline and exit—is a critical driver of the reallocative process. An optimal pace of business dynamics balances the benefits of productivity and economic growth against the costs associated with reallocation—which can be high for certain groups of firms and individuals. While it is difficult to prescribe what the optimal pace should be, there is accumulating evidence from multiple datasets and a variety of methodologies that the pace of business dynamism in the U.S. has fallen over recent decades and that this downward trend accelerated after 2000.1

Canonical models of firm dynamics and empirical evidence imply that there is a tight link between business dynamism and productivity growth. As highlighted by Hopenhayn and Rogerson (1993), increases in the dynamic frictions of adjustment on the extensive or intensive margins will reduce the pace of reallocation and lower productivity. Thus, a prima facie concern arising from these trends in business dynamism is that they may have had adverse effects on aggregate productivity growth. The question is particularly important in light of the growing body of evidence showing that aggregate productivity growth in the U.S. has been declining since the early 2000s (Fernald (2014)).2

At first glance, medium-run fluctuations in economywide productivity growth do not match up with patterns of declining business formation and business dynamism. Productivity growth accelerated in the 1990s through the early 2000s before slowing down after 2003, while aggregate startup activity and job reallocation fell throughout the 1980-2014 period. However, a more careful review of theory and evidence resolves the inconsistency: during the 1980s and 1990s, the decline in entrepreneurship and reallocation was dominated by the Retail Trade sector, where evidence suggests that falling dynamism was actually consistent with rising productivity growth.3

Fernald (2014) highlights that the surge in productivity from the late 1980s to early 2000s and the subsequent decline were both led by the ICT-producing and intensive ICT-using sectors. Interestingly, the High Tech sector exhibits a rise in business formation and job reallocation over the first period and a sharp decline in the post-2000 period, with the period since 2000 also being characterized by a decline in high-growth firm activity throughout the US economy more generally (Haltiwanger, Hathaway and Miranda (2014)). 4

In this paper, we find that changes in how businesses respond to their idiosyncratic productivity conditions are an important driver of the evolution of aggregate job reallocation and productivity in recent decades, especially in the High-Tech sector. We argue that the observed decline in responsiveness is consistent with models of firm dynamics in which increases in adjustment frictions can reduce the pace of reallocation and, consequently, productivity growth. As noted above, the canonical model is Hopenhayn and Rogerson (1993), but this theme is consistent with a wide class of firm-level adjustment cost models (e.g., Cooper and Haltiwanger (2006), Cooper, Haltiwanger and Willis (2007, 2016), and Elsby and Michaels (2013)). The core hypothesis is intuitive. An increase in adjustment frictions makes firms more cautious in responding to idiosyncratic productivity shocks. This yields a decline in the pace of job reallocation (as firms’ hiring and downsizing decisions become more sluggish), an increase in the dispersion of marginal revenue products and a decline in aggregate productivity.

**Productivity growth solves great power war**

**Baru 09**

(Sanjaya, Visiting Professor at the Lee Kuan Yew School of Public Policy in Singapore Geopolitical Implications of the Current Global Financial Crisis, Strategic Analysis, Volume 33, Issue 2 March 2009 , pages 163 – 168)

The management of the economy, and of the treasury, has been a vital aspect of statecraft from time immemorial. Kautilya’s Arthashastra says, ‘From the strength of the treasury the army is born. …men without wealth do not attain their objectives even after hundreds of trials… Only through wealth can material gains be acquired, as elephants (wild) can be captured only by elephants (tamed)… A state with depleted resources, even if acquired, becomes only a liability.’4 Hence, economic policies and performance do have strategic consequences.5 In the modern era, the idea that strong economic performance is the foundation of power was argued most persuasively by historian Paul Kennedy. ‘Victory (in war),’ Kennedy claimed, ‘has repeatedly gone to the side with more flourishing productive base.’6 Drawing attention to the interrelationships between economic wealth, technological innovation, and the ability of states to efficiently mobilize economic and technological resources for power projection and national defence, Kennedy argued that nations that were able to better combine military and economic strength scored over others. ‘The fact remains,’ Kennedy argued, ‘that all of the major shifts in the world’s military-power balance have followed alterations in the productive balances; and further, that the rising and falling of the various empires and states in the international system has been confirmed by the outcomes of the major **Great Power wars**, where victory has always gone to the side with the greatest material resources

#### Fintech’s disruptive startups have been squashed by large financial institutions

Loo ’18 – Associate Professor at BU Law [Rory Van; Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project; 2018; "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021]

Fintechs can be of any size. Four of the ten largest U.S. companies, Google, Apple, Amazon, and Facebook, all have built payment systems and made other inroads into finance.36 Despite the participation of large technology companies, the main drivers of fintech innovation have been the thousands of startups attracting billions of dollars in investment each year. Startup business models are novel, diverse, and shifting. One of the earliest fintech areas was peer-topeer lending, in which companies link individuals who have money to those who want it.37 Most of the original peer-to-peer companies have already grown beyond their origins and now engage in more familiar "marketplace lending."38 They receive money from banks to lend to individuals, and their innovations have spread to other areas, such as sophisticated analytic tools for estimating borrowers' creditworthiness.39

Unlike the other categories of consumer fintechs, advisory fintechs do not need to directly receive any money from consumers to offer their basic product. The goal of Credit Karma, NerdWallet, Mint, and other advisory fintechs is to help people make all of their financial decisions through a single app.4" These companies learn about users-with permission-by accessing personal bank accounts, credit scores, credit card records, tax returns, and other similar sources of financial information. Users then receive recommendations about credit cards or mortgages with lower fees, savings accounts that pay higher rates, and other products that better meet their needs.41

While the term "fintech" is used here to exclude traditional banks, all major financial institutions have become highly technological. The leading banks are each purchasing fintech startups, forming strategic partnerships, or internally building whiz teams to design new products.42 JP Morgan Chase's Intelligent Solutions Group has over 200 analysts and data scientists and produced about fifty technologies in 2015 alone.43 Goldman Sachs, which has more engineers than Facebook or Twitter, is launching an online lender.44 In light of Wall Street's increasing launch of digital products and adoption of artificial intelligence,45 regulating fintech amounts to regulating the future of finance.

B. Private Sector Institutional Dynamics

Fintechs could in theory pose a threat to traditional banks. Almost threequarters of millennials say they would prefer to receive their financial services from technology companies such as Google and Amazon, rather than big banks.46 Convenience, trust, and price all could play important roles in driving customer switching. Individual users, including small businesses, increasingly find dealing with big banks to be time-consuming and frustrating compared to the ease of tailored startup apps.47 In recent years, consumers have grown distrustful of large financial institutions, whose reputations have been battered by subprime mortgage lending, the financial crisis, the LIBOR scandal, and Wells Fargo opening millions of fake accounts in customers' names. 48

Innovation helps explain why publicly traded companies are disappearing at a faster rate today than ever before-six times as fast as forty years ago.49 Online startups have even thrived in other heavily regulated industries, such as transportation and gambling." Convenience and lower costs have driven some of this success, and many fintechs offer similar advantages.51 Furthermore, unlike some industries that Silicon Valley has invaded, finance lacks a meaningful physical component. This makes the base products inherently vulnerable to digital competition. Traditional banks' infrastructures-including their legacy information systems and physical branches-inhibit their ability to rapidly respond to disruption.

Since Dimon's 2015 warning, however, the dynamics between fintech and traditional firms appear to have shifted. Entrepreneurs who started out wanting to do to banks what Amazon did to retail have wound up licensing their technology to banks.52 As one industry observer puts it: "What was once perhaps an adversarial relationship has warmed .... Many no longer see an existential threat in fintech. Instead, they believe that "[i]t is most likely that the small fintech companies will be subsumed" by large financial institutions. 4

Ii. The Competition Shortcomings

A given fintech's decision of whether to challenge or join banks will depend in part on whether regulations and market dynamics give it a real chance to compete. Competition is extremely difficult to measure, and economic models inadequately consider important factors, such as innovation.5 To assess the hypothesis that a lack of competition inhibits fintech, this Part surveys the evidence related to entry barriers, customer switching, anticompetitive prices, and the relative pace of U.S. innovation.

A. Entry Barriers

When firms face excessive barriers to entering a market, competition can stagnate, raising prices and lowering innovation. 6 Although part of the problem is simply the large amount of regulation, 7 fintech has faced two further entry barriers: traditional firms' ability to block market access and the difficulty in obtaining a federal bank license.

Legacy financial institutions can limit some fintechs' operations through control of data. Most notably, advisory fintechs rely on access to both personal and general product data. 8 Some banks' response has been to block or limit fintechs' access to customer accounts, thereby making it harder for fintechs to provide tailored advice. 9 Legacy institutions can also block fintechs from collecting online product information by using laws never intended for such a purpose, including trespass to chattel, the Digital Millennium Copyright Act,6 " and the Computer Fraud and Abuse Act.61 As a result, advisory fintechs cannot on their own provide comprehensive financial advice to their users. In order to access crucial data, fintechs may need to prioritize big banks' interests over helping consumers switch.

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

#### That means US fintech will lose to international competitors.

Loo ’18 – Associate Professor at BU Law [Rory Van; Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project; 2018; "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021]

C. International Competitiveness

Less efficient and innovative U.S. financial services are problematic not only in isolation, but also from an international perspective. Scholars and regulators have inconclusively debated whether banks need to be big to maintain their international competitiveness. 12' Less well-recognized is how a lack of domestic competition may undermine U.S. financial firms' global competitiveness. Foreign financial firms may gain an edge by being subject to greater competition in their home markets, thereby being forced to innovate more and operate leanly. This creates two potential problems. First, reduced domestic competitiveness may make the United States less able to enter foreign markets. The U.S. economy has benefited in recent years from billions of dollars in revenues earned abroad by Google and other leading digital companies. 126 Given the growing portion of the global economy taken up by finance, the fintech lag could constitute a large-scale missed opportunity for U.S. firms to strengthen the economy by bringing in revenues earned abroad.

Second, in the long term, American financial firms may become more vulnerable to international competition even in domestic markets. Although U.S. licenses can shield banks from foreign fintech challengers today, distributed ledger technologies may change this. Americans are already increasingly using Bitcoin, Ethereum, and other unregulated virtual currencies based on blockchain technology.127 Much is unknown about how such technologies will develop, and the trust offered by a governmentally overseen financial system may prove difficult to replicate. 128 If, however, an era of wide-open global finance arrives, U.S. financial institutions could find themselves suddenly exposed to international competition as never before. Without U.S. regulators to insulate them, U.S. financial institutions made soft by lesser competition would be more prone to lose significant market share to foreign financial institutions than they would be if domestic markets were more competitive.

#### Fintech innovation is key to the effectiveness of U.S. economic sanctions

Harrell and Rosenberg 19 – Peter E. Harrell is an adjunct senior fellow at the Center for a New American Security; former Deputy Assistant Secretary for Counter Threat Finance and Sanctions at the U.S. State Department. Elizabeth Rosenberg is a senior fellow and director and director of the Energy, Economics, and Security Program at the Center for a New American Security.

Peter E. Harrell and Elizabeth Rosenberg, “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” *Center for a New American Security*, 2019, pp. 25-26, http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic\_Dominance-final.pdf.

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

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

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

Maintaining U.S. Leverage

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

#### Specifically, North Korea

Harrell and Rosenberg 19 – Peter E. Harrell is an adjunct senior fellow at the Center for a New American Security; former Deputy Assistant Secretary for Counter Threat Finance and Sanctions at the U.S. State Department. Elizabeth Rosenberg is a senior fellow and director and director of the Energy, Economics, and Security Program at the Center for a New American Security.

Peter E. Harrell and Elizabeth Rosenberg, “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” *Center for a New American Security*, 2019, pp. 14-15, http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic\_Dominance-final.pdf.

Technology

Technological developments have also played an important role in strengthening U.S. coercive economic leverage. New analytic computer technologies have increased the capacity of both U.S. government agencies and private-sector companies to detect and stop suspected sanctions evasion. Surveillance technologies have also improved in recent years, providing government agencies, reporters, and activists with new tools to track evasion. For example, the recent deployment of sophisticated, low-cost global imaging satellites has improved the tracking of North Korean and Iranian ships involved in sanctions evasion.41 The importance of, and—at least to date and in the short term—the relative lack of alternatives for U.S. technologies, particularly for telecommunications or computing, in global supply chains has also increased U.S. coercive economic leverage, as the ZTE case illustrates.

Other technological developments, however, have had an adverse, if limited, impact on U.S. coercive economic measures. A prominent development has been the rise of cryptocurrencies, such as Bitcoin, which many have used to skirt sanctions. North Korea, for example, has used multiple avenues to obtain cryptocurrencies, including cryptocurrency mining, using ransomware attacks and demanding payment in cryptocurrency, and stealing cryptocurrency by hacking into cryptocurrency exchanges.42 Iranian groups have also relied on cryptocurrencies as a way of facilitating illicit activities. This prompted the U.S. Treasury Department in November 2018 for the first time to publicly issue identifying information for specific digital currency addresses (unique strings of alphanumeric digits identified/associated with specific digital currency wallets) in an effort to freeze Iranian cryptocurrency accounts subject to U.S. jurisdiction and to persuade foreign cryptocurrency exchanges to cease dealing with Iran.43 In October 2018, the U.S. Treasury’s Financial Crimes Enforcement Network (FinCEN) also warned about potential Iranian use of cryptocurrencies in an advisory highlighting a range of illicit Iranian financial activities and sanctions evasion tactics.44 To date, however, the adverse impact of these technological developments on U.S. coercive economic measures has been comparatively small. Furthermore, it has generally been on par with those of other types of criminal activity by sanctions evaders, rather than representing a major new threat. For example, North Korea’s cryptocurrency efforts appear to be significantly smaller in value than many other North Korean revenue-raising activities conducted in violation of sanctions, including selling labor overseas and traditional criminal smuggling. The value of Iranian cryptocurrency schemes is estimated to be in the millions, not billions, of dollars.45 Cryptocurrencies are not widely enough accepted by companies around the world for sanctioned actors to use to them to engage in significant commercial trade, such as selling oil or other commodities on global markets, or to make large-scale purchases of key economic inputs. In addition, U.S. authorities have already demonstrated that they can restrict sanctioned actors’ ability to use cryptocurrencies. Following the November 2018 U.S. Treasury action identifying Iran-linked digital currency addresses, several major cryptocurrency exchanges, including non-U.S. exchanges such as Binance, appear to have decided to withdraw from offering services in Iran.46

Technological developments may have the potential to enable meaningful impacts on U.S. coercive economic measures over the longer term, however. Financial technology developments—new digital ways to demarcate, raise, store, and move monetary value—as a factor in the continuing utility of U.S. coercive economic measures will be discussed later in this paper.

#### Sanctions evasion causes missile development

Elizabeth Rosenberg, Elizabeth Rosenberg Former Senior Fellow and Director, Energy, Economics and Security Program, CNAS, and ​Neil Bhatiya Former Adjunct Fellow, Energy, Economics, and Security Program, CNAS, March 4, 2020, Busting North Korea’s Sanctions Evasion, https://www.cnas.org/publications/commentary/busting-north-koreas-sanctions-evasion

The Problem is Growing

North Korea raises money to support its nuclear and ballistic missile programs in various ways. Some methods are relatively new, even for seasoned North Korea watchers, and exploit countries and economic areas where there is very little, or absolutely no, awareness about their exposure to North Korean illicit activity.

The Kim regime maintains a sophisticated offensive cyber capability, which it uses to steal financial resources and move money around the global banking system. In the past, hacking groups credibly linked to North Korea have successfully penetrated central banks, cryptocurrency exchanges, and some of the largest corporate banks in the world. The United Nations North Korea Panel of Experts has accused North Korea of stealing up to $81 million from Bangladesh’s Central Bank and laundering the money through casinos in the Philippines. These North Korean criminals have also hacked ATMs in more than 11 countries, stealing hundreds of millions of dollars. Other North Korean–linked entities have sold information technology services, including website and application development services, to firms around the world as a strategy to covertly raise funds for Pyongyang’s illicit aims. Financial institutions are often reluctant to admit that they have been hacked, which makes it difficult for the financial community to absorb lessons learned and harden institutions from future intrusions. Conversely, governments, including the United States, suffer from poor interagency coordination and a lack of institutional knowledge and awareness of North Korea’s malicious cyber activities. Most high-level U.S. policymakers and members of Congress lack basic familiarity with the underlying technology and North Korea’s cyber heist and hacking activities, which makes developing policy and regulatory proposals to counter it difficult. This ignorance is coupled with a government aversion to share useful information with the private sector.

North Korea conducts illicit ship-to-ship transfers of energy resources in violation of United Nations sanctions. The transfers include the import of refined petroleum products, which serves as essential inputs for North Korea’s domestic economy. North Korea also exports coal, including to United Nations Security Council members China and Russia, in violation of the sanctions. An international network of shipbrokers, trading companies, and maritime operators aids North Korea in these efforts. Much of this activity takes place in international waters, making it difficult for the United States and its partners to shut down completely such activity.

North Korean laborers have long operated worldwide, in violation of United Nations Security Council Resolutions enacted in 2017 to curtail such activities. At the peak of North Korean laborers working abroad, 100,000 workers generated about $2 billion a year for the regime. The majority of workers had been concentrated in Russia and China, which the United States has frequently accused of lax enforcement. A deadline for repatriating all North Korean laborers came and went in December 2019, with reports suggesting that these workers continued to be employed in these countries. Future United Nations Panel of Experts reports will likely highlight continuing violations of the rules against employing North Korean overseas laborers.

All told, these strategies potentially deliver hundreds of millions to billions of dollars to North Korea. (United Nations estimates of cyberactivity alone state the total proceeds could be “up to 2 billion,” although the methods North Korea uses makes it difficult for analysts to say with certainty that North Korea’s hackers have been able to move all of that money back to Pyongyang). Through organized and persistent sanctions evasion, this rogue nation has shown the world that it is possible to sustain and continue to develop its nuclear weapons capability in the midst of severe economic constraints. Indeed, the broad nature of the sanctions regime is moving Pyongyang to successfully invest significantly more resources to improve and diversify its revenue generating and financial movement strategies. North Korea is gaining major ground in its use of cyber technologies to finance and conduct illicit operations because the international community is so weak at developing countermeasures in the cyber sector.

As for the tradecraft North Korea uses to stay miles ahead of global banks, companies, and regulators, the regime relies on technological tools of the trade as well as networks of trusted agents that constantly update aliases, shell companies, and front men. The Office of Foreign Assets Control (OFAC), the agency that leads sanctions implementation and enforcement for the U.S. government, works hard to keep up. It regularly discloses new aliases for North Korean proliferation agents, as well as new individuals engaged in this activity. The Financial Crimes Enforcement Network (FinCEN), the Financial Intelligence Unit of the United States, has also distributed advisories on North Korean typologies for illicit fundraising. But it is impossible for federal offices to collect, declassify, and publicly disclose the full array of North Korean sanctions evaders and proliferation fundraisers. Also, by the time that the U.S. government names them in formal sanctions actions, the North Korean agents have changed aliases, locations, and front companies.

Nevertheless, this information disclosure is important, not least because it makes painfully clear that North Korea never paused aggressively fundraising for its nuclear and missile programs when Chairman Kim and President Trump met in Singapore in June 2018. Though they may have committed to a diplomatic process, which included pledges to temporary freezes in bomb and missile testing, North Korea’s track record over the last few years demonstrates that it never intended to halt its race for a bigger and more lethal nuclear arsenal. A significant problem in the current environment is the inadequate international control regime to spot and stop North Korea’s money trail, particularly its blind spot on North Korea’s malicious, highly active, and unfortunately very successful cyber and information technology activities.

Given all of these challenges, is it even possible to halt the financing of proliferation by this dangerous nuclear state?

As a theoretical legal and regulatory matter, the answer is yes. However, such an effort would require two exceedingly difficult-to-achieve goals for every country. It must be every country because universal enforcement is essential to avoid circumvention and dodging by North Korea. The requirements are:

real, high-level political will, and

greater technical capacity to implement and enforce U.N. sanctions and other financial controls on North Korea and North Korean-linked entities.

The international community cannot allow the daunting challenge of making true progress to impede North Korea’s illicit money trail be an excuse for inaction. A small cadre of innovative thinkers from the financial industry and law enforcement community are figuring out targeted strategies for better catching North Korean financing of proliferation, notwithstanding today’s deficit of political will and technical capacity. Scaled up, these strategies could have an outsized impact in catching North Korean criminals and proliferators. Moreover, a handful of well-placed policy shifts in leading economies, starting in Washington, D.C., can also have a big effect.

What’s the Plan?

We know that the challenges are large. So, what’s the plan?

First, the international community must more accurately diagnose the problem. How is North Korea raising and moving money right now? Some bank compliance officials describe the effort to answer this question as looking for a needle in a stack of needles. Essentially, they suggest that scanning hundreds of millions of financial transaction records and pieces of client data against sanctions blacklists, and the known aliases for the blacklisted North Koreans, is a fool’s errand.

But other compliance officials in banking, global shipping, manufacturing, and insurance think the way to spot North Korean footprints lies in getting away from list-checking. They are pioneering approaches to create big lakes of data and sophisticated algorithmic methods, improved by machine learning and overseen by expert humans, to hunt down, and ultimately spot in real time, North Korean patterns of activity. Policymakers can augment these with declassified intelligence and produce shareable reports to inform other governments and companies also tracking proliferation finance. Analysts describe these efforts as exercises in behavioral analytics, trained on tracking North Korean financial footprints. And this work can create a feedback loop for national governments and the private sector to respond to the threats.

A few pathbreaking global firms are putting into practice these behavioral analytic models for tracking North Korean proliferation. They run into significant problems coping with data privacy rules that make it difficult to share data across borders and between institutions. Also, they cope with the skepticism of financial regulators and supervisors who are slow to get comfortable with these new analytics and require a lengthy process to validate computer models. This slow and skeptical approach can be a drag on innovation and creative strategies to catch North Korean proliferators.

Regulators are right to be cautious and to demand that companies to rigorously protect themselves and their customers from North Korean abuse. No global company should let up on sanctions pressure on North Korea for as long as the rogue regime presents a proliferation and regional destabilizing threat. But tough regulation and compliance should be compatible with innovative approaches to catching and halting North Korean proliferators.

Along with better understanding the problem, a second element to undercut North Korean financing of proliferation is for policymakers to embrace innovative approaches to tracking illicit finance as a top and public priority. Only through an evident sense of urgency can policymakers make it a top priority for companies. Companies will take their cue from clear, unambiguous law and regulation. Furthermore, if done right, policymakers will create the space for safe information sharing and a culture of collaboration to identify and halt the money trail for the nuclear threats emanating from North Korea. Dialing up the ingenuity through new policy approaches for identifying and sharing information on financing of proliferation is essential to stop North Korea’s money trail. In fact, it might be the only real path for progress when the diplomatic process between the United States and North Korea has stalled out and against the backdrop of Kim’s threats of renewed provocations.

#### Continued North Korean missile development will result in attempts at forced reunification

Klingner 10/20 – Senior Research Fellow for Northeast Asia, Heritage

Bruce Klingner, served 20 years with the Central Intelligence Agency and the Defense Intelligence Agency, including as CIA’s deputy division chief for Korea, is a distinguished graduate of the National War College, where he received a master’s degree in national security strategy. He also holds a master’s degree in strategic intelligence from the Defense Intelligence College and a bachelor’s degree in political science from Middlebury College in Vermont, North Korea’s Nuclear Strategy and Forces: Trusted Shield and Treasured Sword, Ch. 13 in *Guide to Nuclear Deterrence in the Age of Great-Power Competition* (Adam Lowther, ed.), October 2020, https://atloa.org/wp-content/uploads/2020/12/Guide-to-Nuclear-Deterrence-in-the-Age-of-Great-Power-Competition-Lowther.pdf

North Korean Nuclear and Missile Capabilities

Pyongyang’s evolving nuclear and missile forces increasingly provide the regime with the ability to conduct a surprise preemptive first-strike, retaliatory second-strike, and battlefield counter-force attacks. Pyongyang has:

• Produced 30–60 warheads,11 can create fissile material for 7–12 warheads per year,12 and successfully tested a hydrogen (thermonuclear) weapon at least 10 times as powerful as the Hiroshima and Nagasaki bombs;

• Expanded and refined manufacturing facilities for fissile material, nuclear weapons, missiles, mobile missile launchers, and reentry vehicles;13

• Created a new generation of more advanced, accurate, and survivable missiles for all ranges that escalates the nuclear threat against South Korea, Japan, US bases in Okinawa and Guam, and the continental United States;

• Developed mobile land-based and sea-based missile systems that are harder to detect and target;

• Produced several different solid-fueled missiles that reduce the time necessary for launch, thereby constraining warning time for the US and its allies; and

• Practiced missile launches under wartime conditions by firing multiple missiles from numerous locations throughout the country, simulated nuclear airburst attacks over South Korea and Japan, and conducted salvo launches of several missiles simultaneously.

Pyongyang has an extensive and diversified missile force to attack targets in South Korea, Japan, US bases in the Pacific, and the continental United States.

South Korean Ports and Airfields

To prevent the US from augmenting forces in South Korea during a conflict, North Korea would use nuclear weapons on South Korean ports and airfields. In 2016, Kim Jong-un oversaw several successful surface-to-surface (SCUD) and Hwasong-7 (No Dong) mobile missile launching exercises that simulated preemptive nuclear airburst strikes against South Korean ports and airfields to be used by the US military.14

South Korean Leadership and Military Targets

Pyongyang vowed to initiate a preemptive nuclear attack against the South Korean leadership, including the presidential Blue House, if the regime perceived even a “slight sign” of US or South Korean preparations for a decapitation strike on the North Korean leadership.15 North Korea warned that it could turn South Korea into a “sea of flames” with its long-range artillery force and “reduce all bases and strongholds of the US and South Korean warmongers…into ashes.”16 The regime has deployed SCUD missiles, Pukguksong-2 (KN-15), and Hwasong-7 (No Dong) medium-range missiles. North Korea achieved breakthrough successes with several short-range missile systems in development that emphasized survivability, accuracy, and ability to defeat allied missile defenses.

Defeating Ballistic Missile Defenses (BMD)

North Korea is developing several systems and tactics that would be more effective in degrading or defeating allied missile defenses. Pyongyang has launched missiles to a higher altitude and shorter range which could allow a warhead to arrive at a steeper angle of attack and faster speed which could exceed BMD interception capabilities. The KN-18 and KN-21 SCUD variants have maneuverable reentry vehicles and the KN-23 has a flight profile that showed evasive characteristics instead of a typical ballistic parabola. The KN-23 was flown at depressed trajectories, potentially between the upper reach of Patriot missiles and below the minimum intercept altitude for Terminal High Altitude Area Defense (THAAD), with a final pull-up maneuver that provides a steep terminal descent.17 The KN-23 could also be used in a first strike against leadership, hardened command and control, or high-value military targets. North Korea demonstrated the ability to fire several missiles at once which could enable salvo attacks by less accurate SCUD missiles to overwhelm BMD systems.18

SLBM Threat

North Korea has successfully tested the Pukguksong-1 (KN-11) and Pukguksong-3 (KN-26) submarine-launched ballistic missiles (SLBM) which could target South Korea and Japan, potentially with a nuclear warhead. South Korea does not currently have defenses against SLBMs. The THAAD BMD system radar is limited to a 120-degree view that is directed toward North Korea, precluding it from protecting against SLBMs arriving from either the East or West Seas.19 The SM-2 missile currently deployed on South Korean destroyers only provides protection against anti-ship missiles.

Establishing North Korean Area Denial

Pyongyang could use theater nuclear strikes against US bases in Japan and Guam to prevent the flow of forces and logistics to the peninsula that are planned in the time phased force deployment data (TPFDD) plan. Pyongyang has repeatedly threatened US bases throughout the Pacific, often citing Guam.20 The regime has developed the Hwasong-10 (Musudan) and Hwasong-12 (KN-17) intermediate-range missiles to hit US bases on Okinawa and Guam.

Threatening the US Mainland

Pyongyang has threatened to “reduce the US mainland to ashes and darkness.”21 Kim was photographed in front of a map labelled “US Mainland Strike Plan,” with missile trajectories aimed at Washington, DC, Indo-Pacific Command in Hawaii, San Diego (a principal homeport of the Pacific Fleet), and Air Force Global Strike Command at Barksdale Air Force Base in Louisiana.22

In 2017, North Korea conducted three successful tests of

the Hwasong-14 (KN-20) and Hwasong-15 (KN-22) ICBMs to replace the earlier, less capable KN-08 and KN-14 ICBMs. General Terrence O’Shaughnessy, commander of North American Aerospace Defense Command (NORAD), testified that North Korea demonstrated the capability to threaten the US homeland with thermonuclear-armed ICBMs capable of ranging most, or all, of North America.23 US Forces Korea assessed that the Hwasong-15 ICBM has a range of 8,000 miles and is capable of reaching anywhere on the US mainland.24

New War Plan

After assuming power, Kim Jong-un directed the North Korean military to develop a new strategy to invade and occupy Seoul within three days and all of South Korea within seven days. North Korea had studied US operations in Afghanistan and Iraq and concluded it must prevail quickly before US reinforcements arrived. This would necessitate early use of nuclear weapons.25

The Korean People’s Army General Staff declared that

“the first combined task units stationed in the eastern, central, and western sectors of the front will [carry] out the preemptive retaliatory strike at the enemy groups with ‘an ultra-precision blitzkrieg strike of the Korean style.’ ”26 North Korea has warned that “any military conflict on the Korean Peninsula is bound to lead to an all-out [nuclear] war, an ultra-harsh war of reaction targeting the entire US mainland.”27

Future Capabilities Open Dangerous Doors

North Korea’s continually advancing proficiencies suggest additional and more worrisome evolutions in its nuclear doctrine. Pyongyang may be on the path to developing capabilities that go beyond deterrence to a viable offensive warfighting strategy.

In a few years, North Korea could have 100–200 nuclear warheads, dozens of mobile ICBMs, and hundreds of improved, survivable short-, medium-, and intermediaterange missiles, as well as submarine-launched missiles. North Korea possessing a more formidable military threat would put allied forces at greater risk, augment the danger to the continental United States, and degrade military responses to North Korean actions.

Greater nuclear capabilities could undermine the effectiveness of existing war plans. For example, rather than fully implementing all phases of OPLAN 5015 after a North Korean attack, the allies may strive only for returning to the status quo ante rather than fully liberating North Korea. North Korea’s ability to target American cities with thermonuclear weapons could inhibit US responses or exacerbate growing allied concerns about the viability of the US extended deterrence guarantee. South Korea and Japan have already questioned US willingness to risk its cities for theirs.

The defense of the continental US is currently provided by 44 ground-based interceptors in Alaska and California. Several interceptors would likely be fired at each incoming North Korean missile since the current North Korean ICBM arsenal is small. However, continued North Korean ICBM production could overwhelm US missile defenses.

A more survivable North Korea nuclear force could create first-strike uncertainty for the United States of not being able to get all of Pyongyang’s North Korea’s nuclear weapons. Coupled with the risk of numerous American cities attacked by hydrogen bombs, Washington might be perceived as being hesitant to respond to North Korean actions. As the fictional nuclear strategist Dr. Strangelove opined, “Deterrence is the art of producing in the mind of the enemy, the fear to attack.”

If North Korea believes the US is unwilling to risk catastrophic civilian losses, the regime could feel emboldened to act more belligerently in pursuing its strategic objectives. A former North Korean official testified before Congress in 1997 that “Kim Jong-il believes that if North Korea creates more than 20,000 American casualties in the region, the US will roll back and that North Korea will win the war.”28

Pyongyang may even conclude that nuclear weapons provide the ability to fulfill its oft-stated goal of reunifying the Korean Peninsula on regime terms. Kim Jong-un declared that North Korea “should not allow the national split to persist any longer but reunify the country in our generation without fail.”29 The regime has repeatedly pledged to achieve the “final victory in a great war for national reunification.”30

Deterrence and Diplomacy:

Two Sides of the Same Coin

The arms control community argues that deterrence maintains the nuclear problem but does not solve it. They suggest that there is a need for the US to engage with North Korea to reach a diplomatic resolution to the long-standing nuclear problem.

The international community, including the United States, has repeatedly attempted to do so, having concluded eight denuclearization agreements with North Korea. All failed due to Pyongyang’s cheating or leaving obligations unfulfilled. During these and subsequent negotiations, Washington offered economic benefits, developmental assistance, humanitarian assistance, diplomatic recognition, declarations of non-hostility, turning a blind eye to violations, not enforcing US laws, and reducing allied defenses. Despite these concessions, North Korea still has an insatiable list of security, diplomatic, and economic demands. These include the conclusion of allied military exercises, withdrawal of all US troops from South Korea, abrogation of the US–South Korea defense treaty, ending the US extended deterrence guaranty, signing a peace treaty to end the Korean War, a security guarantee, non-criticism of the regime, and removal of all US and United Nations (UN) sanctions.

Currently, North Korea rejects all working-level diplomats as well as summit meetings with the United States. It is impossible to negotiate with a nation that will not pick up the phone. Until Pyongyang is willing to comply with 11 UN resolutions that require it to abandon its nuclear and missile programs, the US must maintain a comprehensive strategy of diplomacy, upholding UN resolutions, US law, and deterrence. Washington and its allies must keep their eyes open, their shields up, and their swords sharp.

Airmen must remain ever vigilant to maintain the decades long deterrence that has kept the peace on the Korean Peninsula. As George Orwell reportedly opined, “People sleep peacefully in their beds at night only because rough men stand ready to do violence on their behalf.”

#### Causes global draw-in and goes nuclear— even if the U.S. doesn’t respond

Maxwell 20 – Associate Director of the Center for Security Studies and the Security Studies Program in the School of Foreign Service at Georgetown University

David S. Maxwell, “The ROK-US Alliance: One American’s Perspective Now and for the Future,” Pathways to Peace: Achieving the Stable Transformation of the Korean Peninsula, The Hudson Institute, April 2020, <https://www.hudson.org/research/15845-pathways-to-peace-achieving-the-stable-transformation-of-the-korean-peninsula>, pp. 62-63

The Value of the Alliance to the ROK and United States

It is imperative to understand the long-standing North Korean strategy. As a revolutionary nation, as described in its constitution, North Korea seeks to complete the revolution by ridding the peninsula of foreign military forces and unifying it under the domination of the “guerrilla dynasty and gulag state.” which is used to describe the idea the regime rests on the myth of anti-Japanese partisan warfare and incarcerates some 120,000 political prisoners in multiple prison camps or gulags. 210 In the calculus of the Kim family regime, unification on its terms is the only way to ensure its survival. The regime’s strategy is built on subverting the ROK to create political instability, using coercion and blackmail diplomacy to gain political and economic concessions, and, when conditions are right, using force to execute a campaign plan to occupy the entire Korean Peninsula.

To successfully execute its strategy and accomplish its goals, the North requires is a split in the ROK-US alliance. Specifically, it needs to drive US forces off the Korean Peninsula and end extended deterrence and the nuclear umbrella over the ROK and Japan. The regime has been pursuing this strategy for seven decades, and there is no evidence that it has abandoned it. Coincidently, this is also how it views the end of the US “hostile policy.” As long as there is a ROK-US alliance, the regime believes, the United States poses a threat.211

Due to this strategy, the ROK faces an existential threat from North Korea. The North Korean People’s Army (NKPA) has an active force of some 1.2 million personnel, 70 percent of whom are deployed between the Demilitarized Zone (DMZ) and Pyongyang. These forces are postured for offensive operations. The NPKA annual winter training cycle runs from December through March, with forces conducting echeloned training designed to achieve the highest state of readiness by its conclusion. March is the optimal attack time because the ground is still frozen, and the rice fields in the South would not obstruct a mechanized armored attack. The NKPA possesses not only nuclear weapons, but also chemical and biological weapons of mass destruction (WMD). In a war, North Korea would likely use all of its weapons, including these oft-ignored WMD.212 Therefore, the ROK depends on the alliance for combined defensive capabilities for its survival.

The United States has a vital national interest to deter war on the Korean Peninsula. If hostilities resume, Korea’s geostrategic location ensures that the economic effects would not be confined to the peninsula. China and Japan are the second- and third-largest economies in the world, respectively, and the ROK is around the eleventh. A war involving these powers will have a direct impact on the US homeland. Furthermore, conflict is likely to escalate because of the proximity of two nuclear powers, China and Russia, and one of the highest concentrations of military forces anywhere in the world. The size and proximity of the forces, from North Korea, South Korea, China, Russia, and Japan, will likely cause miscalculations and responses with significant global repercussions. Even if the United States chooses not to support its Korean and Japanese allies, it might not be able to avoid conflict, and it certainly will not avoid the economic effects of war in Northeast Asia.

Therefore, deterrence is a vital interest. The question is what deters North Korea from attack. In 1997, Hwang Jong Yop, North Korea’s highest-ranking defector and the father of its juche ideology, told interrogators from the South and the United States that it is the presence of US forces that deters the Kim family regime. Kim Jong-il and his father Kim Il-sung before him knew the NKPA could not win a war against the South if the United States fought on its ally’s side. Kim Jong-un likely knows this as well. In addition, Hwang said that Kim Jong-il believed the United States would use nuclear weapons if North Korea attacked the South.213 This helps explain why the regime has been pursuing nuclear weapons since the 1950s. It is also an indication that US declaratory policy works. On the other hand, the regime believes that if it possesses nuclear weapons, the United States will be deterred from using its nuclear weapons because a nuclear power will not attack another nuclear-armed country.

#### The aff solves – it enables tailored remedies that promote competition but maintain efficiency

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)

More Creative Alternatives

Frequently, neither simple injunctions nor simple breakups will be good solutions for platform monopoly. Injunctions may be inadequate to restore competition, and breakups may impair efficient operation and harm consumers in the process.

The case for a breakup is strongest when noncompetitive performance or conduct seems to be inherent in a firm’s current structure. Even then, however, there is no guarantee that the firm, once dismantled, will perform any better than before. For example, how do we break up Facebook without harming the constituencies that it serves?

The approaches discussed briefly in this Section do not require the breakup of assets or the spinoff of divisions or subsidiaries other than some that have been acquired by merger. Rather, they alter the nature of ownership, managerial decision making, contracts, intellectual-property licenses, or information management. Instead of attempting to force greater competition between a dominant platform and its rivals, we might do better to leave the firm intact but encourage more competition within it. Alternatively, we might increase interoperability by requiring more extensive sharing of information or other inputs. While the current antitrust statutes grant the courts equitable power sufficient to accomplish these remedies,299 the proposals are novel and could provoke resistance.

These remedies can be applied to entities other than structural monopolies, and for offenses under both section 1 and section 2 of the Sherman Act. While less intrusive than asset breakups, however, they can be more intrusive than simple conduct injunctions. As a result, they should be limited to situations where prohibitory injunctions alone are unlikely to be adequate. Occasional uses of unlawful exclusive dealing, most-favored-nation agreements,300 or other anticompetitive contract practices deserve an injunction, but ordinarily would not merit a breakup of the entire firm or fundamental alteration of its management structure.

The traditional way that antitrust law applies structural relief is to break up firms’ various physical assets, through such devices as forcing selloffs (divestiture) of plants, products, or subsidiaries.301 To the extent these breakups interfere with a firm’s production and distribution, they can produce harmful results such as increased costs or loss of coordination. This is particularly true of integrated production units, such as single digital platforms. The D.C. Circuit noted this concern in Microsoft when it refused the government’s request for a breakup.302

a. Enabling Competition Within the Platform

One alternative to divestiture is to leave a platform’s physical assets and range of participants intact but change the structure of ownership or management so as to make it more competitive internally. A platform or other organization can itself be a “market” within which competition can occur. In that case, antitrust law can be applied to its internal decisions, improving competition without limiting the extent of scale economies or beneficial network effects.

Ordinarily, agreements among subsidiaries or other agents within a firm are counted as unilateral and so are attributed to the firm itself.303 That rule is a direct consequence of the separation of ownership and control. The all-important premise, however, is that the firm’s central management is the only relevant economic decisionmaker. When that is not the case, even agreements among the various constituents within the firm can be treated as cartels.

There is plenty of precedent on this issue. The history of antitrust law is replete with examples of incorporated firms that are owned or managed by distinct and often competing entities. The courts have treated these firms as cartels or joint ventures, even for practices that, from a corporate law perspective, appeared to be those of a single firm. If properly managed, the result can be to force entities within the same incorporated organization to behave competitively vis-à-vis one another.

Firms whose ownership is reorganized in this fashion can still be very large and retain most of the attributes of large firms. On the one hand, this will satisfy those concerned that the breakup of large firms can result in the loss of economies of scale or scope, or of other synergies that generally lead to high output and lower prices. On the other hand, it will not satisfy those who believe that “big is bad” for its own sake.304

Joint management of unified productive assets has a storied history that goes back to the Middle Ages. Farmers, ranchers, and fishermen produced cattle, sheep, and fish on various “commons,” or facilities that were shared among a large number of owners and subjected to management rules.305 Many of these operated on a mixed model that involved individual production for stationary products such as crops, but a commons for grazing cattle or other livestock. For mobile products such as cattle or fish, the costs of shared management were lower than the costs of creating or maintaining boundaries. That was not the case for radishes or wheat. So rather than cutting a large pasture or bay into 100 fenced-off plots, participating property owners operated it as a single economic unit, substituting management costs for fencing costs. Just as for any firm, size and shape are determined by comparing the costs and payoffs of alternative forms of organization.306

So while a commons can be a very large firm, it can be operated by a collaboration of competing entities rather than a single one. Output reductions and price setting by a single firm are almost always out of reach of the federal antitrust laws. On the other hand, if a market is operated by a joint venture of

active business participants, their pricing is subject to the laws against collusion. Their exclusions also operate under the more aggressive standards that antitrust applies to concerted, as opposed to unilateral, refusals to deal.307 The fact that this joint venture is a corporation organized under state law, as many ventures are, does not make any difference. It is still a collaboration as far as antitrust law is concerned.

The theory of the firm precludes claims of an antitrust conspiracy between a corporation and its various subsidiaries, officers, shareholders, or employees. This preclusion is an essential corollary to the proposition that a corporation is a single entity for most legal purposes and not simply a cartel of its shareholders or other constituent parts. This is how corporate law preserves the boundary between firms and markets.308

But important exceptions exist. While a corporation is a single entity for most antitrust purposes, if it is operated by its shareholders for the benefit of their own separate businesses, its conduct is reachable under section 1 of the Sherman Act. A cartel is still a cartel even if it organizes itself into a corporation.

The classic antitrust example of such a collaborative structure is in the 1918 Chicago Board of Trade case, which first articulated the modern rule of reason for antitrust cases.309 As Justice Holmes had described the Board thirteen years previously, 310 it was an Illinois state-chartered corporation whose 1600 members were themselves traders for their own individual accounts, and with individual exclusive rights to do business on the Board’s trading floor.311 The “call rule,” which prevented collaborative price making among the members except during exchange hours, could not have been challenged under the antitrust laws as unilateral conduct. A single firm may set any nonpredatory price it wishes. Further, all of the relevant participants were inside the firm. Nevertheless, they were regarded as independent actors for the purpose of trading among themselves.

Thus the United States challenged the call rule as price fixing among competitors. 312 Not only is the substantive law against such collaborative activity more aggressive than that against unilateral actions, but the remedial problems are less formidable. If a firm acting unilaterally should set an unlawful price, the court must order it to charge a different price, placing it in the awkward position of a utility regulator. By contrast, price fixing by multiple independent actors operating in concert is remedied by a simple order against price fixing, requiring each participant to set its price individually without dictating what the price must be. The Supreme Court ultimately found the Chicago Board’s call rule to be lawful. If it had not, however, the remedy would have been an injunction against enforcement of the rule, leaving the members free to set their own prices. In fact, the United States’ requested relief was precisely that.313

The same thing applies to refusals to deal. If a firm is acting unilaterally, its refusal to deal is governed by a strict standard under which liability is unlikely, particularly if there has not been an established history of dealing.314 Further, in many circumstances a court can enforce a dealing order only by setting the price and other terms. By contrast, if the entity that refuses to deal is operated by a group of active business participants, its collective refusal to deal is governed by section 1 of the Sherman Act. A court usually need do no more than issue an injunction against the agreement not to deal. This is true even if the actors have incorporated themselves into a single business entity, as in the Associated Press case, which involved a New York corporation whose members were 1200 newspapers. 315 The government charged the Association with “combining cooperatively” to prohibit news sales to nonmembers or making it more difficult for a newspaper to enter competition with an existing newspaper.316 The Court upheld an injunction against the restrictive rules under the Sherman Act.317

The modern business world provides many analogies to this structural situation. For example, each of the NCAA’s 1200 member schools operates as a single entity in the management of education, student housing and discipline, and financing of its own operations, including athletic departments. By contrast, the rules for recruiting and maintaining athletic teams, their compensation, as well as the scheduling, operation, and playing rules of games, are controlled through rulemaking by the collective group.318 While the schools compete with one another in recruiting athletes and coaches, in obtaining both live and television audiences, and in the licensing of intellectual property, all of these things fall within NCAA rulemaking and are reachable by antitrust law. Specifically, decisions to restrict the number of televised games;319 to limit the compensation of coaches320 or players;321 or to limit licensing of students’ names, images, and likenesses322 all fall within section 1 of the Sherman Act. When a violation is found, the antitrust remedy is an injunction permitting each team to determine its choices individually.

The same analysis drove the American Needle litigation, a refusal-to-deal case that involved the National Football League (NFL).323 The NFL is an unincorporated association controlled by thirty-two individual football teams, each of which is separately owned. NFL Properties (NFLP) is a separate, incorporated LLC in New York, controlled by the NFL. The individual teams are members, and they also collectively control the licensing of the teams’ substantial and individually owned intellectual-property rights. In this case, the team members voted to authorize NFLP to grant an exclusive license to Reebok to sell NFLlogoed headwear (i.e., helmets and caps) for all thirty-two teams.324 The plaintiff, American Needle, was a competing manufacturer that the agreement excluded.325

The issue for the Supreme Court was whether NFLP’s grant of an exclusive license should be addressed as a “unilateral” act of NFLP or as a concerted act by the thirty-two teams acting together, and the Court unanimously decided the latter.326 As a matter of corporate law, the refusal to deal appeared to be unilateral. NFLP, the licensing party, was an incorporated single entity. The lower court had relied on earlier Seventh Circuit decisions holding that professional sports leagues should be treated as single entities under these circumstances.327

The Supreme Court’s decision to the contrary was consistent with its earlier cases Sealy328 and Topco.329 In both of those cases, the Court held that even if an entity is incorporated, it can be addressed as a collaboration of its competing and actively participating shareholders. In Sealy, each member was a shareholder, and collectively the members owned all of Sealy’s stock.330 In Topco, each of the twenty-five members owned an equal share of the common stock, which had voting rights. They also owned all of the preferred stock, which was nonvoting, in proportion to their sales.331

Agreements among the active members or shareholders on incorporated real-estate boards are treated in the same way. Acting as a single entity, the board organizes the listing of properties for sale, formulates listing rules, promulgates standardized listing forms and sales agreements, and controls much of the conduct of individual brokers. Acting individually, the shareholder-brokers show properties to clients and obtain commissions from sales. Each real-estate office acts as not only a shareholder or partner in the overall organization, but also a competitor for individual real-estate sales.

Without discussing single-entity status, in 1950 the Supreme Court held that price fixing among real-estate agents who were members of an incorporated board was an unlawful conspiracy.332 A leading subsequent decision involved Realty Multi-List, a Georgia corporation organized and owned by individual real-estate brokers.333 Under the corporation’s arrangement, one shareholder member could show properties listed by a different shareholder member.334 The Fifth Circuit concluded that both the agreements among the members fixing commission rates and setting exclusionary and disciplinary rules for brokers who deviated from these rates were unlawful under section 1 of the Sherman Act.335

In the 2000s, the government and private plaintiffs sued several multiplelisting services, challenging their decisions to exclude real-estate sellers.336 The Fourth Circuit eventually applied American Needle, rejecting the contention that concerted action was lacking because the parties making the decision were acting as “agents of a single corporation.”337 Several other decisions have arrived at similar results reaching both price fixing and concerted exclusion.338

Hospital-staff-privileges boards also provide an analogy. Hospitals regularly use such boards to decide which physicians can be authorized to practice at the hospital. If physician-board members with independent practices deny staff privileges to someone, they may be treated as a conspiracy rather than a single actor.339

Even an incorporated natural monopoly can be subject to section 1 of the Sherman Act if it is controlled by its shareholders for their separate business interests. That issue arose in the 1912 Terminal Railroad decision.340 The railroadbridge infrastructure across the Mississippi was very likely a natural monopoly, given it operated as a bottleneck through which all traffic across the river had to pass.341 However, the facility was incorporated, and its shareholders were a group of thirty-eight firms and natural persons organized by railroad financier Jay Gould.342 The venture constituted a single corporation under Missouri law, but it was actively managed by its shareholder participants, all of whom had separate businesses. They were mainly individual railroads, a ferry company, bridges, a “system of terminals,” and several individuals.343 The venture thus controlled an extensive collection of railroad transportation, transfer, and storage facilities at a point at which all east-west traffic in that part of the country had to cross the Mississippi River.344

The Court’s order is both interesting and pertinent to platforms. It rejected the government’s request for dissolution. It noted that dissolving the corporation would do nothing to eliminate the bottleneck.345 Rather, it ordered the district court to fashion a “plan of reorganization” that permitted all shippers, whether or not they were members of the organization, to have access on fair and reasonable terms, with the goal of “plac[ing] every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.”346 Dissolution would be mandated only if the parties failed to agree on these terms.347

The *Terminal Railroad* decree suggests a way to remedy anticompetitive behavior by large digital platforms representing several sellers without sacrificing operational efficiencies. Rather than requiring divestiture of productive assets, which almost always leads to higher prices, we could restructure ownership and management. A large firm such as Amazon can attain economies of scale and scope that rivals cannot match. Further, Amazon benefits consumers, most suppliers, and labor, by selling its own house brands and the brands of third-party merchants on the same website. This is how a seller of house brands can break down the power of large name-brand sellers.348

The problem is not that Amazon sells too much, but rather that Amazon’s ownership and management make it profitable for Amazon to discriminate in favor of its own products and against those of third-party sellers, or to enter other anticompetitive agreements with independent sellers. Breaking up Amazon or forcing a physical separation of own-product and third-party sales would mean giving up a great deal of brand rivalry that benefits consumers.

Suppose a court required Amazon to turn important commercial decisions over to a board of active Amazon participants who made their own sales on the platform, purchased from Amazon, or dealt with it for ancillary services. Acting collaboratively, they could control product selection, distribution and customer agreements, advertising, internal product development, and pricing of Amazon’s own products. Their decisions would be subject to antitrust scrutiny under section 1 of the Sherman Act.

Such an approach could be particularly useful in situations involving refusals to deal. To illustrate, an important focus of the EU’s November 2020 Statement of Objections Against Amazon is on claims that Amazon “artificially favour[s] its own retail offers” in product areas where it sells both its own and third-party merchandise.349 Under current United States antitrust law, a firm acting unilaterally would not be prevented from discriminating between its own and thirdparty sales. That was the very issue in Trinko—namely, that monopolist Verizon discriminated against third-party carriers and favored its own.350

If decision making in this area were entrusted to a board of active sellers, including both Amazon itself and third parties, the section 1 standard would reach the conduct. Justice Scalia’s Trinko opinion, citing Terminal Railroad, observed that the Supreme Court had imposed nondiscrimination obligations under similar circumstances, but only when the government was attacking concerted rather than unilateral conduct.351 Further, when such conduct is concerted, it is “amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.”352 The number and diversity of participants could vary, but they should be sufficiently numerous and diverse to make anticompetitive collusion unlikely. That could include individual merchants who sell on Amazon, principal shareholders, and perhaps customers and others. The Board should be subject to rules setting objective standards for product selection.

Numerosity should not interfere with effective operation. The Chicago Board of Trade had 1800 trading members and decisionmakers in 1918, when organizational rules and procedures were still being managed with pencil and paper.353 The NCAA has more than 1200 member schools,354 and the Associated Press had more than 1200 member newspapers in 1945.355 The Terminal Railroad Association had 38 shareholder members, but the decree contemplated nondiscriminatory sharing with any non-shareholder who wished to participate. 356 One large real-estate board, the Chicago Association of Realtors, has

over 15,500 members.357

The designated decisionmakers need not be Amazon shareholders, as long as they have independent business interests and operate on Amazon. In fact, the details of state corporate law or organization would not ordinarily affect the federal antitrust issue. For example, in some of these cases—such as Terminal Railroad, 358 Sealy,359 and Topco360—the relevant decisionmakers owned shares in the corporation. In American Needle, the organization in question was NFL Properties, an LLC,361 which does not have shareholders but rather owner-members similar to a partnership. Similarly, in Associated Press, the Court probed a cooperative association incorporated under the Membership Corporation Laws of New York.362

Whether the court applies the per se rule or the rule of reason in such cases would depend on the offense. In NCAA, the Supreme Court concluded that the rule of reason should apply to all restraints undertaken by the association because cooperation was necessary to the creation of the product: intercollegiate sports.363 That is not the case with product sales on Amazon. Rather, the traditional distinction between naked and ancillary restraints would work well. Price fixing or unjustified limitations on output would be strongly suspect.364 On the other hand, rules establishing uniform practices governing distribution and resolution of customer complaints could certainly be reasonable and thus lawful. Concerted refusals to deal can cover a range of practices from naked boycotts motivated by price (per se unlawful)365 to reasonable standard setting (rule of reason),366 and should be addressed accordingly.

Such an approach would notably not aim at size *per se*. An Amazon with competitively restructured management could be just as large as it is now. Indeed, it could be even larger. Cartels and monopolies function by restricting output, and facilitating internal competition could serve to increase it. Amazon would likely retain the efficiencies that flow from its size and scope. We would have effectively turned the internal workings of its platform into a market. It still might be in a position to undersell other businesses or to exclude products that its members and rules disapprove. If it did so in an anticompetitive manner, however, section 1 of the Sherman Act could be applied.

### 1AC – Conduct Adv

Advantage 2 is conduct

#### The full scope of *Amex* is unclear – companies will exploit it to misuse their platforms – that’s effectively impossible to police

Khan, JD, FTC Chair, former director of legal policy with the Open Markets Institute, former professor at Columbia Law, ‘18

(Lina, “The Supreme Court just quietly gutted antitrust law,” July 3, <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>)

Last Monday, a 5-4 majority on the Supreme Court upheld that approach. Not only does the decision show stunning disregard for core elements of antitrust law, it carelessly mangles long-accepted legal rules along the way to establishing its position. Perhaps most strikingly, it overrides or ignores facts established by the district court.

For example, the Supreme Court states that AmEx’s increased merchant fees reflect “increases in the value of its services,” even though the lower court expressly found that AmEx’s price hikes exceeded the value of the cardholder rewards.

In practice, the Court has shielded from effective antitrust scrutiny a huge swath of firms that provide services on more than one side of a transaction — and, in today’s digital economy, there are many (as Justice Stephen Breyer noted in a dissent he read from the bench to emphasize his concerns).

Worse yet, the Court left unclear what kinds of businesses actually qualify for this new rule. As the Open Markets Institute, for which I work, explained in an amicus brief, deciding an antitrust case using the amorphous concept of a “two-sided” market will incentivize all sorts of companies to seek protection under this bad new theory.

What kinds of companies might have more freedom to exert pressure on customers, as a result of this decision? Not newspapers, the Court said: Readers are “largely indifferent” to the number of advertisements on newspaper pages, even though advertisers are looking to reach readers. So someone suing a newspaper on antitrust grounds (say, for prohibiting advertisers from doing business with other newspapers) would not have to prove that a newspaper’s conduct harmed both readers and advertisers.

On the surface, the Court’s language suggests that the special rule would apply to Amazon’s marketplace for third-party merchants, to eBay, and to Uber — but not to Google search or Facebook. Indeed, the Justice Department’s antitrust division chief, Makan Delrahim, has also come to this conclusion about the scope of the decision. But the Court’s opinion hardly delivers a clear and workable standard for judges to go by.

One can imagine the reams of studies Google would commission to show that targeting users with advertising did indeed amount to a “transaction” with users that users highly valued — a showing that, if successful, would likely qualify it for the shield of the special rule. If so, Google might be able to impose exclusionary contracts on advertisers and significantly boost the prices it charges them. Amazon, meanwhile, can continue to squeeze the suppliers and retailers reliant on its platform with little worry about being charged with the abuse of monopsony power.

Federal judges generally lack the expertise needed to independently assess the hyper-complex economic studies that this new rule will spur. Rather than focusing on the conduct between a company and one set of its customers, the new rule requires a much more involved showing.

#### This trend is accelerating—two Circuit decisions doubled down and extended Amex to new sectors, and to mergers

Rozga, JD, Counsel, Davis Wright Tremaine LLP, former Federal Trade Commission attorney, Guest Lecturer, Boston University School of Law, ‘20

(Kaj, “Antitrust After American Express: Down a Competitive Effects Rabbit Hole,” September 21, <https://techlawdecoded.com/antitrust-after-american-express-down-the-competitive-effects-rabbit-hole/>)

These are no longer just predictions, but lived realities. Since American Express came down, parties opposing government antitrust enforcement actions have taken that decision and run with it.

Antitrust in tech markets after American Express

In the two years since the American Express decision, courts have already relied on it to toss out two more major antitrust cases brought by the government, both involving tech markets.

Sabre/Farelogix

The first of these cases involved the DOJ’s effort to block a merger. Sabre was seeking to acquire Farelogix, its competitor in offering booking services to airlines. Sabre operates a two-sided transaction platform that connects airlines to travel agencies (or travelers) for the sale of tickets and other services. Farelogix provides IT solutions to airlines that are used to sell tickets to travel agencies (or travelers).

The DOJ concluded that the deal would harm competition. It believed that Farelogix acted as a competitive constraint on Sabre to the extent that it provided an alternative for airlines that rely on such third-party services to sell tickets to travel agencies and end customers. The evidence at trial—including company documents and testimony from airlines—showed that the two viewed each other as competitors and that some airlines were able to use this to seek lower commission fees from Sabre. The court hearing the case found that “it is logical to conclude that part of Sabre’s interest in acquiring Farelogix is to mitigate the risk” resulting from the fact that its technology enables airlines to bypass Sabre’s transaction platform.4

Nevertheless, the court ruled that the DOJ failed to meet its burden of proof to “show that this purchase will harm competition on both sides of the two-sided market” for travel services provided to airlines and travel agencies. Citing the American Express decision, the court said: “As a matter of antitrust law, Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre’s platform.” Therefore, it was not enough to prove that the merger would harm competition on only the one side of the two-sided market that Farelogix is active on.

And so despite the extensive evidence of competition between the companies, the court had to conclude that, as a matter of law, “Sabre and Farelogix do not compete in a relevant market.” To succeed in blocking the merger, the DOJ would have had to “produce evidence that the anticompetitive impact of the merger on the airline side of the [transaction] platform would be so substantial that it would sufficiently reverberate throughout the [platform] to such an extent as to make the two-sided [transaction] platform market, overall, less competitive.”

Qualcomm

The second case that shows how American Express left its mark on antitrust is a monopolization (abuse of a dominant position) case brought by the Federal Trade Commission against Qualcomm. The case involved modem chips used in smart phones. Qualcomm made the chips, but it also held important patents for the technology. Rival chip makers licensed that technology from Qualcomm to produce their own competing chips.

The FTC alleged that Qualcomm had abused a dominant market position when it refused to sell its chips to smartphone manufacturers unless they also entered into a patent license (which required making a royalty payment) for any chips that they acquired from not only Qualcomm but also any of its rival chip makers. This practice, the FTC argued, imposed an anti-competitive surcharge on rivals’ chips which raised the barriers for competing with Qualcomm. This, in turn, hurt the phone manufacturers by inflating the price they paid for chips.

The court hearing the case in the first instance agreed, and ruled for the FTC. But an appeals court overturned the decision. On the main antitrust theory of the case, the appeals court reasoned that the FTC had failed to prove that Qualcomm’s “no license, no chip” policy harmed the “area of effective competition.”5 Although its evidence had shown how the policy could have increased costs for Qualcomm customers (phone makers) who buy the chips, it had not shown how the policy harmed competition by directly impacting Qualcomm competitors (rival chip makers). It pointed to the ruling in American Express that the DOJ in that case had failed to meet its burden of proof because it did not show how restrictions imposed on merchants “have anticompetitive effects that harm consumers” (italics my own).

The analogy to the Qualcomm case seems to have been that the FTC needed to connect all the dots—customers and competitors alike—in proving anticompetitive effects. Showing that the “all-in” (royalty plus sales) price charged to customers might have been inflated by Qualcomm’s licensing practices was not enough because it “falls outside the relevant antitrust markets” at issue.

Down the competitive effects rabbit hole

The *American Express*, *Sabre/Farelogix* and *Qualcomm* cases share three traits in common that show how the half-century transformation of antitrust into an Economism-driven, predictive framework is undermining enforcement, especially in tech markets.

First, the cases show how the government agencies bringing an antitrust case and the courts rendering the decisions in them must undertake a massive burden. They have to dissect the inner workings of a market and then make predictions or conjectures about actual competitive effects in the market that result from the conduct at issue. In American Express and Sabre/Farelogix, it was proving lower output and higher overall “net” (or “two-sided”) prices on multi-sided transaction platforms. In *Qualcomm*, it meant proving “an anticompetitive surcharge on rivals’ modem chip sales” by directly linking up proof of harm to customers with proof of hindering competitors.

In all three instances, the burden imposed by the courts for proving these so-called “actual anticompetitive effects” was simply too high for the government to meet. *Qualcomm* arguably went even further in raising the evidentiary bar for tech cases. The influential appeals court issuing that decision went so far as to declare that “novel business practices—especially in technology markets—should not be ‘conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use’” (italics my own). Requiring “elaborate” and “precise” proof would seem to doom all but the slam-dunk government actions against tech.

Second, the trio of cases shows how proof of actual anticompetitive effects depends heavily on economic theory and models. The Supreme Court sets the pace in American Express by relying entirely on a string of academic articles by economists—citing nothing from the fact record of the case before it—to construct its “two-sided transaction platform” market and reach the critical conclusion that “[e]valuating both sides of a two-sided transaction platform is [] necessary to accurately assess competition.”

Sabre/Farelogix picks up the baton and runs with it, relying on that theory-based legal holding in American Express to ignore an exhaustive factual record of company documents, executive testimony, and third-party complaints showing close competition between the merging companies. Qualcomm then carries the baton across the finish line when it frames the case with a skepticism of “novel” theories of competitive harm by citing blanket assertions in two academic article about how antitrust cases of technology markets skew towards over-enforcement.6 When it comes to economic theory and a predictive antitrust that requires proof of actual anticompetitive effects, the tail wags the dog.

Third, these three cases rest on a critical assumption—arguably bordering on a blind faith—that economics is up to the task of proving actual competitive effects. Baked into the courts’ reasoning is that economics can be used to understand and predict complex market environments that change in real-time in often unexpected ways. Yet, as discussed in my recent article, it has yet to be empirically proven—or seriously tested—that economics can perform the sort of analyses and predictions that would justify its having become the foundational underpinning of the enforcement of the antitrust laws. If anything, real-world experience in competition law practice combined with general research on uncertainty and decision-making suggest that expert judgments are poor predictors in complex environments like those at issue in antitrust cases.

And as they push antitrust further down an Economism-driven path, the courts provide little guidance on how plaintiffs are to meet their super-sized burden for proving actual anticompetitive effects. In American Express and Sabre/Farelogix, the government’s case is thrown out because it failed to prove an increase in the “net” or “two-sided” prices on a multi-sided transaction platform. But such a thing exists only as a figment of a court’s imagination. It does not exist in the real world. No one pays it, and no one charges it. And it’s unclear how an antitrust plaintiff is to go about the precarious exercise of weighing benefits to one side of a market against the harms to another. In American Express, for example, would it mean weighing the swipe fees charged to merchants against the rewards points earned by shoppers? In the absence of any guidance, it can safely be assumed that economic theories and models are expected to conjure such “net” prices into existence.

The trio of cases, therefore, reflects and even propels a broader trend that has eviscerated antitrust enforcement—especially in tech—by erecting high barriers for plaintiffs to prove actual anticompetitive effects using dubious economic tools.

A modern antitrust in peril

With the Sabre/Farelogix and Qualcomm cases, the American Express decision has rounded out its influence on the three main pillars of US antitrust law: mergers, monopolization, and contracts in restraint of trade.

None of the three cases sets out groundbreaking new law. Their significance lies rather in accelerating a trend, half of a century in the making, among policymakers, academics, and judges to require antitrust plaintiffs to take on an ever-increasing burden of proof in using economic tools to show how market conduct harms competition. Each such case is an individual brick in a rising wall—reaching its tallest heights in tech markets that are especially difficult to understand and predict—that plaintiffs must scale to bring a successful antitrust case.

The consequence is not just an intellectual failing about humankind’s ability to make accurate predictions in unpredictable markets. It also means lax antitrust enforcement and the mass-consolidation of economic power across the economy.

#### First, mergers – Amex undermines enforcement against nascent acquisitions

Salop, Professor of Economics & Law, Georgetown University Law Center and Senior Consultant, Charles River Associates, ‘21

(Steven, “Dominant Digital Platforms: Is Antitrust Up to the Task?” yalelawjournal.org/pdf/SalopEssay\_rnon2ejq.pdf)

This most recent agency loss involved an acquisition by a dominant digital platform. Sabre is a digital platform that permits airlines to post schedules, fares and seat availability and allows travel agents to access this information, make travel bookings and pay for them. Sabre proposed to acquire Farelogix, which provides technology to airlines. This technology allows an airline to disintermediate Sabre by allowing the airline to connect directly to travel agencies and provide travel agencies with information and ticket-booking services itself. Thus, this acquisition was analytically like a vertical merger, where Farelogix sells a critical input (i.e., its technology) to airlines, which they use to compete with Sabre for the business of travel agents. The competitive concern is that Sabre would foreclose airlines’ ability to acquire the Farelogix technology input.

Perhaps attempting to exploit the horizontal-merger structural presumption and avoid the difficulties they faced in AT&T/Time Warner, the DOJ did not litigate the case as a vertical merger. Instead, the complaint alleged that Sabre and Farelogix competed in the provision of booking services for airline tickets sold through travel agencies. This competition is indirect, resulting from Farelogix working with the individual airlines to disintermediate Sabre. However, the trial court did not miss the point. It observed that “Sabre and Farelogix view each other as competitors” and found that “the record reflects competition between Sabre’s and Farelogix’s direct connection solutions for airlines.”94

Having concluded that competition was reduced by the merger, the trial court nonetheless rejected the DOJ’s complaint on the grounds that Farelogix and Sabre do not compete in the two-sided platform market.95 While Sabre provides services to customers on both sides (i.e., to both airlines and travel agencies), Farelogix provides services to only one side (i.e., to airlines, but not to travel agencies). The travel agency services are provided by the airlines themselves, using the Farelogix technology.

This approach was both defective and unnecessary because Sabre competed with the combination of Farelogix and the airlines.96 Yet the court thought that American Express compelled the opposite result, despite its own fact-finding and the vertical nature of the transaction. If other U.S. courts similarly follow this same defective approach, the result will be underdeterrence of anticompetitive acquisitions by digital platforms.97 Indeed, this approach would lead to ludicrous results. Under this reasoning, Microsoft could have legally ended the competitive threat from Netscape and Java simply by acquiring them instead of trying to destroy them.

#### AI acquisitions have increased six-fold.

CB Insights ’19 – data analytics company [CB Insights; private company with a business analytics platform and global database that provides market intelligence on private companies and investor activities, targeted at private equity, venture capital, investment banking, angel investing, and consulting professionals by providing insights about high growth private companies; 9-17-2019; "The Race For AI: Here Are The Tech Giants Rushing To Snap Up Artificial Intelligence Startups"; CB Insights; https://www.cbinsights.com/research/top-acquirers-ai-startups-ma-timeline/; accessed 8-15-2021]

Artificial intelligence has long been a major focus for tech leaders across industries. Big corporations across every sector, from retail to agriculture, are trying to integrate machine learning into their products. At the same time, there is an acute shortage of AI talent.

This combination is fueling a heated race to scoop up top AI startups, many of which are still in the early stages of research and funding.

Below, we dig into AI acquisition trends, from which companies are the most acquisitive to what areas of focus are attracting the most attention.

TECH GIANTS LEAD IN AI ACQUISITIONS

The usual suspects are leading the race for AI: tech giants like Facebook, Amazon, Microsoft, Google, & Apple (FAMGA) have all been aggressively acquiring AI startups in the last decade.

Among the FAMGA companies, Apple leads the way, making 20 total AI acquisitions since 2010. It is followed by Google (the frontrunner from 2012 to 2016) with 14 acquisitions and Microsoft with 10.

Apple’s AI acquisition spree, which has helped it overtake Google in recent years, was essential to the development of new iPhone features. For example, FaceID, the technology that allows users to unlock their iPhone X just by looking at it, stems from Apple’s M&A moves in chips and computer vision, including the acquisition of AI company RealFace.

In fact, many of FAMGA’s prominent products and services came out of acquisitions of AI companies — such as Apple’s Siri, or Google’s contributions to healthcare through DeepMind.

That said, tech giants are far from the only companies snatching up AI startups.

Since 2010, there have been 635 AI acquisitions, as companies aim to build out their AI capabilities and capture sought-after talent (as of 8/31/2019).

The pace of these acquisitions has also been increasing. AI acquisitions saw a more than 6x uptick from 2013 to 2018, including last year’s record of 166 AI acquisitions — up 38% year-over-year.

In 2019, there have already been 140+ acquisitions (as of August), putting the year on track to beat the 2018 record at the current run rate.

#### Tech behemoths won’t take DOD contracts. Antitrust would encourage smaller firms to develop AI for the sole purpose of defense needs.

Foster and Arnold ’20 – Researchers at ***Georgetown’s*** Center for Security and Emerging Technology [Dakota; Visiting Researcher at Georgetown’s Center for Security and Emerging Technology, graduate student in the Department of War Studies at King’s College London, conducted research on terrorism and U.S. national security policy for the U.S. military, the House Foreign Affairs Committee, and the Washington Institute; Zachary; Research Fellow at Georgetown’s Center for Security and Emerging Technology, where he focuses on AI investment flows and workforce trends, J.D. from Yale Law School; 2020; "Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI"; Center for Security and Emerging Technology at Georgetown University; https://www.geopolitic.ro/wp-content/uploads/2020/05/CSET-Antitrust-and-Artificial-Intelligence.pdf; accessed 8-10-2021]

3. Are smaller vendors more likely to produce innovative products that meet the Pentagon’s needs?

Tech industry leaders have relatively little incentive to work with the Pentagon. Their companies already enjoy broad customer bases and financial independence from U.S. government contracts—including those at the Pentagon.89 DOD contracts involve applying AI technology in varied, complex, and operationally demanding environments with low tolerance for error. Similarly, industry has little motivation to take on unique DOD data management and privacy requirements, such as data compartmentalization, protection against deceptive or compromised data inputs, and strict data accountability provisions complicating algorithm training.90 Finally, some commercial AI advances will easily convert into Pentagon applications. Others will require significant, difficult adaption and productization.

Antitrust action could create smaller AI firms targeting DOD business as their “niche.” With the Pentagon as their sole customer, these firms could focus on its unique needs, tailoring broader AI innovations for the Pentagon through productization and organizational adaptation. They could follow the example of Palantir, which makes 50 percent of its revenue from government contracts,91 or Kratos (60 percent).92 In the last five years, a number of companies have emerged in this mold, including Anduril Labs (2017), Shield AI (2015), Descartes Labs (2014), and Uptake (2014). As smaller firms’ primary, high-value customer, the Pentagon can dictate their innovation objectives, ultimately yielding AI applications better suited to defense needs.

#### Military AI ushers in the erosion of conventional deterrence – developing it is necessary to prevent great power wars.

Brose ’19 – Senior Fellow at the Carnegie Endowment for International Peace [Christian; Senior Fellow at the Carnegie Endowment for International Peace; 2019; "The New Revolution in Military Affairs"; Foreign Affairs; <https://www.foreignaffairs.com/articles/2019-04-16/new-revolution-military-affairs>]

The idea of a future military revolution became discredited amid nearly two decades of war after 2001 and has been further damaged by reductions in defense spending since 2011. But along the way, the United States has also squandered hundreds of billions of dollars trying to modernize in the wrong ways. Instead of thinking systematically about buying faster, more effective kill chains that could be built now, Washington poured money into newer versions of old military platforms and prayed for technological miracles to come (which often became acquisition debacles when those miracles did not materialize). The result is that U.S. battle networks are not nearly as fast or effective as they have appeared while the United States has been fighting lesser opponents for almost three decades.

Yet if ever there were a time to get serious about the coming revolution in military affairs, it is now. There is an emerging consensus that the United States' top defense-planning priority should be contending with great powers with advanced militaries, primarily China, and that new technologies, once intriguing but speculative, are now both real and essential to future military advantage. Senior military leaders and defense experts are also starting to agree, albeit belatedly, that when it comes to these threats, the United States is falling dangerously behind.

This reality demands more than a revolution in technology; it requires a revolution in thinking. And that thinking must focus more on how the U.S. military fights than with what it fights. The problem is not insufficient spending on defense; it is that the U.S. military is being countered by rivals with superior strategies. The United States, in other words, is playing a losing game. The question, accordingly, is not how new technologies can improve the U.S. military's ability to do what it already does but how they can enable it to operate in new ways. If American defense officials do not answer that question, there will still be a revolution in military affairs. But it will primarily benefit others.

It is still possible for the United States to adapt and succeed, but the scale of change required is enormous. The traditional model of U.S. military power is being disrupted, the way Blockbuster's business model was amid the rise of Amazon and Netflix. A military made up of small numbers of large, expensive, heavily manned, and hard-to replace systems will not survive on future battlefields, where swarms of intelligent machines will deliver violence at a greater volume and higher velocity than ever before. Success will require a different kind of military, one built around large numbers of small, inexpensive, expendable, and highly autonomous systems. The United States has the money, human capital, and technology to assemble that kind of military. The question is whether it has the imagination and the resolve.

NEW TECHNOLOGIES, OLD PROBLEMS

Artificial intelligence and other emerging technologies will change the way war is fought, but they will not change its nature. Whether it involves longbows or source code, war will always be violent, politically motivated, and composed of the same three elemental functions that new recruits learn in basic training: move, shoot, and communicate.

Movement in warfare entails hiding and seeking (attackers try to evade detection; defenders try to detect them) and penetrating and repelling (attackers try to enter opponents’ space; defenders try to deny them access). But in a world that is becoming one giant sensor, hiding and penetrating—never easy in warfare—will be far more difficult, if not impossible. The amount of data generated by networked devices, the so-called Internet of Things, is on pace to triple between 2016 and 2021. More significant, the proliferation of low-cost, commercial sensors that can detect more things more clearly over greater distances is already providing more real-time global surveillance than has existed at any time in history. This is especially true in space. In the past, the high costs of launching satellites required them to be large, expensive, and designed to orbit for decades. But as access to space gets cheaper, satellites are becoming more like mobile phones—mass-produced devices that are used for a few years and then replaced. Commercial space companies are already fielding hundreds of small, cheap satellites. Soon, there will be thousands of such satellites, providing an unblinking eye over the entire world. Stealth technology is living on borrowed time.

On top of all of that, quantum sensors—which use the bizarre properties of subatomic particles, such as their ability to be in two different places at once—will eventually be able detect disruptions in the environment, such as the displacement of air around aircraft or water around submarines. Quantum sensors will likely be the first usable application of quantum science, and this technology is still many years off. But once quantum sensors are fielded, there will be nowhere to hide.

The future of movement will also be characterized by a return of mass to the battlefield, after many decades in which the trend was moving in the opposite direction—toward an emphasis on quality over quantity—as technology is enabling more systems to get in motion and stay in motion in more places. Ubiquitous sensors will generate exponentially greater quantities of data, which in turn will drive both the development and the deployment of artificial intelligence. As machines become more autonomous, militaries will be able to field more of them in smaller sizes and at lower costs. New developments in power generation and storage and in hypersonic propulsion will allow these smaller systems to travel farther and faster than ever. Where once there was one destroyer, for example, the near future could see dozens of autonomous vessels that are similar to missile barges, ready to strike as targets emerge.

Technology will also transform how those systems remain in motion. Logistics—the ability to supply forces with food, fuel, and replacements—has traditionally been the limiting factor in war. But autonomous militaries will need less fuel and no food. Advanced manufacturing methods, such as 3-D printing, will reduce the need for vast, risky, and expensive military logistics networks by enabling the production of complicated goods at the point of demand quickly, cheaply, and easily.

In an even more profound change, space will emerge as its own domain of maneuver warfare. So far, the near impossibility of refueling spacecraft has largely limited them to orbiting the earth. But as it becomes feasible to not just refuel spacecraft midflight but also build and service satellites in space, process data in orbit, and capture resources and energy in space for use in space (for example, by using vast solar arrays or mining asteroids), space operations will become less dependent on earth. Spacecraft will be able to maneuver and fight, and the first orbital weapons could enter the battlefield. The technology to do much of this exists already.

THE MILITARIES OF TOMORROW

Technology will also radically alter how militaries shoot, both literally and figuratively. Cyberattacks, communication jamming, electronic warfare, and other attacks on a system’s software will become as important as those that target a system’s hardware, if not more so. The rate of fire, or how fast weapons can shoot, will accelerate rapidly thanks to new technologies such as lasers, high-powered microwaves, and other directed-energy weapons. But what will really increase the rate of fire are intelligent systems that will radically reduce the time between when targets can be identified and when they can be attacked. A harbinger of this much nastier future battlefield has played out in Ukraine since 2014, where Russia has shortened to mere minutes the time between when their spotter drones first detect Ukrainian forces and when their precision rocket artillery wipes those forces off the map.

The militaries of the future will also be able to shoot farther than those of today. Eventually, hypersonic munitions (weapons that travel at more than five times the speed of sound) and space-based weapons will be able to strike targets anywhere in the world nearly instantly. Militaries will be able to attack domains once assumed to be sanctuaries, such as space and logistics networks. There will be no rear areas or safe havens anymore. Swarms of autonomous systems will not only be able to find targets everywhere; they will also be able to shoot them accurately. The ability to have both quantity and quality in military systems will have devastating effects, especially as technology makes lethal payloads smaller.

Finally, the way militaries communicate will change drastically. Traditional communications networks—hub-and-spoke structures with vulnerable single points of failure—will not survive. Instead, technology will push vital communications functions to the edge of the network. Every autonomous system will be able to process and make sense of the information it gathers on its own, without relying on a command hub. This will enable the creation of radically distributed networks that are resilient and reconfigurable.

Technology is also inverting the current paradigm of command and control. Today, even a supposedly unmanned system requires dozens of people to operate it remotely, maintain it, and process the data it collects. But as systems become more autonomous, one person will be able to operate larger numbers of them single-handedly. The opening ceremonies of the 2018 Winter Olympics, in South Korea, offered a preview of this technology when 1,218 autonomous drones equipped with lights collaborated to form intricate pictures in the night sky over Pyeongchang. Now imagine similar autonomous systems being used, for example, to overwhelm an aircraft carrier and render it inoperable.

Further afield, other technologies will change military communications. Information networks based on 5G technology will be capable of moving vastly larger amounts of data at significantly faster speeds. Similarly, the same quantum science that will improve military sensors will transform communications and computing. Quantum computing—the ability to use the abnormal properties of subatomic particles to exponentially increase processing power—will make possible encryption methods that could be unbreakable, as well as give militaries the power to process volumes of data and solve classes of problems that exceed the capacity of classical computers. More incredible still, so-called brain-computer interface technology is already enabling human beings to control complicated systems, such as robotic prosthetics and even unmanned aircraft, with their neural signals. Put simply, it is becoming possible for a human operator to control multiple drones simply by thinking of what they want those systems to do.

Put together, all these technologies will displace decades-old, even centuries-old, assumptions about how militaries operate. The militaries that embrace and adapt to these technologies will dominate those that do not. In that regard, the U.S. military is in big trouble.

A LOSING GAME

Since the end of the Cold War, the United States' approach to projecting military force against regional powers has rested on a series of assumptions about how conflicts will unfold. The U.S. military assumes that its forces will be able to move unimpeded into forward positions and that it will be able to commence hostilities at a time of its choosing. It assumes that its forces will operate in permissive environments-that adversaries will be unable to contest its freedom of movement in any domain. It assumes that any quantitative advantage that an adversary may possess will be overcome by its own superior ability to evade detection, penetrate enemy defenses, and strike targets. And it assumes that U.S. forces will suffer few losses in combat.

These assumptions have led to a force built around relatively small numbers of large, expensive, and hard-to-replace systems that are optimized for moving undetected close to their targets, shooting a limited number of times but with extreme precision, and communicating with impunity. Think stealth aircraft flying right into downtown Belgrade or Baghdad. What's more, systems such as these depend on communications, logistics, and satellite networks that are almost entirely defenseless, because they were designed under the premise that no adversary would ever be able to attack them**.**

This military enterprise and its underlying suppositions are being called into question. For the past two decades, while the United States has focused on fighting wars in the Middle East, its competitors-especially China, but also Russia-have been dissecting its way of war and developing so-called anti-access/area-denial (or A2/AD) capabilities to detect U.S. systems in every domain and overwhelm them with large salvos of precision fire. Put simply, U.S. rivals are fielding large quantities of multimillion-dollar weapons to destroy the United States' multibillion-dollar military systems.

China has also begun work on megaprojects designed to position it as the world leader in artificial intelligence and other advanced technologies. This undertaking is not exclusively military in its focus, but every one of these advanced-technology megaprojects has military applications and benefits the People's Liberation Army under the doctrine of "military-civil fusion." Whereas the U.S. military still largely treats its data like engine exhaust-a useless byproduct-China is moving with authoritarian zeal to stockpile its data like oil, so that it can power the autonomous and intelligent military systems it sees as critical to dominance in future warfare.

The United States' position, already dire, is rapidly deteriorating. As a 2017 report from the rand Corporation concluded, "U.S. forces could, under plausible assumptions, lose the next war they are called upon to fight." That same year, General Joseph Dunford, chairman of the Joint Chiefs of Staff, sounded the alarm in stark terms: "In just a few years, if we do not change the trajectory, we will lose our qualitative and quantitative competitive advantage."

The greatest danger for the United States is the erosion of conventional deterrence. If leaders in Beijing or Moscow think that they might win a war against the United States, they will run greater risks and press their advantage. They will take actions that steadily undermine the United States' commitments to its allies by casting doubt on whether Washington would really send its military to defend the Baltics, the Philippines, Taiwan, or even Japan or South Korea. They will try to get their way through any means necessary, from coercive diplomacy and economic extortion to meddling in the domestic affairs of other countries. And they will steadily harden their spheres of influence, turning them into areas ever more hospitable to authoritarian ideology, surveillance states, and crony capitalism. In other words, they will try, as the military strategist Sun-tzu recommended, to "win without fighting."

#### Second, platform misuse – that undermines cyber security

Stucke is a co-founder of The Konkurrenz Group and a law professor at the University of Tennessee, ‘18

(Maurice, “Here Are All the Reasons It’s a Bad Idea to Let a Few Tech Companies Monopolize Our Data,” <https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data>)

So, the divergence in antitrust enforcement may reflect differences over these data-opolies’ perceived harms. Ordinarily the harm from monopolies are higher prices, less output, or reduced quality. It superficially appears that data-opolies pose little, if any risk, of these harms. Unlike some pharmaceuticals, data-opolies do not charge consumers exorbitant prices. Most of Google’s and Facebook’s consumer products are ostensibly “free.” The data-opolies’ scale can also mean higher quality products. The more people use a particular search engine, the more the search engine’s algorithm can learn users’ preferences, the more relevant the search results will likely be, which in turn will likely attract others to the search engine, and the positive feedback continues.

As Robert Bork argued, there “is no coherent case for monopolization because a search engine, like Google, is free to consumers and they can switch to an alternative search engine with a click.”

How Data-opolies Harm

But higher prices are not the only way for powerful companies to harm their consumers or the rest of society. Upon closer examination, data-opolies can pose at least eight potential harms.

Lower-quality products with less privacy. Companies, antitrust authorities increasingly recognize, can compete on privacy and protecting data. But without competition, data-opolies face less pressure. They can depress privacy protection below competitive levels and collect personal data above competitive levels. The collection of too much personal data can be the equivalent of charging an excessive price.

Data-opolies can also fail to disclose what data they collect and how they will use the data. They face little competitive pressure to change their opaque privacy policies. Even if a data-opoly improves its privacy statement, so what? The current notice-and-consent regime is meaningless when there are no viable competitive alternatives and the bargaining power is so unequal.

Surveillance and security risks. In a monopolized market, personal data is concentrated in a few firms. Consumers have limited outside options that offer better privacy protection. This raises additional risks, including:

Government capture. The fewer the number of firms controlling the personal data, the greater the potential risk that a government will “capture” the firm. Companies need things from government; governments often want access to data. When there are only a few firms, this can increase the likelihood of companies secretly cooperating with the government to provide access to data. China, for example, relies on its data-opolies to better monitor its population.

Covert surveillance. Even if the government cannot capture a data-opoly, its rich data-trove increases a government’s incentive to circumvent the data-opoly’s privacy protections to tap into the personal data. Even if the government can’t strike a deal to access the data directly, it may be able to do so covertly.

Implications of a data policy violation/security breach. Data-opolies have greater incentives to prevent a breach than do typical firms. But with more personal data concentrated in fewer companies, hackers, marketers, political consultants, among others, have even greater incentives to find ways to circumvent or breach the dominant firm’s security measures. The concentration of data means that if one of them is breached, the harm done could be orders of magnitude greater than with a normal company. While consumers may be outraged, a dominant firm has less reason to worry of consumers’ switching to rivals.

Wealth transfer to data-opolies. Even when their products and services are ostensibly “free,” data-opolies can extract significant wealth in several ways that they otherwise couldn’t in a competitive

#### Platform monopoly allows attackers to zap critical infrastructure in one hit—competition key

Geer et al., PhD, Chief Technology Officer and co-founder of AtStake, ‘03

(Daniel, Rebecca Bace, Peter Gutmann, Perry Metzger, Charles P. Pfleeger, John S. Quarterman, Bruce Schneier, CyberInsecurity: The Cost of Monopoly, <https://cryptome.org/cyberinsecurity.htm>)

Computing is crucial to the infrastructure of advanced countries. Yet, as fast as the world's computing infrastructure is growing, security vulnerabilities within it are growing faster still. The security situation is deteriorating, and that deterioration compounds when nearly all computers in the hands of end users rely on a single operating system subject to the same vulnerabilities the world over.

Most of the world’s computers run Microsoft’s operating systems, thus most of the world’s computers are vulnerable to the same viruses and worms at the same time. The only way to stop this is to avoid monoculture in computer operating systems, and for reasons just as reasonable and obvious as avoiding monoculture in farming. Microsoft exacerbates this problem via a wide range of practices that lock users to its platform.

The impact on security of this lock-in is real and endangers society. Because Microsoft's near-monopoly status itself magnifies security risk, it is essential that society become less dependent on a single operating system from a single vendor if our critical infrastructure is not to be disrupted in a single blow. The goal must be to break the monoculture. Efforts by Microsoft to improve security will fail if their side effect is to increase user-level lock-in. Microsoft must not be allowed to impose new restrictions on its customers – imposed in the way only a monopoly can do – and then claim that such exercise of monopoly power is somehow a solution to the security problems inherent in its products. The prevalence of security flaw in Microsoft’s products is an effect of monopoly power; it must not be allowed to become a reinforcer.

Governments must set an example with their own internal policies and with the regulations they impose on industries critical to their societies. They must confront the security effects of monopoly and acknowledge that competition policy is entangled with security policy from this point forward.

#### Ensures cyberattacks go nuclear

Sagan and Weiner ’21 – Stanford Professors [Scott D.; Caroline S.G. Monroe professor of political science and senior fellow at the Center for International Security and the Freeman Spogli Institute at Stanford University; Allen S.; senior lecturer in law and director of the program in international and comparative law at Stanford Law School; 7-9-2021; "The U.S. says it can answer cyberattacks with nuclear weapons. That’s lunacy."; The Washington Post; https://www.washingtonpost.com/outlook/2021/07/09/cyberattack-ransomware-nuclear-war/; accessed 8-15-2021]

Over the July 4 weekend, the Russian-based cybercriminal organization REvil claimed credit for hacking into as many as 1,500 companies in what has been called the largest ransomware attack to date. In May, another cybercriminal group, DarkSide, also apparently located mainly in Russia, shut down most of the operations of Colonial Pipeline, which supplies nearly half the diesel, gasoline and other fuels used on the East Coast — setting off a round of panic buying that ended only when the company handed over a ransom. These incidents were bad enough. But imagine a much worse cyberattack, one that not only disabled pipelines but turned off the power at hundreds of U.S. hospitals, wreaked havoc on air-traffic-control systems and shut down the electrical grid in major cities in the dead of winter. The grisly cost might be counted not just in lost dollars but in the deaths of many thousands of people.

Under current U.S. nuclear doctrine, developed during the Trump administration, the president would be given the military option to launch nuclear weapons at Russia, China or North Korea if that country was determined to be behind such an attack.

That’s because in 2018, the Trump administration expanded the role of nuclear weapons by declaring for the first time that the United States would consider nuclear retaliation in the case of “significant non-nuclear strategic attacks,” including “attacks on the U.S., allied, or partner civilian population or infrastructure.” The same principle could also be used to justify a nuclear response to a devastating biological weapons strike.

But our analysis suggests that using nuclear weapons in response to biological or cyberattacks would be illegal under international law in virtually all circumstances. Threatening an illegal nuclear response weakens deterrence because the threat lacks inherent credibility. Perversely, this policy could also wind up committing a president to a nuclear attack if deterrence fails. While the American public would indeed be likely to want vengeance after a destructive enemy assault, the law of armed conflict requires that some military options be taken off the table. Nuclear retaliation for “significant non-nuclear strategic attacks” is one of them.

The Biden administration is now conducting its own review of the U.S. nuclear posture. The 2018 Trump change is an urgent candidate for reevaluation, but people have generally ignored it up to now. As officials work on this process, they have the chance to take full account of what could be called the “nuclear law revolution” — a growing recognition that international-law restrictions on warfare, and especially those that protect civilians, apply even to nuclear war.

#### Aff solves – the squo prior to Amex evaluated conduct on a case-by-case basis and created clear, enforceable guidelines

Rozga, JD, Counsel, Davis Wright Tremaine LLP, former Federal Trade Commission attorney, Guest Lecturer, Boston University School of Law, ‘20

(Kaj, “How tech forces a reckoning with prediction-based antitrust enforcement,” August 31, <https://techlawdecoded.com/how-tech-forces-a-reckoning-with-prediction-based-antitrust-enforcement/>)

Such a framework for monopolization claims could also draw from case law experience with “unreasonable restraints of trade”, which are collusive agreements among competitors that are subject to another subset of the antitrust laws. Certain such agreements are treated as so pernicious as to render them strictly “per se” illegal (unlawful without any regard for their actual competitive effects), and others as so benign as to subject them to a highly permissive “rule of reason” (usually lawful under a full-blown competitive effects analysis). But a “truncated” rule of reason lying in a Goldilocks middle between these two extremes causes certain agreements to be presumed unlawful without delving into its actual competitive effects, while still allowing the parties to the agreement to rebut that presumption with adequate proof. This framework could be roughly imported into a presumption-based structuralist approach to monopolization cases.

One major hurdle for monopolization cases under the new framework would be in determining whether, in a particular case, the monopolist has engaged in a preset category of problematic conduct. This would not always be obvious (a lesson learned from courts grappling with when to apply the truncated rule of reason in restraints of trade cases). But in keeping with the goal of a simple, formulaic approach that avoids slipping into the competitive effects quagmire, an objective screen could be used. This screen would look at certain nonpredictive indicators—market conditions or circumstances present and not present—which would function as a checklist or be summed up to formulaically determine whether the monopolist’s conduct falls within the pre-determined list of presumptively unlawful activities.

Fine-tuning the proper aims of a nonpredictive antitrust

Although the proposed frameworks for monopolization and merger cases differ in some ways, both rely on an objectively-determined presumption of unlawfulness on the front-end which pushes any Economism-based, predictive analysis of actual competitive effects to the back-end, where the opposing party faces a high evidentiary burden for rebuttal.

This approach, while seeking to minimize the role of subjective judgment in antitrust decisions, does not eliminate it, which means still having to grapple with the issue of what the proper aim of antitrust ought to be. In either the merger or monopolization context, the presumption (whether facing the party bringing the case or the one defending it) can be rebutted with sufficient proof regarding actual competitive effects. Naturally, a question therefore arises about what types of effects are fair game for argument.

As discussed above, the current consumer welfare approach which focuses entirely on prices and output ignores various harmful effects from the concentration of economic power that would seem otherwise within the reach of antitrust laws. But how much broader ought the goals of antitrust be under the new proposed enforcement frameworks? Harm to competitors (exclusion), laborers (wage suppression), and suppliers (price squeezes) might be the low hanging fruit for inclusion in a broader welfare standard. The same might be said of loss of redundancies in the supply chain, or consolidation of control over user data. Harm to the environment and concentration of political power may be tougher to incorporate. While hate speech and the polarization of public discourse would almost certainly fall outside of the proper purview of antitrust.

Wherever the line is ultimately drawn by policymakers, it need not be inclusive to an extreme. After all, broader societal concerns about concentration of private markets can be left to the protection of a very strong presumption on the front-end of the new enforcement framework. But other than to say that it is intended to be the rare case where a competitive effects analysis is performed on the back-end, it must be acknowledged that more work would need to be done to figure out its proper boundaries.

Questions surrounding how to define the proper aims of antitrust would also seep into the judgment calls that need to be made about what triggers the presumptions of illegality on the front-end. That is because the threshold levels of concentration and additional objective factors triggering the structural presumption in merger cases, as well as the categories of conduct deemed presumptively unlawful in monopolization cases, would be determined according to their tendencies to result in market conditions conducive to bad competitive outcomes. But what is a “competitive outcome” is in the eye of the beholder, and so difficult questions would arise in formulating the front-end presumptions in both merger and monopolization cases.

Difficult as that task may be, there is much benefit to working out those difficulties at a policy level. Those who in the last half-century have—through their influence over academia, the courts, and government officials—reined in merger and monopolization enforcement by shifting its focus to price-output effects have done so with little say from lawmakers. A reset of the antitrust enforcement framework would be an opportune moment to refocus competition policy on the broader detrimental effects of allowing markets to persist in conditions of concentrated economic power.

Where the lines are drawn would have a huge impact on the reach of antitrust laws under the new enforcement regime. The debate would be especially fraught and consequential in the digital context, where existing enforcement of the merger and monopolization laws has been particularly controversial and prone to disappointing results (the latter discussed here and here in the context of investigations of Google). Difficult cuts would have to be made, and the results would ultimately reflect not only ideology about the proper role of antitrust, but also pragmatic factors such as the likelihood and ability of other regulations to fill the gaps (covered here).

Nonpredictive antitrust enforcement in practice

The formulaic, nonpredictive approaches outlined above are guided by a simple principle: that antitrust enforcement ought to be put on a sounder intellectual footing that acknowledges the limits of the human mind in making predictions amidst complexity.

The practical effects of the proposed changes would be to improve clarity and certainty for everyone involved—companies, government agencies, courts—in distinguishing lawful from unlawful market activities. They would also ease the burden for bringing such cases, and in the process free up resources for more enforcement of the antitrust laws. At the same time, some of the changes—such as adding new objective factors to the structural presumption in merger cases, employing a clear-cut list of presumptively unlawful monopolistic conduct, and subjecting enforcers to reverse presumptions of lawfulness—would probably tip the balance the other way, scaling back certain types of enforcement.

Still, it seems self-evident that the net result of the proposed changes would be more active enforcement of the merger and monopolization laws. The specific make-up of the resulting cases—which types would increase versus decrease, which industries or players would see the biggest changes, etc.—is less clear. But the aim in reforming competition policy should be more accurate enforcement, targeting the right mergers and monopolistic conduct, for its own sake. Then let the chips fall where they may.

As for the day-to-day enforcement of the antitrust laws, the major implications could be summarized as follows.

First, there would be the lowering of the barrier currently put in front of enforcers and courts that requires the lawfulness of market activities to be determined by performing the difficult task of predicting and conjecturing about actual competitive effects.

Second, the simple, formulaic framework put in its place would de-emphasize the role of predictions in the decision-making process, streamlining antitrust enforcement for those activities which are empirically known to perpetuate the structural market conditions associated with bad competitive outcomes.

Third, at the same time, it would leave some wiggle room for nuanced expert judgments to soften the blunt force of a trial-by-formula in those rare instances when unique circumstances justify diving back into the lion’s den of analyzing actual competitive effects.

Fourth, by relying on objective criteria about market structure or conduct instead of subjective judgments about market effects, the new framework would empower antitrust to reach various other important kinds of harm—beyond just price and output effects—that can flow from the concentration of economic power. That is, by targeting the roots of harmful concentration instead of just cutting off a few branches that have grown out of its trunk, antitrust would protect various interests in society other than just the consumer who wants to buy more for less.

### 1AC – Solvency

#### The aff removes *Amex*’s increased burdens for platform challenges – that solves because well-plead cases go forward and courts will reject anticompetitive conduct

Hovenkamp, Assistant Professor, USC Gould School of Law, ‘19

(Erik, “Platform Antitrust,” 44 J. Corp. L. 713)

That is no longer the case, however, as the Supreme Court recently confronted platform commerce head-on in AmEx 111.13 In June of 2018, the Court issued its first decision on how antitrust's rule of reason 14 is to be applied in cases involving platform defendants. 15 It was superficially a question of how to define the "relevant market" for purposes of an antitrust adjudication. 1 6 In particular, the question was whether the market definition must include both groups of users, which would require a plaintiff to prove a net injury to competition across both user groups-not just to win on the merits, but simply to carry its initial burden. The Supreme Court held that it does. 17

Most of the important complexities arising under two-sided competition center on the juxtaposition of countervailing effects-that is, pro and anticompetitive effects-arising within the separate sides of the market. In fact, even outside the platform context, such a juxtaposition of plausible effects is very common in antitrust disputes. And the rule of reason ordinarily divides the burdens of establishing them; it bifurcates them into separate stages, delaying the need for potential balancing or "netting out" of the effects (which is notoriously difficult) until the final stage of the adjudication. By evaluating the effects carefully and independently, a court is better equipped to determine whether such balancing is genuinely necessary; and, if so, the court is at least in a better position to compare the relevant effects. However, the Court's AmEx III decision largely abandoned this burdenshifting framework, effectively collapsing the entire rule of reason analysis-and all of its intermediate inquiries-into the plaintiffs initial burden.

Whether or not one agrees with its holding, the AmEx III decision is inarguably a watershed moment for platform antitrust. Against this backdrop, this Article considers how antitrust ought to accommodate the distinctive features of platforms and platform competition. It focuses principally on conduct evaluated under the rule of reason, 18 with emphasis on vertical restraints and unilateral conduct. 19 The analysis is organized as follows: I begin by providing an overview of the distinctive features of platforms and platform competition, as reflected within the platform economics literature. Part III then explains how such factors may bear on the analysis of various restrictive practices that are already familiar within antitrust, but whose effects may become more or less concerning when undertaken by two-sided defendants. In Part IV, I address the economic effects of an important category of restraints that are unique to platform markets. Finally, Part V turns to the broad question of law that was at issue in AmEx III.

One of the important competitive dynamics arising in platform markets is known as "steering." 21 This refers to any efforts aimed at inducing users to opt for one platform over another. The restraint at issue in AmEx IIIwas an example of this: it prohibits its merchants from offering AmEx cardholders a better price at checkout if they agree to switch to an alternative card (e.g. Visa), since competing cards generally charge lower network usage fees to merchants. 22 But, more generally, steering restraints take many different forms, and arise in many platform markets. 3 In general, steering strategies are usually procompetitive, as they typically act as a vehicle for price competition among rival platforms. Restraints on steering should therefore be regarded as a potential source of serious antitrust concerns. However, as discussed in detail in Part III, many research articles suggest that such restraints may be necessary to maintain adequate participation, and thus regard their welfare effects as highly ambiguous. 24 The AmEx III opinion cites these commentaries copiously. Importantly, however, these arguments stem primarily from economic models involving a platform monopolist, with the operative restraint merely precluding efforts to steer users toward a nonpla'fform alternative (e.g. toward cash rather than using a monopolist's payment card platform). 25 But this is not a good representation of how such restraints usually operate in real-world commerce. In practice, most of the relevant restraints seek to prevent steering toward competing platforms, rather than a nonplatform alternative that lacks the same transactional efficiencies.

As I argue below, when a restraint merely prevents steering toward competing platforms, there is substantially less reason to presume that it might be justified for reasons relating to the market's two-sidedness. Instead, the more likely result is simply that it prevents users from switching to rival platforms that would provide them with better jointvalue. That would suggest the restraint does not enhance the market-wide volume of trade. Rather, at best, it merely reallocates transactions among platforms, albeit in a way that leaves transacting parties with diminished welfare on average. At worst, it affirmatively reduces the overall volume of trade by undermining price competition generally. This can occur for two reasons. First, the restraint may extinguish rival platforms' incentive to make competitive price offerings, as it may prevent transacting parties from switching to the competitor's platform in response to its price cut. Second, the restraint may induce sellers who transact over the platform to set higher retail prices for their own wares, which injures all consumers, whether or not they take advantage of the platform's transaction service.

The question of law addressed in AmEx III is extremely broad in scope, as it bears on the application of antitrust law to all kinds of restrictive practices that might be undertaken by transaction platforms. As noted above, while facially a holding about market definition, the Supreme Court's decision is in fact a major alteration of the rule of reason's burden shifting framework. The Court's analysis was guided principally by a number of antitrust academics that focus most of their attention on a simple point-in effect that "both sides matter," and that it would be inappropriate to focus on one side myopically. 26 While correct, this point was actually never in dispute. Even the district court, whose market definition was formally limited to the merchant side of the market, 27 expressly emphasized the importance of accounting for the market's two-sidedness. 28 Indeed, its analysis gives substantial attention to cardholders, and it even concluded that they were likely injured in addition to merchants. 2 9 Despite this, the AmEx III majority chastised the district court's approach as "looking at only one side of the platform in isolation."' 30

It is indeed true that a platform's conduct may have countervailing effects within the two sides, and that this requires courts to take the market's two-sidedness into account. 31 But it does not follow that the appropriate way to deal with this is to require a plaintiff to "net out" all such considerations merely in order to support its prima facie case-before the defendant has substantiated its asserted efficiency defense. This approach is also a substantial deviation from precedent. Most difficult cases evaluated under the rule of reason involve potential countervailing pro- and anticompetitive effects. 32 And the courts developed a multi-stage burden shifting framework precisely to deal with this difficulty. By construction, this framework contemplates that a plaintiff can carry its initial burden without having shown that the defendant's conduct is definitively anticompetitive on the whole; that is why it is merely the first stage among several.

Far from providing any necessary reform, the AmEx III decision merely developed a "law of the horse": a needless construction of new legal principles when the old ones would do just fine (and likely much better).33 It is true that platform economics has important implications for antitrust policy and practice; this Article gives substantial attention to that fact. But such considerations can already be accounted for-both more practicably and more reliably-within the rule of reason's existing structure. To that end, a much better approach would be to maintain careful consideration of platform economics throughout the established burden shifting framework, which is designed to work through complex cases in incremental steps and to cast light on countervailing effects through an efficient allocation of burdens.

#### Aff is the least intrusive mechanism – it only punishes anticompetitive practices and allows innovative conduct to continue – regulation worse

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)

Antitrust today suffers from an antienforcement bias that is scientifically obsolete and produces too many false negatives. This will hopefully pass as courts become more familiar with the economics of digital platforms and networks. Decisions such as Amex in the Supreme Court and Qualcomm in the Ninth Circuit indicate that development still has far to go. The rule of reason in particular has become much too burdensome for plaintiffs. Antitrust policy would perform better if plaintiffs had a lighter burden in establishing a prima facie case, with a heavier answering burden on defendants, who typically have better control of the relevant facts.436

Antitrust’s fact-specific, individual approach to intervention is usually superior to regulation. A few problems, such as management of consumer information, cut across all markets and regulation can be effective. Most other failures are specific to the firm, however. Calls for categorical treatment often amount to regulation by another name. It is easy to speak universally about these markets as winner-take-all, as having high barriers to entry, or as unnecessarily harmful to competitors or consumers. An example is broad statements of the nature that the big digital platforms must be broken up. These overly generalized conclusions frustrate rather than further reasonable competitive analysis. Platforms differ from one another by almost as wide a range as firms differ in general.

Market-power inquiries in cases involving platforms do produce some unique factual issues. When market power is assessed by conventional marketshare methods, a single relevant market should be defined with reference to one side. Effects on the other side must be considered to the extent that they strengthen or weaken any inference to be drawn from market shares. Direct economic measures will usually produce better results, although effects on the other side of two-sided platforms must be considered even when power is measured directly. Finally, the threat of competitive harm in networked markets can occur at lower market shares than the level required in conventional markets.

Antitrust’s fact-specific approach is also essential for the construction of appropriate remedies. The goal of a remedy should be consistent with the output-expanding goals of the antitrust laws themselves. Simple injunctions should always be considered. Often they can correct discrete problems while doing little to no damage to the efficiency and integrity of the firm or the market in which it operates. In addition, results are typically easier to predict.

#### The aff is goldilocks – it remedies type II errors because it is POSSIBLE for plaintiffs to win, but caps type I error because frivolous cases would still be dismissed

Hovenkamp, Assistant Professor, USC Gould School of Law, ‘19

(Erik, “Platform Antitrust,” 44 J. Corp. L. 713)

Most rule of reason cases resolve before reaching the balancing stage. 198 However, this is in part due to the fact that a large majority of cases end at the first stage, with plaintiffs failing to make a prima facie case. 199 Michael Carrier finds that, between 1999 and 2009, plaintiffs fail at the first stage in 97% of rule of reason cases. 2 0 Further, 'there was only one final judgment issued in a plaintiff's favor over that period (out of 222 total judgments). Thus, given that the burden of establishing a prima facie case *without* balancing is already highly demanding, we would hardly stack the deck against defendants by continuing to reserve the balancing analysis for the final stage.

Everyone agrees that platform economics makes matters more complicated, which does indeed increase the concern that courts might err in attempting to resolve the balance of countervailing effects. But the maximal possible number of type 1 errors is capped by the number of judgments issued in plaintiffs' favor. And that number is already miniscule under the traditional burden shifting rules. As such, there simply isn't any room for a large swath of plaintiff-favoring errors, because plaintiffs almost never win in the first place.

# 2AC

## Platforms Adv

#### Platform monopoly is a structural limit on high-tech innovation

Newman, Associate Professor, University of Miami School of Law, ‘19

(John, “Antitrust in Digital Markets,” 72 Vand. L. Rev. 1497)

Despite the fact that digital markets frequently exhibit high barriers to entry, skeptics of antitrust enforcement have one card left to play: they portray digital markets as nonetheless being characterized by intense innovative rivalry.135 As a result, the argument runs, antitrust would move too slowly to correct any problems and is unnecessary because the relevant markets will quickly correct themselves.136 Under this view, the lure of monopoly profits will inevitably attract disruptive upstarts seeking to replace dominant incumbents—and monopoly is actually good and desirable because it is necessary to spur technological progress.137 This unorthodox vision traces its roots to Schumpeter’s decades-old invocation of “creative destruction,”138 which became a favorite trope among those associated with the Austrian and Chicago schools.139

For empirical support, proponents of this digital creative destruction narrative commonly point to Facebook’s “disruption” of MySpace and Google’s “disruption” of Yahoo.140 Thus, for example, Robert Bork and Gregory Sidak argued that Google should not face antitrust liability because “[i]t surpassed Yahoo, just as Yahoo surpassed others before it.”141 Put another way, if Facebook and Google could supplant their predecessors, they must themselves face the constant risk of disruption—their perch at the top is a precarious one.

Let us pause to revisit these two commonly cited examples of digital disruption. It is true that Facebook supplanted MySpace as the largest social network—in April 2008.142 That was, to put it rather mildly, some time ago.143 Facebook’s reach continuously expanded during the following decade. As of 2018, Facebook, Inc. controlled the three largest mobile social networking apps in the United States144 and boasted a combined user base over five times larger than that of its nearest rival.145 With each passing year, the creative-destruction narrative becomes ever less credible.

The Google example fares even worse. Google was already the world’s second most popular search provider by 2000.146 That same year, Yahoo (previously the most popular provider) announced that Google would begin serving as the search engine for Yahoo’s web portal,147 effectively making Google the dominant global search provider.148 As with Facebook, Google’s stranglehold over search only increased with the passage of time—as of 2018, after nearly two decades of dominance, Google still controlled more than 90% of the global market for general search results.149

The anecdotes of MySpace and Yahoo, still commonly cited by those who argue that digital markets are epicenters of creative destruction,150 look increasingly creaky with age. The relevant markets have been characterized not by the “gale” of creative destruction described by Schumpeter, but by entrenched and unchecked dominance. It is high time to abandon the “romantic but naïve Schumpeterian [notion] that giant” monopolists and concentrated oligopolies are necessary for technological progress.151 In fact, a more sophisticated reading of Schumpeter suggests that he was not nearly so opposed to government intervention—particularly in the form of antitrust enforcement—as his modern-day adherents tend to be.152 An antitrust enterprise that somehow came to view monopoly as good and necessary has rather clearly lost its way.153

Durable market power is the precise evil antitrust laws are meant to prevent. Far from being self-correcting, digital markets often facilitate such power. This suggests that the orthodox position rests in part upon a flawed assumption about the balance of error costs in this context. The societal cost from false negatives is substantially higher than pro-defendant analysts have previously assumed. Normatively, this militates in favor of an invigorated approach to digital markets.

## Conduct Adv

#### Data is cheap and widely available

Kennedy 19 – Senior fellow at the Information Technology and Innovation Foundation. Former chief economist for the U.S. Department of Commerce.

Joe Kennedy, “Data and Privacy Are Not Antitrust Concerns,” *Information Technology and Innovation Foundation*, 15 October 2019, https://itif.org/publications/2019/10/15/data-and-privacy-are-not-antitrust-concerns.

A great deal of data is widely available at little cost. Data, especially personal data, which is the focus of this week’s hearing, is often not exclusive to a specific company. Indeed, nothing stops users from sharing their personal information with more than one company. Data is also nonrivalrous. Unlike most resources, its use by one party does not diminish its value to anyone else. Many parties can use the same information, and once data is generated the cost of duplicating it is almost zero.

#### Has a limited life span so stockpiling doesn’t help incumbents

Kennedy 19 – Senior fellow at the Information Technology and Innovation Foundation. Former chief economist for the U.S. Department of Commerce.

Joe Kennedy, “Data and Privacy Are Not Antitrust Concerns,” *Information Technology and Innovation Foundation*, 15 October 2019, https://itif.org/publications/2019/10/15/data-and-privacy-are-not-antitrust-concerns.

Another constraint is that lots of data is useful for only a short time. Thus, any advantage it confers is temporary. Knowledge that a consumer has been searching for hiking boots is only valuable until she buys a pair. Economists Anja Lambrecht and Catherine E. Tucker looked at the implications of data for market power and concluded that: “The unstable history of digital business offers little evidence that the mere possession of big data is a sufficient protection for an incumbent against a superior product offering.”

#### Google severed AI ties with the DOD – young startups are the only ones taking tech contracts.

Metz ’21 – correspondent at NYT [Cade; technology correspondent, covering artificial intelligence, driverless cars, robotics, virtual reality, and other emerging areas; 3-3-2021; "Away From Silicon Valley, the Military Is the Ideal Customer"; The New York times; https://www.nytimes.com/2021/02/26/technology/anduril-military-palmer-luckey.html; accessed 8-15-2021]

Though parts of Silicon Valley have kept the Pentagon at arm’s length in recent years, Mr. Luckey’s company, based 400 miles to the south in Irvine, is aggressively courting business from government agencies and the military.

It is one of a number of young tech companies, many of them far from Silicon Valley, that are shrugging off the concerns about the potential militarization of their creations that in recent years have stirred employee revolts at industry giants like Google and Microsoft.

On a recent afternoon, Mr. Luckey, dressed as if ready for the beach in a Hawaiian-like shirt, shorts and flip-flops, joined other Anduril employees at the company’s testing site near Camp Pendleton, a Marine training facility.

As the drone took off and swooped between the hills, Mr. Luckey said it could track an object and capture detailed images from seven football fields away. Using many of the artificial intelligence technologies that underpin self-driving cars, Anduril’s drones can identify and track vehicles, people and other objects largely on their own.

The drones are not armed, but could be useful for guarding bases or reconnaissance. The same sensor technologies that allow the drones to fly on their own could also be used to identify targets on a battlefield.

Mr. Luckey, who sold his previous company, the virtual-reality start-up Oculus, to Facebook for $2 billion, shrugged off the question of whether tech companies should willingly work with the military and intelligence communities.

“Most engineers want to engineer. They want to get stuff done,” the outspoken entrepreneur said as artillery fire echoed from a nearby range. “Most people have a pretty practical view.”

The military and intelligence communities have a long history with research labs and tech companies in Silicon Valley. ARPANET, the forerunner of the internet, was funded by the Defense Department. David Packard, one of the founders of Hewlett-Packard, served as deputy secretary of defense under President Richard Nixon. Oracle, one of the biggest software companies, got its start writing computer code for the Central Intelligence Agency.

But the idea of autonomous weapons has been controversial in Silicon Valley, and in recent years some in the tech industry have developed a new distrust of government work.

That distrust swelled in 2013 when the former defense contractor Edward J. Snowden leaked documents that revealed the breadth of spying on Americans by intelligence services, including monitoring the users of large internet companies. In 2018, Google *pulled out* of a Defense Department effort to develop artificial intelligence technology after sustained protests from company workers.

Parts of the Valley firmly draw the line at weaponization of their creations. Mike Volpi, a partner with the venture capital firm Index Ventures, said that Anduril’s drone technology impressed him but that his firm would not invest in any company whose technology could be used with weapons.

“There are many ways to make money,” Mr. Volpi said. “If a company has a stated strategy to hurt people, we would not invest.”

But a growing array of venture capital firms see things differently. Anduril is backed by several notable ones, including Founders Fund, created by the PayPal co-founder Peter Thiel; Andreessen Horowitz; and General Catalyst.

“We have the greatest technologists in the world in Silicon Valley,” said Katherine Boyle, a General Catalyst partner. “We really need to have Silicon Valley working with Washington.”

With seed funding from the Founders Fund, Anduril was created in 2017. The founders included several former employees of Palantir, the Founders Fund-backed company that helps collect and analyze data for the government, and Mr. Luckey.

Anduril chose Irvine, the heart of Orange County, partly because of the proximity to military posts and partly because the founders wanted to avoid the growing distrust for military work in Silicon Valley.

“We are 400 miles away from Silicon Valley,” Mr. Luckey said. “Attitudes in Orange County have always been more pro-military.”

Mr. Luckey is known for bucking Silicon Valley stereotypes. Just before Anduril was founded, he was pressured to leave Facebook after he donated to an organization built to spread anti-Hillary Clinton internet memes in the run-up to the 2016 presidential election. When I visited Anduril’s test site on a recent afternoon, other employees were wearing masks and standing six feet apart. But Mr. Luckey was maskless, and he asked if I would shake hands.

In the drone business, however, he is not alone. A host of start-ups are building similar technology for the military. Shield AI, founded by a former member of the Navy SEALs, is in San Diego, not far from Anduril. Teal Drones, whose founder emerged from Mr. Thiel’s internship program, is in Salt Lake City.

#### Acquisitions decks Big Tech investment.

**Knott 18** --- Robert and Barbara Frick Professor in Business at Washington University’s Olin Business School and author of the book “How Innovation Really Works.”

Anne Marie, 4-17-2018, "There’s No Good Alternative to Investing in R&D," Harvard Business Review, https://hbr.org/2018/04/theres-no-good-alternative-to-investing-in-rd

Yazin Ozcan shared data on 2,378 technology mergers and acquisitions that he compiled for his paper “[Innovation and Acquisitions](http://www.yasinozcan.com/Ozcan_2SidedMatching.pdf).” His paper identified the top 16 technology acquirers (those with more than 10 technology acquisitions between 1986 and 2007). For each of the 17 companies, I compared their RQ with that of their industry. Seventy percent of these acquirers have lower average RQ than their industry, and all but three of them have below-average RQ. Thus these companies seem to be following the maxim “Those that can, do; those that can’t, acquire” — precisely the strategy captured in the ethos Sarah Williamson mentioned: “Instead of doing R&D, we’ll acquire companies who do.” The problem is that this ethos applied to the new acquisitions kills the target’s R&D as well — thus the lower RQ of acquirers.

In addition to this simple check of the 16 “high acquirers,” I conducted more formal analysis for the full set of technology acquisitions. In the analysis, I controlled for the initial quality of the acquiring company and examined what happened to their RQ as they assimilated their targets. I found that an increase in three-year acquisition intensity (dollars of acquisitions divided by acquirer’s revenues) corresponds with a significant decrease in company RQ. On average, a company with acquisitions whose value is 50% of its revenues sees a nine-point decrease in RQ following the acquisitions. At the very least, technology acquisitions fail to turn around troubled companies. More likely, they actively harm them.

There’s No Easy Alternative to R&D

In summary, there is no free lunch. Acquiring your way to innovation doesn’t work — the only way to stay innovative as a big company is to invest in R&D. Luckily for big companies, investing in R&D is a good strategy. Your inventors will seldom walk out the door with your ideas. And recognizing that you can’t buy the technology downstream will force you to be more productive with your R&D investment. Higher R&D productivity yields higher profits, growth, and market value per dollar of R&D.

## T

#### Changing plaintiff’s burden increases “scope”

Orbach, Professor of Law and the Director of the Business Law Program, the University of Arizona College of Law, ‘15

(Barak, “The Durability of Formalism in Antitrust,” 100 Iowa L. Rev. 2197)

In other dimensions, the Supreme Court has developed formalistic rules and categories. For example, in the late 1970s, when the Court started blurring the distinction between per se and rule of reason, it also introduced the “direct purchaser” doctrine as a standing requirement. This rule bars indirect purchasers from bringing antitrust lawsuits, regardless of the circumstances. Also in the late 1970s, the Court began drawing a categorical distinction between horizontal and vertical restraints. The distinction is exceptionally important for the understanding of economic relationships but it does not necessarily define competitive effects as some suggested. Likewise, since the late 1970s, the Supreme Court has been using procedure—namely by applying formalism—to narrow the scope of antitrust through rules that disfavor plaintiffs.

#### Prohibitions are implemented via legal tests—the threshold of the test determines how much or how little conduct is prohibited

Mark S. Popofsky, Antitrust Partner at Ropes and Gray, Served as Senior Counsel to DOJ Antitrust Division, Adjunct Professor of Advanced Antitrust Law and Economics at Harvard Law School and the Georgetown University Law Center, 2016, Section 2 and the Rule of Reason: Report from the Front, CPI Antitrust Chronicle March 2016 (1)

Courts remain, in the words of one observer, mired in an “exclusionary conduct ‘definition’ war.”2 Applying Section 2’s broad prohibition on “monopolizing” conduct requires courts to select a governing legal test. Section 2 legal tests run the spectrum from rules of per se legality to rules of near per se illegality.3 Courts, nonetheless, largely apply two dominant paradigms. The first consists of legal tests based on bright-line rules or safe harbors. Familiar examples include the Brooke Group4 below-cost price test for analyzing predatory pricing claims and the Aspen/Trinko5 “profit sacrifice” test for refusals to deal. Developing bright-line rules for Section 2, proponents argue, promotes business certainty and reduces the risk of chilling otherwise procompetitive conduct. The second paradigm is rule of reason balancing. Arguably the default Section 2 legal test,6 courts and commentators have described Section 2’s rule of reason in various ways: as mandating a step-wise approach, as requiring a balancing of pro- and anticompetitive effects, or (to borrow from Section 1) a framework for generating the enquiry “meet for the case.”7 However the rule of reason is expressed, its champions contend, its flexibility and fact-intensive approach permits courts to identify anticompetitive conduct without the under-inclusion that is an admitted feature of safe harbors and other bright-line rules.

#### “Expand the scope” means broadening the range of claims that can be brought

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

## States CP

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

Richard A. Duncan is a partner in the Minneapolis office of Faegre & Benson LLP, and Alison K. Guernsey is presently a third-year law student at the University of Iowa College of Law and Editor-in-Chief of the Iowa Law Review, 2008, Waiting for the Other Shoe to Drop:

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

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2003, Federalism in Antitrust, 26 Harv. J. L. & Pub. Pol'y 877

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

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2004, The Case for Federal Preemption in Antitrust Enforcement, 18 Antitrust 79

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.

## New Statute CP

#### Doesn’t compete – expands the scope of “core antitrust laws” by adding a new one

Sleet 99 – Judge, United States District Court, Delaware

Gregory M. Sleet, Scriptgen Pharms., Inc. v. 3-Dimensional Pharms., Inc., 79 F. Supp. 2d 409, United States District Court for the District of Delaware, December 1999, LexisNexis

Noting that the term "extent" is not defined in either one of the patent specifications, 3-DP contends that the ordinary meaning of the word should control. See, e.g., Zelinski, 185 F.3d at 1315; Desper Prods., 157 F.3d at 1336. Because "extent" in this instance would appear to serve as synonym for "amount" or "degree," 3-DP purports to advance this interpretation.3 While Scriptgen appears to take issue with this proposed definition, it fails to provide an alternate construction. After reviewing the language of the representative claim, which discusses "the extent to which the target protein occurs in the folded state, the unfolded state or both in the test combination and in the control combination," the court will afford the term "extent" its ordinary meaning, i.e., as meaning "amount" or "degree."

#### The CP makes it part of the ‘core’ antitrust laws

Clark 04 – Judge, United States District Court, Texas Eastern

Ron Clark, Motorola, Inc. v. Analog Devices, Inc., 2004 U.S. Dist. LEXIS 31301, United States District Court for the Eastern District of Texas, Beaumont Division, June 2004, LexisNexis

The definition offered by Motorola from the 1996 IEEE Dictionary is actually for the term "processor," rather than "core processor." The word "core" is defined as "the innermost or most important part: heart." Webster's II New College Dictionary (1995). The term "core processor" suggests something less than a "processor" as a whole.

## DOJ Tradeoff DA

#### Non-unique and turn—defense-friendly standards increases cost and reduces impact of agency enforcement

Alison Jones, Professor of Law at King's and a solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, George Mason University Foundation Professor at the George Mason University School of Law, former FTC Commissioner, 2020, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, The Antitrust Bulletin 2020, Vol. 65(2) 227-255

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

#### Turn—*Amex* requirement eats up agency resources

Ben Brody, Bloomberg, U.S. Google Monopoly Case Could Hit Supreme Court AmEx Hurdle, August 28, 2020, <https://www.bloomberg.com/news/articles/2020-08-28/u-s-google-monopoly-case-could-hit-supreme-court-amex-hurdle>

Google’s lucrative search ad business sells advertising space to brands around the results it provides to consumers. It also plays a key intermediary role connecting buyers and sellers of digital display ads across the web, and as a seller of display ad space for its YouTube video unit. Investigators have looked into all three, Bloomberg has reported.

Antitrust experts said that one reason for the delay in the Google lawsuit, which was expected in July, could be that government lawyers needed more time to construct the case to meet the standards in the AmEx ruling.

“That’s a complex, lengthy complaint to draft, and that takes time,” said Spencer Weber Waller, director of the Institute for Consumer Antitrust Studies at Loyola University Chicago. The government would probably have to create a “a belt-and-suspenders approach” that says why it would win under two kinds of market definitions, he said.

#### No internal link—agency resources ineffective b/c they drive away the best talent

Alison Jones, Professor of Law at King's and a solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, George Mason University Foundation Professor at the George Mason University School of Law, former FTC Commissioner, 2020, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, The Antitrust Bulletin 2020, Vol. 65(2) 227-255

The modern critique of the U.S. system often describes the federal agencies as captured by the business community or beholden to ideas that disfavor robust intervention.143 Advocates of change suggest that the execution of their reform program at the federal antitrust agencies will require the appointment of senior managers and new staff who repudiate the consumer welfare standard, or at least embrace a vision for expanded enforcement under the consumer welfare, and embrace the multidimensional conception of the proper goals of competition law. Those already employed by the enforcement agencies as managers and staff will be expected to accept the expanded (goals) framework or they will find their duties reduced and their roles marginalized. New appointees to top leadership positions will not be tainted by substantial previous experience in the private sector, nor will they have spent too much time as civil servants in a government enforcement culture that assumed the primacy of consumer welfare as the aim of antitrust law and accepted norms that tilted toward underenforcement. The concern about compromised motives is also likely to disqualify many academics who, though sympathetic to some expansion of antitrust enforcement, remain excessively beholden to some notion of a consumer (rather than citizen) welfare standard, or have engaged in consulting on behalf of large corporate interests.

One consequence of the acute anxiety about capture is to slam the revolving door shut, or at least to slow the rate at which it spins. We offer two cautions about this approach. First, the modern experience of the FTC raises reasons to question the strength of the theory. For example, if business perspectives dominate the FTC, why did the agency persist in its efforts to challenge reverse payment agreements involving leading pharmaceutical producers?144 Was it because the pharmaceutical firms weren’t as good at lobbying as, say, the information services giants? And what explains the FTC’s decision to sue Qualcomm for monopolization early in 2017?145 Is this simply attributable to the inadequacy of Qualcomm’s Washington, DC, lobbyists, or is the capture explanation for the behavior of the federal antitrust agencies not entirely airtight?

Our second caution is that severe restrictions on the revolving door could deny the federal agencies access to skills they will need to carry out a major expansion of antitrust enforcement. Recruiting attorneys, economists, and other specialists from the private sector can give the agencies a vital infusion of talent which, when combined with agency careerists, permit the creation of project teams that can equal the capability of the best teams that the defense can mount in major litigation matters. We also are wary of the idea that an attorney or economist coming from the private sector will discourage effective intervention during the period of public service as a way to pave the road to a better private sector position upon leaving the agency. Rather, there is evidence to suggest that creating a reputation for aggressiveness and toughness as an enforcer increases one’s post-agency employment options. More than a few individuals have development prosperous careers based on piloting businesses through navigational hazards that they helped create while they were senior officials in public agencies.

#### Pounder—agency squabbling reduces resources

Sara Fischer, Axios, Top regulators battle to crack down on Big Tech giants, September 17, 2019, <https://www.axios.com/big-tech-regulation-multiple-investigations-ftc-doj-ebdfd6ab-1fbb-40ea-ae08-89299d58a11e.html>

As investigations into tech giants' possible anti-competitive behavior multiply, authorities are beginning to tussle over turf — adding a new potential for discord to the regulatory chess game.

Why it matters: These probes are legally complex and historically difficult to pull off. There's bipartisan support right now for checking Big Tech's power, but the companies have enormous resources and remain popular, and fighting among regulators can only hamper their work.

Driving the news: Federal Trade Commission Chairman Joe Simons has written a letter to the Justice Department's antitrust division complaining about the DOJ's behavior in handling disagreements over which agency has the authority to probe Facebook, The Wall Street Journal reports.

Sen. Mike Lee (R-Utah) intends to bring up the letter and address the issue at a Senate Judiciary antitrust subcommittee hearing Tuesday, his office confirmed to Axios.

Be smart: Both agencies have clashed over who has jurisdiction to investigate, particularly Facebook.

Earlier this year the two agencies agreed that they would divide up investigations into the companies, with the DOJ taking on Alphabet (the parent company of Google) and Apple, and the FTC looking into Facebook and Amazon.

Tensions apparently rose in July when the DOJ announced another sweeping investigation into Big Tech platforms for their dominance, a move which reportedly had the FTC concerned that the DOJ would be stepping on its turf to investigate Facebook.

The big picture: A growing list of media investigations are presenting evidence of tech platforms abusing their dominance to promote their own products and services.

On Monday, the Journal reported that Amazon has changed its search function to more prominently feature products that are more profitable for the company. Amazon denies the report, saying it features products customers want, "regardless of whether they are our own brands or products offered by our selling partners."

Last week, a New York Times investigation revealed that Apple-owned apps often top rivals in its own App Store.

Friday, the House Judiciary Committee sent Facebook, Google, Apple and Amazon lengthy document requests, including executives' private communications, for its own investigation into the companies' practices.

The bottom line: Multiple probes can help regulators cover the vast territory they have set out to explore. But any time and resources they spend fighting each other will only benefit the companies they are seeking to hold accountable.

#### U.S. economy recovering now

Carlsson-Szlezak et al 21 – Partner and managing director of Boston Consulting Group’s New York office and global chief economist for Boston Consulting Group.

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.

## Court DA

#### Antitrust doesn’t affect legitimacy – no one cares

Baum and Devins 10 – Lawrence Baum is a professor emeritus in the Department of Political Science at Ohio State University; his primary research focus is judges’ behavior in decision making. Neal Devins is Sandra Day O’Connor Professor of Law and Professor of Government at William and Mary Law School.

Lawrence Baum and Neal Devins, “Why the Supreme Court Cares About Elites, Not the American People,” *The Georgetown Law Journal*, vol. 98, 2010, pp. 1549-1550, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs.

It is worth underlining the point that a great deal of the

Court’s work is essentially invisible to the public. Decisions in fields such as antitrust and patent law may be highly consequential, but it seems unlikely that there are strong public feelings about those decisions. Even if Justices seek to maintain the Court’s legitimacy, they have no reason to worry that public outrage in decisions in those fields will damage this legitimacy.170 More telling, the Rehnquist Court’s federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated eleven federal statutes on federalism grounds,171 thereby shifting the balance between the federal government and the states substantially. Nevertheless, these decisions (although prompting significant law review commentary) appeared to have low political salience.172 Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or any other Supreme Court invalidations of federal statutes.173

#### Court isn’t moderating its decisions – their evidence cherry-picks cases – VRA and campaign finance cases prove

Litman and Murray 7/1 – Leah Litman is an assistant professor of law at the University of Michigan Law School. Melissa Murray is a professor of law at the New York University School of Law.

Leah Litman and Melissa Murray, “Don’t be fooled: This is not a moderate Supreme Court,” *The Washington Post*, 1 July 2021, https://www.washingtonpost.com/opinions/2021/07/01/make-no-mistake-this-is-conservative-supreme-court-it-just-sometimes-acts-slowly/.

This Supreme Court term was significant mostly because of what the court did not do: The newly constituted 6-3 conservative supermajority did not use every case to openly and dramatically move the law rightward. Rather, in several important cases — including those involving the fate of the Affordable Care Act and the tension between religious liberty and gay rights — the court managed to resolve matters on seemingly narrow grounds and with broad majorities that transcended ideological differences.

But to call this term a model of judicial restraint — or even nonpartisanship — would be misleading. This is not a moderate or apolitical court. It is a reliably conservative court that, on occasion, chooses to act incrementally.

Characterizing this term as moderate would also overlook the profound impact of the court’s final two decisions, a pair of 6-to-3 rulings — one that hobbled what remains of the Voting Rights Act and another that lays a foundation for a seismic shift in campaign finance rules.

In some cases where there was cross-ideological agreement, the court achieved that result by deciding very little. In its 8-to-1 ruling on the case of the cheerleader disciplined for vulgar speech, the court declined to impose a broad rule letting schools regulate students’ off-campus speech in all circumstances. But meaningfully, the court did not say off-campus speech was never subject to oversight by school authorities. As its reasoning suggests, cross-ideological agreement is possible, as long as you agree to not say very much.

Technical legal doctrines also gave the court a way to appear less ideological. In the Affordable Care Act case, the court, voting 7 to 2, turned aside a third challenge to the law on the narrow grounds that the states and private parties challenging the law didn’t have standing to sue because they couldn’t show they were injured by the unenforceable requirement to obtain insurance.

Cross-ideological agreement also prevailed in the case involving whether Catholic Social Services could decline to certify same-safe couples as foster parents. In Fulton v. City of Philadelphia, the court ruled unanimously in favor of Catholic Social Services’ challenge to Philadelphia’s policy requiring city contractors not to discriminate on the basis of race, sex or sexual orientation. But the court’s fragile unanimity only warded off the more aggressive approach to religious liberty favored by some of the court’s Republican-appointed justices.

Much to the chagrin of some of the court’s most stalwart conservatives, the decision avoided overruling a major religious liberty precedent. But even in its so-called restraint, the majority changed the law. By invalidating a nondiscrimination requirement on the ground that it includes some system for exercising discretion — even if that discretion is never exercised — the court’s ruling opens the door to religious liberty challenges to a wide range of laws and policies.

In lower-profile cases, the court behaved in more obviously ideological ways — with conservatives banding together to aggressively move the law sharply to the right. In a major labor case that continues the conservatives’ hostility toward unions and worker organizing, the six conservative justices voted to invalidate a California regulation that facilitated agricultural workers’ ability to unionize.

The ruling could affect other private-sector unions’ ability to enter employers’ property if organizers cannot easily contact workers off-site. But the potential impact goes far beyond labor organizing. The court concluded that a California law that allowed union organizers to enter a workplace for a few hours a day constituted a taking of private property. This finding could call into question all manner of laws and regulations that require businesses to allow certain people onto their property — including for health and safety inspections, for child welfare or to prevent discrimination in the provision of goods and services.

In another case that will insulate corporations from regulation, five conservative justices held that a major credit reporting agency could not be sued for wrongly labeling its customers as possible terrorists or drug traffickers on a Treasury Department watch list. The decision accelerates a trend toward blocking the courthouse doors to persons seeking to enforce federal consumer protection laws.

As the term reached its conclusion, the muscular conservatism of the Roberts court was in full flower. In a major Voting Rights Act challenge, the justices sharply divided along ideological lines, weakening what remained of the act’s protections for our multiracial democracy. Likewise, in a challenge to a California public disclosure law, the court determined that states cannot require charities to report the identity of their donors to state authorities — a decision that will likely have sweeping repercussions for state and federal laws that require disclosure of campaign donations.

Instead of viewing this term as a triumph of restraint and moderation, we should see it for what it was — table-setting for the term to come. When the court resumes its work in October, it will have even more opportunities to reshape the landscape of American law, including on abortion rights and gun regulation. The question is whether the justices will do so explicitly, or in this term’s more slow and subtle fashion.

#### Court legitimacy is resilient – positivity bias is entrenched

Feldman 20 – Distinguished professor of law and adjunct professor of political science at the University of Wyoming.

Stephen M. Feldman, “Court-Packing Time? Supreme Court Legitimacy and Positivity Theory,” *Buffalo Law Review*, vol. 68, no. 5, December 2020, pp. 1548-1552, <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4892&context=buffalolawreview>.

In fact, political science studies suggest that the public’s diffuse support for the Court is resilient, sustained by “a reservoir of favorable attitudes or good will.”87 A “positivity bias” helps the Court maintain this good will and institutional legitimacy. According to positivity (bias) theory, “anything that causes people to pay attention to courts— even controversies— winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts.”88 Even when the Court issues a decision contrary to an individual’s personal views, that individual is unlikely to lose faith in the Court. If anything, when news of Court activities draws an individual’s attention, then that attention (to the Court) will likely reinforce the individual’s positive views of the institution. In a sense, the more one knows about the Court, the more one is likely to find its decisions legitimate (the opposite is true for Congress).89

To be sure, the Court’s legitimacy is not bulletproof: It depends on a perception that the Court is not merely another political institution. For instance, a confirmation battle in the Senate is unlikely to damage the Court’s legitimacy, but if widely viewed advertisements (related to the confirmation battle) attack the Court as purely political, then diffuse support for the Court is likely to diminish.90 Thus, while a politically salient Supreme Court decision might offend some Americans based on political ideology,91 a lack of specific support for that decision does not translate into a meaningful reduction of diffuse support. Only those Americans who already reject the Court as an institution—those individuals who have not developed a favorable attitude and good will toward the Court—are likely to denigrate it because of a small number of specific decisions. For the most part, the Court is able to maintain its institutional legitimacy despite “the ideological and partisan cross-currents that so wrack contemporary American politics.”92 Even so, sustained disappointment with the Court’s decisions over the long term, especially in politically salient cases, can weaken diffuse support for the Court. To take one example, diffuse support for the Court diminished among black Americans during the post-Warren Court years (consider the Burger, Rehnquist, and Roberts Courts’ consistent hostility toward race-based affirmative action).93

Significantly, the people’s diffuse support for and loyalty to the Court does not depend on the myth of pure law—that is, the myth of the law-politics dichotomy. To the contrary, many Americans seem to understand that Supreme Court decision making entails a combination of law and politics— the law-politics dynamic. As Gibson and Caldeira conclude: “[T]he American people seem to accept that judicial decisionmaking (sic) can be discretionary and grounded in ideologies, but also principled and sincere. Judges differ from ordinary politicians in acting sincerely . . . .”94 This insight into the Court’s institutional legitimacy has enormous implications for Democratic court-packing. Although a court-packing controversy would undoubtedly entail debates over the Court’s politically-charged decisions, the Court’s overall diffuse support would probably remain relatively stable. Most likely, in these hyper-polarized times, individuals’ political ideologies—leaning Republican or Democratic— would influence reactions to a Democratic court-packing plan. Republicans of course would oppose it, but many Democrats would likely support it, especially if Democratic politicians emphasized that they sought to return the Court to sincere and principled decision making.95 To the extent that individual views of the Court’s legitimacy might change in response to a court-packing plan, partisan shifts would likely cancel each other out. In the end, despite divergent views of the court-packing plan, the overall legitimacy of the Court itself would likely be sustained (or even grow) whether because of a positivity bias favoring the Court or a widespread Democratic (policy) opposition to the Roberts Court’s conservatism (as well as Democratic abhorrence toward recent Republican Senate maneuvers, including the rushed confirmation of Barrett, which resulted in an ironclad six-justice conservative bloc).96

#### Texas thumps every internal link – the decision was BONKERS and totally undermined any illusion that the court cares about the rule of law

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.

#### Legitimacy doesn’t increase in response to decisions – negativity bias

Christenson and Glick 19 – Dino P. Christenson is an associate professor of political science at Washington University in St. Louis. David M. Glick is an associate professor of political science at Boston University.

Dino P. Christenson and David M. Glick, “Reassessing the Supreme Court: How Decisions and Negativity Bias Affect Legitimacy,” *Political Research Quarterly*, vol. 72, no. 3, 2019, pp. 649-650, https://journals.sagepub.com/doi/pdf/10.1177/1065912918794906.

The second major source of variation we provide evidence for concerns negativity bias. We find that disappointment is generally more powerful than delight. The dramatic drops among those with positions contra the Court’s decisions point to asymmetrical effects. The pronounced evidence of negativity bias for cases decided in opposite directions prompts a natural follow-up question: why does legitimacy not tend toward zero? We speculate that the mechanisms we provide evidence for likely only apply in salient and polarizing cases. These cases are critical in that they are the ones people are paying attention to, but they are also rare. It is likely that ideological mechanisms and those from Positivity Theory are both in play but at different times. In between salient decisions, subtle mechanisms central to Positivity Theory may gradually help the Court recoup legitimacy. While our panel data show that ideological and, in particular, issue-support effects persist, it is possible that a long sequence of routine days and/or decisions helps reinforce the Court’s legitimacy until the next big case in which the Court provides fodder for ideological legitimacy updating. These findings and mechanisms are consistent with prior work that similarly allows for support for the Court to vary with outputs while reverting toward a baseline in the long term (Durr, Martin, and Wolbrecht 2000; Mondak and Smithey 1997).

# 1AR

## Platforms Adv

No cards

## Conduct Adv

No cards

## States CP

#### Aggressive state enforcement spills over—leads to broad overdeterrence and undermines innovation

DOJ, U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, Updated June 2015, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1

Standards of section 2 liability that overdeter risk harmful disruption to the dynamic competitive process itself. Being able to reap the gains from a monopoly position attained through a hard-fought competitive battle, or to maintain that position through continued competitive vigor, may be crucial to motivating the firm to innovate in the first place. Rules that overdeter, therefore, undermine the incentive structure that competitive markets rely upon to produce innovation.(80) Such rules also may sacrifice the efficiency benefits associated with the competitive behavior.

Importantly, rules that are overinclusive or unclear will sacrifice those benefits not only in markets in which enforcers or courts impose liability erroneously, but in other markets as well. Firms with substantial market power typically attempt to structure their affairs so as to avoid either section 2 liability or even having to litigate a section 2 case because the costs associated with antitrust litigation can be extraordinarily large. These firms must base their business decisions on their understanding of the legal standards governing section 2, determining in advance whether a proposed course of action leaves their business open to antitrust liability or investigation and litigation. If the lines are in the wrong place, or if there is uncertainty about where those lines are, firms will pull their competitive punches unnecessarily, thereby depriving consumers of the benefits of their efforts.(81) The Supreme Court has consistently emphasized the potential dangers of overdeterrence. The Court's concern about overly inclusive or unclear legal standards may well be driven in significant part by the particularly strong chilling effect created by the specter of treble damages and class-action cases.(82) Many hearing panelists reiterated this concern.(83)

#### Differing state enforcement strategies undermine tech sector transactions specifically—lasting uncertainty, predictable legal regime key

Huddleston, JD, Director of Technology and Innovation Policy, American Action Forum, ‘20

(Jennifer, “Antitrust Actions Beyond the Federal Government: The Potential Impact of State and Private Litigation,” December 18, <https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/insight/antitrust-actions-beyond-the-federal-government-the-potential-impact-of-state-and-private-litigation/>)

States are once again taking an aggressive view on antitrust in the tech industry, but the divergence in arguments could lead to more confusion and disruption in an industry that has provided consumers with beneficial and free services. Currently, the attorneys general of many states disagree with one another and the federal government regarding the nature of anticompetitive behavior and consumer harm by the tech giants’ actions. As we are starting to see with the new claim led by Texas Attorney General Ken Paxton, this split is likely to result separate cases with different theories of antitrust that seek not to apply current standards but embrace more expansive policy uses of this powerful tool. Often the animus behind these claims is not clear evidence of anticompetitive behavior but a desire to solve other concerns regarding tech policy, such as data privacy or alleged anti-conservative bias. This desire to solve non-competition-related issues could give rise to divergent theories of antitrust action that are incompatible with one another and not based in the traditional elements of consumer welfare and competition policy.

With a growing number of likely divergent claims, the current tech antitrust battles could continue for some time and lead to more confusion around the application of antitrust to this dynamic sector of economy. This may appear to be a short term problem, but uncertainty around the application of competition policy could impact numerous sectors of the economy. Regulators already appear to be increasing scrutiny of acquisitions related to the technology sector well-beyond the tech giants. Multiple court cases with a wide-range of theories that do not follow traditional antitrust applications could further the uncertainty or thought that previously justified actions might be subject to greater scrutiny. If a court chooses to embrace the creative and expansive theories at the center of these state-led cases, it could set precedent that changes the application of antitrust law in the future not only for the technology industry, but in many other areas of the economy as well. Regardless of the impact of these cases—and there is reason to think that these antitrust actions would not remedy the underlying policy concerns—the uncertainty and broad reach created by these competing state cases would likely stifle economic growth and innovation.

#### CP is vast over-deterrence that causes companies to abandon transactions—primary federal enforcement better

Lande, Associate Professor, University of Baltimore School of Law, ‘90

(Robert H., “When Should States Challenge Mergers: A Proposed Federal/State Balance,” 35 N. Y. L. Sch. L. Rev. 1047)

Further, it is confounding enough for antitrust counselors to have to contend with two potential federal enforcement agencies. Since both the Assistant U.S. Attorney General and the Chair of the FTC are selected by the President, 63 however, their approaches are in practice similar, if not identical. 64 Experienced merger counselors can provide relatively certain advice to their clients as to what the federal enforcers are likely to do by closely monitoring both agencies.65

It is immensely more difficult to actively monitor the enforcement philosophies of fifty state attorneys general, many of whom have little track record in the merger area (and some of whom bring few antitrust cases of any type).66 The state attorneys general come from both political parties and can have widely differing enforcement philosophies.67 The states have agreed upon a common substantive standard to be used in evaluating mergers-the NAAG Merger Guidelines.68 No set of guidelines with fifty different potential enforcers can offer anything close to predictability, however, since enforcers with divergent philosophies necessarily will interpret ambiguous terms differently in various factual contexts. In the extreme, business would be forced "to limit its activities to the levels set by the most restrictive state interpretation of federal antitrust law.,,70 The additional uncertainty from fifty potential state reviews, along with the inevitable accompanying delays and costs,71 could cause many beneficial transactions never to be attempted. These uncertainties and costs are an increment to the transaction costs already arising from federal review, which by itself may deter significant beneficial transactions.72

#### Supreme court has directly concluded the CP is preempted

Stamp, Chief Counsel, Washington Legal Foundation, ‘14

(Richard A., “The Role of State Antitrust Law in the Aftermath of Actavis,” 15 Minn. J.L. Sci. & Tech. 149 (2014))

On the other hand, state antitrust laws—like all state laws—are subject to the restrictions imposed by the Supremacy Clause of the U.S. Constitution,15 and are impliedly preempted to the extent that they conflict with federal law.16 Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility,”17 or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”18 On a number of occasions, the Supreme Court has concluded that state antitrust law is preempted because it conflicts with a federal statute other than federal antitrust law.19

The Court has been particularly quick to find preemption when state antitrust law has an impact on labor law, an area in which federal law is pervasive.20 Indeed, on at least one occasion, the Court found that a claim arising under state antitrust law was preempted by federal labor law even though the Court concluded that the conduct that gave rise to the state claim could proceed as a claim under federal antitrust law.21 The Court explained that “Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.”22 The Court said that state antitrust laws “generally have not been subjected to this process of accommodation” and thus that “[t]he use of state antitrust law . . . [must] be pre-empted because it creates a substantial risk of conflict with policies central to federal labor law.”23

#### Specifically applies to divergent procedural devices

Stamp, Chief Counsel, Washington Legal Foundation, ‘14

(Richard A., “The Role of State Antitrust Law in the Aftermath of Actavis,” 15 Minn. J.L. Sci. & Tech. 149 (2014))

It seems reasonably clear, however, that Actavis prohibits states from adopting the procedural devices rejected by the U.S. Supreme Court—either a per se condemnation of reverse payment settlements or a presumption of illegality accompanied by “quick look” review. The Supreme Court rejected those approaches because it determined that in many cases there might well be pro-competitive economic justifications for reverse payment settlements and that presuming their illegality could result in the suppression of economically useful conduct.82 State antitrust laws that adopted the FTC’s proposed presumption of illegality would be subject to similar criticism, and thus would likely be impliedly preempted as inconsistent with the careful balance between antitrust and patent law established by Actavis.

## Court DA

#### Decisions like the aff can’t affect legitimacy – public needs a defined opinion for the case to be salient

Crane 13 – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust and the Judicial Virtues,” *Columbia Business Law Review*, no. 1, 2013, pp. 4, https://core.ac.uk/download/pdf/232689875.pdf.

Antitrust law is not plagued by a substantial countermajoritarian difficulty and thus presents no reason for judges to exercise passive or avoidant virtues. Judges making antitrust law do not have to worry that their decisions will trump the popular will, except in the limited sense that they may reject suits by public enforcers like the Justice Department or Federal Trade Commission ("FTC"). To the extent that judges promulgate legal norms different from those favored by the executive branch, a small countermajoritarian difficulty is presented. But since judicial antitrust decisions are theoretically reversible by Congress, the courts do not have the final word on antitrust questions, as they do in constitutional cases. There is therefore little reason for judges to worry that their decisions in antitrust cases will compromise the legitimacy of the courts by undermining popular will.

#### Public doesn’t follow cases in general, much less on antitrust

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.

#### Even elites don’t care

Crane 13 – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust and the Judicial Virtues,” *Columbia Business Law Review*, no. 1, 2013, pp. 22, https://core.ac.uk/download/pdf/232689875.pdf.

In Trinko and Microsoft, the judges spoke with a unified voice, politely papering over their deep differences. There is a moment for such harmony, particularly in cases like Brown v. Board of Education," where the political legitimacy, independence, and power of the Court would be instantly challenged by powerful reactionary forces. One could only wish that the Supreme Court could have spoken with an equally unified voice in Bush v. Gore," whichever way the decision came out. Thankfully, courts deciding antitrust cases have few reasons to worry that their decisions will provoke serious challenges to their legitimacy, independence, or power. Given the luxury of relative indifference to their decisions in the general population, and even among the political elite, antitrust judges may, and often should, candidly disclose their differences.

#### Moderate trends won’t hold – the world ends next term

Robinson 6/18 – Supreme Court reporter for Bloomberg Law.

Kimberly Strawbridge Robinson, “Barrett Channels Roberts’ ‘Go-Slow’ Approach in Landmark Cases,” *Bloomberg Law*, 18 June 2021, https://news.bloomberglaw.com/us-law-week/barrett-channels-roberts-go-slow-approach-in-landmark-cases.

End of the World

But the ACA and LGBT cases, along with the extraordinary agreement all term, suggests a majority of the justices don’t think it’s the right time to make major changes in the law.

“In the throes of everything"—the pandemic, Barrett’s first term, Kavanaugh’s biting confirmation, calls for Breyer to retire, and the caustic 2020 presidential election—"they didn’t want to shock the world this year,” Segall said.

“Preserving the court’s own political capital is incredibly important to the justices because they know their only capital is the confidence of the American people,” he added.

Adler said the court has developed a sort of 3-3-3 split—that is, three liberals, three conservative justices willing to chuck precedents they don’t agree with, and three conservative justices hesitant to overturn cases they may disagree with. Roberts, Kavanaugh, and now, apparently, Barrett make up that last group.

Adler said that split will create some interesting pressures for the three justices in the middle next term, when—as Segall said—"the world will end.”

The end of the world was a reference—in part—to the court’s abortion case, which could call into question the landmark ruling in Roe v. Wade and later cases.

Incomplete Story

The ACA and LGBT rulings are, however, not the complete story on Barrett, who isn’t even a full year into what’s likely to be a decades-long tenure.

Barrett’s nomination raised questions about her personal views on abortion and whether they would influence her decisions. In a 1998 law review article, she wrote that abortion and euthanasia “take away innocent life” and that abortion is “always immoral.”

On guns, some have seen a willingness in Barrett to go further even than the late Justice Antonin Scalia in protecting Second Amendment rights.

And along with the blockbuster issues the justices are set to tackle next term, the court still has some consequential cases to decide, including a free speech case dealing with corporate disclosures and a property dispute involving labor organizing.

Adler said he’d expect to see some splintered rulings this term.

Moreover, “we have seen important 6-3 decisions” in cases like Jones v. Mississippi and Edwards v. Vannoy, Chemerinsky said, referring to cases on life sentences for juvenile defendants and unanimous jury verdicts for criminal trials.

Both divided the justices ideological, with Barrett siding with her conservative colleagues.

#### Statistical analysis proves the court is moving rightward – conservatives disagree about the speed of shift, not the direction

Bronner and Mejía 7/2 – Laura Bronner is FiveThirtyEight’s quantitative editor. Elena Mejía is an associate visual journalist at FiveThirtyEight.

Laura Bronner and Elena Mejía, “The Supreme Court’s Conservative Supermajority is Just Beginning to Flex Its Muscles,” *FiveThirtyEight*, 2 July 2021, https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/.

Understanding the full impact of former President Donald Trump’s 6-3 conservative supermajority is challenging at this point, though. On the one hand, this term saw the highest share of unanimous rulings in the last three years. On the other hand, the court’s last two major rulings broke down along 6-3 ideological lines. But that seeming inconsistency may have more to do with divisions among the court’s conservatives over how fast to move — not in what direction. Make no mistake, the court is moving in a conservative direction, and the conservative justices are in the driver’s seat.

To understand the court’s rightward shift, look no farther than the justice now at the center of the court: Justice Brett Kavanaugh. A position once held by Chief Justice John Roberts, this year’s preliminary Martin-Quinn scores, a prominent measure of the justices’ ideology, suggest Kavanaugh, not Roberts, was this term’s median justice. What’s most striking here, though, is not that Kavanuagh is at the center of the court, but the lack of daylight between where Roberts, Kavanaugh and even Justices Amy Coney Barrett and Neil Gorsuch are estimated to fall on the court.

One way to interpret the justices’ ideological scores this term is that there are actually multiple “median” justices on this court, as any split decision in which the liberal justices are part of the majority involves at least two conservative justices voting with the liberals. At the very least, Kavanaugh’s position at the center of the court doesn’t suggest he’s getting more liberal: Neither Kavanaugh nor Roberts are estimated to have moved to the left at all compared to where they fell last year. Rather, the replacement of the late Justice Ruth Bader Ginsburg by Barrett, whose ideological score this term is estimated to fall to the right of that of Roberts and Kavanaugh, has shifted the center of the court — and shifted it in a more conservative direction.

Of course, the Martin-Quinn scores are not a perfect measure of the justices’ ideology. Other work has shown that there is no single median justice on the court. Instead, different issues before the court often attract different “median” justices.

“The Supreme Court isn’t quite as one-dimensional as everyone says it is,” Josh Fischman, a law professor at the University of Virginia, told us.

That said, a conservative quad made up of Roberts, Kavanaugh, Barrett and Gorsuch has dominated the court’s decisions this term. Kavanaugh was in the majority in 97 percent of all cases this term — and in the majority in a whopping 95 percent of divided cases. Roberts wasn’t that far behind. He was in the majority in 91 percent of all cases and 84 percent of divided cases.1 Barrett and Gorsuch also were in the majority in more than 80 percent of divided cases. And in another sign that the court is moving in a rightward direction: Justices Thomas and Alito were in the majority 80 and 83 percent of the time, respectively, despite their images as the perennial dissenters. In fact, it was the three liberal justices who dissented most this term, perhaps unsurprisingly given the makeup of the court.

There was a lot of hype this term around the number of unanimous decisions issued — 44 percent in all — but that wasn’t actually all that unusual. In the previous 10 terms (2010-19), an average of 47 percent of cases were decided unanimously. And as you can see in the chart below, the rate at which the justices agreed with each other is still telling. The three liberal justices agreed with each other far more than with any of the other justices; the same was true of the five conservative justices. In fact, the two justices who are the most in lockstep are Roberts and Kavanaugh (they went the same way in 94 percent of all cases).

Barrett also was often lockstep with Gorsuch and Kavanaugh (she agreed with each of them in 91 percent of the cases in which she participated).2 It’s worth noting, though, that justices’ first years can be a bit misleading — in Kavanaugh’s first term on the court, for instance, he agreed as much with Justice Elena Kagan as he did with Gorsuch (70 percent), but in his second term he agreed far more with Gorsuch (88 percent) than with Kagan (72 percent), a pattern that has held true this past year as well.

Here, though, is where we can see Thomas and Alito earn their reputations as the two justices least likely to agree with the other justices. This term, they both agreed with Gorsuch the most (88 percent of the time), and although Alito voted in line with the other conservative justices (at least more so than Thomas), both conservative justices stand out for just how infrequently they agreed with the liberal justices — underscoring how intractable some members of the court’s conservative majority are.

So, what does this tell us about the court overall? As we said at the outset, it’s too early to evaluate just how far Trump’s conservative majority will fundamentally shift law in this country to the right. But we would caution that it’s important not to confuse disagreement among the conservative justices — which evidently exists — with disagreement over the direction the court is moving. Alito’s dissents, for instance, show impatience with the speed the court is moving at, but a closer look at some of the conservatives’ opinions reveal that even when they find themselves on opposite sides of Alito and Thomas, they still largely agree with them on the merits. Take Kavanaugh on the court’s decision to uphold the Centers for Disease Control and Prevention’s nationwide moratorium on evictions because of the COVID-19 pandemic. He joined the majority opinion, even though he thinks the CDC exceeded its authority in issuing the moratorium, saying he ultimately didn’t think it was worth overturning the moratorium because it ends July 31 anyway — hardly a ringing endorsement of the merits of the case. Or take Barrett on Fulton: She joined the majority opinion, but issued a separate concurrence with Kavanaugh, where both suggested they remain open to overturning the ruling in Employment Division v. Smith, which would dramatically change how courts evaluate laws that impose restrictions on religious groups.

Additionally, one caveat of the data we’ve looked at is that the justices’ ideology scores or how much they agree with each other don’t account for the types of cases the justices hear. For instance, this term, several of the highest-profile cases still resulted in the expected 6-3 ideological split. The Voting Rights Act of 1965 will now be less enforceable. Union access to workplaces will be restricted. Disclosure requirements for some political donations will have less oversight. And there won’t be any constraints on life sentences for juvenile offenders.

In other words, the conservative supermajority on the court has really just begun to flex its capabilities. What kinds of cases the justices decide to take on is as important as how they rule, and many of the cases decided this term were taken while Ginsburg was still on the court. The current court has already decided to take up cases on abortion and gun rights next term — two hot-button issues that might give us better insight into just how far, and quickly, the court is willing to move law to the right.

#### Texas decision eviscerates their internal links – it’s legal nonsense

Seddiq 9/11 – Politics reporter for Business Insider.

Oma Seddiq, “‘Lawless behavior’: Legal experts say the Supreme Court acted out of ‘political motivations’ in upholding Texas’ abortion ban,” *Insider*, 11 September 2021, https://www.businessinsider.com/legal-experts-supreme-court-is-lawless-after-upholding-texas-abortion-law-2021-9.

The Supreme Court opened the door to fierce backlash when a narrow majority of justices in a ruling last week upheld a strict Texas law that bans abortions after six weeks of pregnancy.

From President Joe Biden to advocacy leaders, critics have knocked the court's decision, arguing it flouts the constitutional right to an abortion established nearly 50 years ago under Roe v. Wade. That Supreme Court decision, along with other major abortion rulings since, protect the right to an abortion until pre-viability, or the point when a fetus can survive outside of the womb, which most experts say occurs around 24 weeks of pregnancy.

The court's refusal to block the Texas law "unleashes unconstitutional chaos," Biden said last Thursday, hours after the decision was handed down. The Department of Justice filed a lawsuit this week in an attempt to block the six-week abortion ban.

"This is the loudest alarm yet that abortion rights are in grave danger, in Texas and across the country," Alexis McGill Johnson, president and CEO of Planned Parenthood Federation of America, said in response to the ruling.

Some legal experts, too, have piled on the criticism. They argue that the Supreme Court justices, who are meant to behave as interpreters and appliers of the law, instead conducted themselves as partisan lawmakers in the Texas decision.

"Our court is broken. I mean, it's more of a political institution than it is a legal institution," Barry McDonald, a law professor at Pepperdine University Caruso School of Law, told Insider, adding that the Texas law is "flagrantly unconstitutional."

The Texas decision came via a little-known process called the 'shadow docket'

At midnight on September 1, a Texas statute that bans abortions after six weeks of pregnancy, a time when many people do not yet know they are pregnant, went into effect. The law makes no exceptions for cases of rape or incest and invites private citizens, rather than state officials, to enforce the ban.

It was not until 24 hours later when the Supreme Court responded to a request from abortion providers in the state to block the law. The court declined the appeal, and handed down its 5-4 opinion via a little-known process dubbed the "shadow docket."

The shadow docket, a term coined by University of Chicago law professor William Baude in 2015, refers to the range of decisions the Supreme Court makes that fall out of line with its normal routine. Unlike the lengthy process the court uses to decide 60-70 major cases per term, these shadow docket rulings are usually short, unsigned and could come before any oral arguments take place before the court, as was the case with the Texas decision.

Traditionally, the court uses the shadow docket for procedural purposes — to accept or deny applications for emergency action — in typically small, uncontroversial cases. But in recent years, the court's use of the shadow docket has sparked outrage over what critics describe as increasingly partisan and unsubstantial rulings, including now in the Texas abortion case.

"In the abortion case, it's not only short, it's just a jumble of nonsense," Richard Pierce, a law professor at the George Washington University Law School, told Insider of the court's opinion. "It's incoherent. The reasoning makes no sense at all."

The court's majority, in an unsigned opinion, argued that its ruling was technical and not based on the substance of the Texas law, which could still be legally challenged.

"In particular, this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts," the majority wrote.

Yet experts dispute the court's decision-making. "That's lawless behavior," Pierce said.

"It just concerns me tremendously," he added. "To me, the court should never take any action without providing a full set of reasons, telling us why it acted as it did. And the court has not been doing this in these cases that are referred to as the shadow docket."

"It's stunning," McDonald said of the court's ruling. "It just adds to this perception that the court is acting out of political motivations as opposed to impartial and objective application of legal principles."