# 1AC

### 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

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(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

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(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

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(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

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(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

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(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

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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.

#### Iran’s an emerging global hub for Bitcoin mining. Absent our internal link, they’ll obviate the role of financial institutions and effectiveness of sanctions.

**Erdbrink 19** --- Dutch journalist who is the Northern Europe bureau chief for The New York Times

Thomas, 1-29-2019, "How Bitcoin Could Help Iran Undermine U.S. Sanctions,” New York Times, https://www.nytimes.com/2019/01/29/world/middleeast/bitcoin-iran-sanctions.html

Iran’s economy has been hobbled by banking sanctions that effectively stop foreign companies from doing business in the country. But transactions in Bitcoin, difficult to trace, could allow Iranians to make international payments while bypassing the American restrictions on banks.

In the past, the threat of United States sanctions has been enough to squelch most business with Iran, but the anonymous payments made in Bitcoin could change that. While Washington could still monitor and intimidate major companies, countless small and midsize companies could exploit Bitcoin and other cryptocurrencies to conduct business under American radar.

The United States Treasury, well aware of the threat, is attempting to bring Bitcoin and the others into line. In recent weeks, in response to an internet fraud case originating from Iran, the Treasury imposed sanctions on two Iranians and the Bitcoin addresses, or ‘‘wallets,’’ they had used for trading in the currency.

The Treasury also has warned digital marketplaces that buy and sell Bitcoin and companies that sell computers used to process Bitcoin transactions that they should not provide services to Iranians. Several well-known trading sites are now blocking buyers and sellers from Iran. Some have confiscated money belonging to clients based in Iran.

“Treasury will aggressively pursue Iran and other rogue regimes attempting to exploit digital currencies,” the department said in a statement.

But by their nature, cryptocurrencies are uncontrolled by any person or entity. At best, efforts to regulate or monitor trade in them are episodic, whack-a-mole affairs. With Bitcoin and other cryptocurrencies, there is simply no way to duplicate the banking sanctions that have proved so damaging to the Iranian economy.

Bitcoin transactions are recorded on a digital ledger or database known as the blockchain, maintained communally by many independent computers. The system is designed explicitly to avoid central banks and large financial institutions. Like emails delivered without going through a central postal service, the computer network maintaining Bitcoin records enables the movement of money without going through any central authority.

The Iranian government has been slow to recognize the potential sanctions-evading possibilities of Bitcoin. But it is now considering the establishment of exchanges to facilitate trading, one official, Abdolhassan Firouzabadi, said recently. Despite the failure of Venezuela’s state-backed cryptocurrency, the Petro, Iran’s central bank said recently that it was seriously considering creation of something similar, possibly called the Crypto-Rial, named after the national currency, the rial.

Still, Iran’s venture into Bitcoin pales in comparison to what has been happening the former Soviet republic of Georgia, where thousands of people have jumped into the cryptocurrency business.

At the computerized processing operation in the Iranian desert, no one seemed particularly concerned with the geopolitical implications of Bitcoin.

The operation consisted of 2,800 computers from China, fitted into eight containers, which when linked are called a farm. It makes intense mathematical calculations, known as mining, needed to confirm Bitcoin transactions. Miners collect fees in Bitcoin for their services.

Ignoring the rain, the European visitor used the calculator on his mobile phone to determine how much money could be made from this particular farm, multiplying computer power and deducting electricity and operational costs.

He estimated about five Bitcoins a month, which at roughly $4,000 per Bitcoin at current price levels, would be about $20,000.

“Not too bad,” he said.

The currency fluctuates like any other, though it has proved particularly volatile, sinking to slightly less than $4,000 a unit from nearly $20,000 about a year ago.

“We’ll have two engineers on site to keep everything running, that’s it,” said Behzad, the chief executive of IranAsic, the company running the site. He, like the European investor, did not want to provide his family name, out of fear of penalties from the United States.

The Chinese computers, called Antminer V9s, were regarded as outdated by the European visitor. Still, he said, “I guess this is the last place on earth where they are still profitable.”

That helps explain why Iran seems to be taking its first baby steps toward becoming a global center for mining Bitcoins. Because of generous government subsidies, electricity — the energy for the computers needed to process cryptocurrency transactions — costs little in Iran. It goes for about six-tenths of a cent per kilowatt-hour, compared with an average of 12 cents in the United States and 35 cents in Germany.

In recent months, dozens of foreign investors from Europe, Russia and Asia have considered moving their mining operations to Iran and other low-cost countries like Georgia. “We have to be flexible in this industry and go where prices are the lowest in order to survive,” said the European investor.

#### Tracking solves Iranian evasion – US lead key.

**Robinson 21** --- Ph.D., Co-founder and Chief Scientist discusses cryptocurrency forensics, investigations, compliance, and sanctions.

Tom, "How Iran Uses Bitcoin Mining to Evade Sanctions and “Export” Millions of Barrels of Oil," Elliptic, <https://www.elliptic.co/blog/how-iran-uses-bitcoin-mining-to-evade-sanctions>

The Iranian state is therefore effectively selling its energy reserves on the global markets, using the Bitcoin mining process to bypass trade embargoes. Iran-based miners are paid directly in Bitcoin, which can then be used to pay for imports - allowing sanctions on payments through Iranian financial institutions to be circumvented.

This has become all but an official policy, with a think tank attached to the Iranian president’s office recently publishing a report highlighting the use of cryptoassets to avoid sanctions.

Many of those making the Bitcoin transactions and paying the fees to Iran-based miners will be located in the United States - the very country spearheading the sanctions. As the US government considers whether to lift some sanctions on Iran in exchange for a return to a nuclear deal, it will need to consider the role that Bitcoin mining plays in enabling Iran to monetise its natural resources and access financial services such as payments.

In the meantime, financial institutions should consider the sanctions risk they are exposed to due to Iranian Bitcoin mining - particularly those that are beginning to offer cryptoasset services. If 4.5% of Bitcoin mining is based in Iran, then there is a 4.5% chance that any Bitcoin transaction will involve the sender paying a transaction fee to a Bitcoin miner in Iran. Financial institutions should also be on the lookout for crypto deposits originating from Iranian miners that are seeking to cash-out their earnings.

Solutions for Sanctions Risks

However as we discuss in more detail our new sanctions guide, solutions to these challenges exist and are already used by financial institutions engaging in cryptoasset activity.

For example, blockchain analytics solutions such as those provided by Elliptic can be used by regulated financial institutions to detect and block cryptoasset deposits from Iran-based entities including miners. Techniques can also be employed to ensure that transaction fees are not paid to miners in high risk jurisdictions.

#### Effective sanctions key to prevent Iranian nuclear acquisition.

**Morrison 21** --- Master of Arts of Political Science, University of Waterloo.

Kallen, 2021, “Economic Sanctions and Nuclear Non-proliferation: A Comparative Study of North Korea and Iran, “University of Waterloo, Fulfilment of the thesis requirement for the degree of Master of Arts, https://uwspace.uwaterloo.ca/bitstream/handle/10012/16666/Morrison\_Kallen%20.pdf?sequence=3

Economic sanctions have been successful in stopping Iran from pursuing their nuclear program thus far. Iran has conceded multiple times to the United States and the international community to halt the enrichment of uranium and the advancement of their nuclear program. The most notable example of Iran’s concessions has been the signing of the Joint Comprehensive Plan of Action in which Iran agreed to halt and greatly reduce their nuclear program in return for substantial easing of economic sanctions. The second criteria has been met as Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Continued economic pressure has been paramount to bringing Iran to the negotiating table. While the United States and its regional allies do pose a military threat to Iran, that is unlikely a sufficient factor in dissuading Iran.

We have established that the level of political contestation in the targeted countries, their economic and security vulnerabilities, and the degree of international cooperation are important factors in determining if economic sanctions are effective at limiting nuclear proliferation. In Iran’s case the regime, while authoritarian, allows for limited political contestation. The general public gets to elect the president (even if candidates are handpicked by the supreme leader). Iranians have been able to protest against the government. One goal of economic sanctions is to galvanize the general public against the government and their policy decisions. Iranians have indeed been frustrated by the sanctions and voiced their discontent with the government policies targeted by the sanctions.

Iran’s international environment is also conductive for economic sanctions to be effective. Iran is a regional power with an impressive arsenal of missiles and extensive network of proxy forces. Therefore, nuclear weapons are not imperative for Iran’s defence. On the other end, Iran’s economy is largely based on oil and gas exports. Integration into the global market is very important for Iranians and a vital source of revenue for the government. Economic sanctions have hurt the Iranian economy and therefore have hurt Iranians. The economic squeeze has brought Iran to the negotiating table in the past and will likely do so in the future. The international approach to Iran has been encompassing with the European Union and the United Kingdom taking a common stand with the United States in preventing Iran from acquiring nuclear weapons. Even after the United States left the JCPOA the EU and UK have attempted to develop mechanisms to provide Iran with economic incentives to keep Iran abiding to the JCPOA. Even though China has given Iran an economic lifeline there is tension within Iran over concerns of becoming too economically dependent on China.

#### Israel would preempt before the nukes come online. Sparks a wider regional conflict that draws in all the major powers.

Scheinman 18 – Security Studies Chair, Nat’l War College; Nuclear Nonprolif Rep. for Obama

Adam M. Scheinman, What if Iran leaves the NPT?, 8 June 2018, <https://thebulletin.org/2018/06/what-if-iran-leaves-the-npt/>

Not to diminish the immensity of North Korea’s nuclear challenge, but Iran’s withdrawal from the NPT carries weightier risks. It would likely mean that Iran’s Supreme Leader had given the green light to an Iranian nuclear weapon, opening the floodgates to NPT withdrawals by other Arab states—Saudi Arabia, the UAE, and Egypt head that list. These and possibly other Sunni governments, none of whom can rely on a major power for defense, may conclude that they require their own nuclear weapon to check Iran’s rise. The Saudis are very clear and public on this point.

More immediately, Israel may feel compelled to strike Iranian nuclear facilities before they become fully operational. This raises the specter of a regional war that may draw in several of the nuclear weapon states—the United States, the UK, France, and Russia—and reshape the Middle East in ways we cannot predict. Whether the NPT could survive such a shock is another unknown.

#### Loss of economic leverage alone is sufficient to trigger the impact.

**Zilber 21** --- Journalist covering Middle East politics and an adjunct fellow at the Washington Institute for Near East Policy.

Neri, 9-14-2021, "Israel Can Live With a New Iran Nuclear Deal, Defense Minister Says," Foreign Policy, https://foreignpolicy.com/2021/09/14/israel-iran-nuclear-deal-defense-minister-gantz/

TEL AVIV, Israel—Israel would be willing to accept a return to a U.S.-negotiated nuclear deal with Iran, Defense Minister Benny Gantz told Foreign Policy—but Israeli officials are also pressing Washington to prepare a serious “demonstration of power” in case negotiations with Tehran fail.

The remarks, made during an exclusive interview last week, appear to reflect a shift in policy for Israel, which under the leadership of former Prime Minister Benjamin Netanyahu loudly opposed the 2015 nuclear agreement and worked to undermine it.

Former U.S. President Donald Trump pulled the United States out of the agreement in 2018, but the Biden administration has renewed the diplomacy—even as Iran moves closer to enriching enough uranium to make a nuclear weapon.

Gantz, asked about efforts by the Biden administration to get back to an agreement with Iran, said: “The current U.S. approach of putting the Iran nuclear program back in a box, I’d accept that.”

He added that Israel would want to see a “viable U.S.-led plan B” that includes broad economic pressure on Iran in case the talks fail. And he gestured at Israel’s own “plan C,” which would involve military action.

Gantz estimated that Iran was two to three months away from having the materials and capabilities to produce one nuclear bomb. Iran has steadily ramped up its nuclear work since the United States withdrew from the deal, despite a so-called maximum pressure campaign advanced by Trump and Netanyahu that included sanctions and sabotage efforts.

#### Can’t stay contained—multiple pathways to global nuclear war.

Avery 13 – Lektor Emeritus & Associate Professor, U of Copenhagen

John Scales Avery, Lektor Emeritus, Associate Professor, at the Department of Chemistry, University of Copenhagen, since 1990 he has been the Contact Person in Denmark for Pugwash Conferences on Science and World Affairs, An Attack On Iran Could Escalate Into Global Nuclear War, 11/6/13, http://www.countercurrents.org/avery061113.htm

Despite the willingness of Iran's new President, Hassan Rouhani to make all reasonable concessions to US demands, Israeli pressure groups in Washington continue to demand an attack on Iran. But such an attack might escalate into a global nuclear war, with catastrophic consequences. As we approach the 100th anniversary World War I, we should remember that this colossal disaster escalated uncontrollably from what was intended to be a minor conflict. There is a danger that an attack on Iran would escalate into a large-scale war in the Middle East, entirely destabilizing a region that is already deep in problems. The unstable government of Pakistan might be overthrown, and the revolutionary Pakistani government might enter the war on the side of Iran, thus introducing nuclear weapons into the conflict. Russia and China, firm allies of Iran, might also be drawn into a general war in the Middle East. Since much of the world's oil comes from the region, such a war would certainly cause the price of oil to reach unheard-of heights, with catastrophic effects on the global economy. In the dangerous situation that could potentially result from an attack on Iran, there is a risk that nuclear weapons would be used, either intentionally, or by accident or miscalculation. Recent research has shown that besides making large areas of the world uninhabitable through long-lasting radioactive contamination, a nuclear war would damage global agriculture to such an extent that a global famine of previously unknown proportions would result. Thus, nuclear war is the ultimate ecological catastrophe. It could destroy human civilization and much of the biosphere. To risk such a war would be an unforgivable offense against the lives and future of all the peoples of the world, US citizens included.

#### Saudi will follow them across the nuclear threshold---nuclear war.

Robb et. al 12 (Senator Charles S. – Virginia, General Charles Wald – Former Deputy Commander of U.S. European Command, Dr. Daniel Ahn – Senior Economist and Head of Portfolio Strategy for CitiBank New York, John Hannah – Former Assistant for National Security Affairs to the Vice President, Stephen Rademaker – Former Assistant Secretary of State for Arms Control and Nonproliferation, Christopher Carney – former U.S. Representative from Pennsylvania, Ed Husain – Senior Fellow for Middle Eastern Studies at the Council on Foreign Relations, Ambassador Dennis Ross – Counselor for the Washington Institute for Near East Policy, Ambassador Eric Edelman – Former Under Secretary of Defense for Policy, Reuben Jeffrey III – Former U. S. Under Secretary of State for Economic, Business, and Agricultural Affairs, John Tanner – Former U.S. Representative from Tennessee, Secretary Dan Glickman – Senior Fellow at the Bipartisan Policy Center, Admiral Gregory Johnson – Former Commander of U.S. Naval Forces, Europe, Mortimer Zuckerman – CEO and Chairman of the Board of Directors for Boston Properties, Inc., Larry Goldsetin – Founder of Energy Policy Research Foundation, Inc., and General Ron Keys – Former Commander of the Air Combat Command, The Price of Inaction: Analysis of Energy and Economic Effects of a Nuclear Iran, Bipartisan Policy Center, p. 24)

Saudi Arabia would be very likely to try to follow Iran across the nuclear threshold. Should it do so, the world would face the possibility of an Iran-Saudi nuclear exchange—a catastrophic humanitarian event that would threaten the entirety of Gulf oil exports for an extended period of time. In early 2008, the Senate Foreign Relations Committee concluded: “If Iran obtains a nuclear weapon, it will place tremendous pressure on Saudi Arabia to follow suit.”19 By 2012, some experts believe it has already begun to do so. Two main factors could drive Saudi Arabia to pursue a nuclear weapon: (1) a decades-long Saudi-Iran cold war waged along sectarian, religious, ethnic, and geopolitical lines and (2) a deep-seated competition over the energy policies that form the lifeblood of both regimes. The Sunni Saudi monarchy and Shiite Iranian theocracy each claim leadership of the Islamic world. This sectarian competition for primacy is reinforced by ethnic differences: Saudi Arabia is the largest and most populous Arab country astride the Gulf, but it is dwarfed by Iran’s much larger Persian-majority population. These competing claims have pitted the two countries in an enduring cold war and proxy conflict spanning from Lebanon to Iraq and the Arabian Peninsula. Iran—under both the Shah and the ayatollahs—has routinely sought to use its conventional military capabilities, large population, geostrategic position, expansive resources, and ties to armed groups to shift the balance of power in the Persian Gulf in its favor and at the expense of its Sunni Arab neighbors.20 As a result, Saudi Arabia has made it clear it views a nuclear-capable Iran as an existential threat. In 2008, King Abdullah urged the United States to “cut off the head of the snake,” one instance of his “frequent exhortations [to] the United States to attack Iran to put an end to its nuclear weapons program,” according to U.S. diplomatic cables revealed by Wikileaks.21 With uncertain prospects for a halt to Iran’s nuclear program—peaceful or otherwise—in 2009, the King informed a senior American official, “If [Iran] gets nuclear weapons, we will get nuclear weapons.” This year, senior Saudi officials reiterated that “it would be completely unacceptable to have Iran with a nuclear capability and not the kingdom [of Saudi Arabia].”22 Rather than lose time developing an indigenous nuclear program, it is likely the Saudi kingdom would seek to obtain a nuclear warhead from Pakistan ready to mount on its CSS-2 ballistic missiles. Close Saudi-Pakistani security ties date back to shared Cold War–era interests, and it is widely believed that Riyadh bankrolled Islamabad’s nuclear weapons program with the stipulation that Pakistan would sell nuclear devices to Saudi Arabia in an emergency; in the words of a senior Saudi official, “within weeks.”23 Pakistan would benefit by receiving much-needed cash and could demand in return dual-key authority over missile launches, both to control Saudi policy and to bolster its own secondstrike capability against India. At best, this would create a nuclear-armed standoff between the two most powerful and mutually antagonistic countries in the Persian Gulf. At worst, it could devolve into atomic warfare. Iran’s and Saudi Arabia’s small arsenals, lack of durable communication channels, poor civilian oversight of command-and-control systems, erratic intelligence, proximity to each other, religious ardor, and sectarian divide would all distinguish this scenario from the Cold War balance between the United States and the Soviet Union. Any such conflict would likely be extremely devastating. Each country would have natural incentives to cripple its opponent’s oil facilities in any nuclear conflict. Crudeoil exports are both regimes’ political and economic lifeblood, and thus the basis for their military power. Also, each country’s oil infrastructure and export terminals are concentrated along the Gulf, within range of the other’s nuclear-weapons delivery vehicles. Moreover, a nuclear war in this region would likely not only destroy a large portion of the Gulf’s oil infrastructure but also render the entire Gulf unavailable to shipping for some period of time. This could come directly through radioactive fallout, atmospheric pollution, and environmental destruction, or indirectly through prohibitively high insurance rates and other risk factors for tankers transiting the region.24 Therefore, even if a nuclear exchange did not spread into a region-wide war, the transit of Hormuz-bound oil exports would be halted by such a conflict.

#### 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

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(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

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(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.

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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

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(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

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

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

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

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

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

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

## Conduct Adv

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#### 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.

#### By LOWERING the threshold for plaintiffs, the aff makes MORE CONDUCT illegal

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(“Defining Exclusionary Conduct: Section 2, The Rule Of Reason, and the Unifying Principle Underlying Antitrust Rules,” Antitrust Law Journal , 2006, Vol. 73, No. 2 (2006), pp. 435-482)

The first step in detecting an underlying principle for crafting Section 2 legal tests is to examine the comparatively few circumstances in which the legality of conduct under Section 2 is relatively clear.30 What is striking is that courts do not implement Section 2 through a single legal test. Rather, Section 2 courts often apply different liability tests to different conduct. Moreover, these liability tests (either express or implied) are "interventionist" to varying degrees. Certain conduct is unlawful only in very specific circumstances or not at all; the applicable doctrine is relatively less interventionist. For other conduct, the applica- ble test allows for illegality in a broader set of circumstances, and the test is more interventionist. At the extreme, certain conduct is virtually per se illegal under Section 2.

#### The phrase “business practice” requires a pattern of conduct

Lucas 88 – Judge, California Supreme Court

Malcolm Millar Lucas, Cal. ex rel. Van De Kamp v. Texaco, 46 Cal. 3d 1147, Supreme Court of California, October 1988, LexisNexis

\*\* Italics in original.

The statute defines "unfair competition" to mean, as relevant here, "unlawful, unfair or fraudulent *business practice* . . . ." ( Bus. & Prof. Code, § 17200, italics added.) In so doing it effectively requires what the court variously described in the leading case of Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal.Rptr. 745, 496 P.2d 817], as "a 'pattern' . . . of conduct" ( id. at p. 108), "ongoing . . . conduct" ( id. at p. 111), "a pattern of behavior" ( id. at p. 113), and, "a course of conduct" (ibid.).

What the Attorney General challenges in this action is the Texaco-Getty merger. Under the Barquis court's construction of the statute, however, the merger itself cannot be characterized as "a 'pattern' . . . of conduct," "ongoing conduct," "a pattern of behavior," "a course of conduct," or anything relevantly similar: it is rather a single act. That the complaint, under the Attorney General's reading, alleges that Texaco engaged in certain unlawful, unfair, or fraudulent business practices in the past and may engage in other such practices in the future is simply not enough: the complaint attacks not those past or future practices, but only the merger.

#### The core antitrust laws are the Sherman and Clayton Acts – means that all affs must interpret existing statutes

Felsenfeld 93 – Professor of Law, Fordham University School of Law

Carl Felsenfeld, “The Bank Holding Company Act: Has It Lived Its Life?,” Villanova Law Review, Vol. 38, January 1993, LexisNexis

It is well established that, despite the "extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition,"480 the United States' core antitrust statutes (the Sherman and Clayton Acts) apply to banks.481 There is respectable opinion that "existing antitrust laws are fully adequate to guard against anticompetitive mergers or acquisitions, or other anticompetitive activity, in the banking industry."482 A proposal to remove the BHCA, however, is not a suggestion that only the Sherman and Clayton Acts would impose antitrust limitations on banks. The other bank laws and regulations would continue in effect.483

Whether the antitrust laws are sufficient to curb bank abuse that is otherwise dealt with by the BHCA has been disputed. One relatively early opinion suggested that illicit bank behavior is "almost impossible to detect and prove in a court of law" and, consequently, explicit legislation, like the BHCA, which foreclosed banks from other fields was desirable. 484 In contrast, a former Deputy Assistant Attorney General for Antitrust later opined that bank antitrust problems within the BHCA sphere are simply traditional antitrust issues that can be dealt with by those laws.485 He was countered by a then current Attorney General for Antitrust who believed the BHCA was essential to keep banks separate from commerce.486 Because these last two views were expressed in 1969 and 1970, one must assess current antitrust laws to analyze what view is valid today.487

There is a high degree of flexibility in the antitrust laws. One of the functions of the antitrust laws is to adapt their application to the particular industry under consideration and to the particular markets within which the industry operates.488 The general approach of the antitrust laws towards a merger or consolidation of the sort that currently requires preapproval under the BHCA is to accept the industry in its existing form as the norm and then to establish the effects of the merger or acquisition in terms of its effects on that norm. The net effect is the antitrust laws' disposition in favor of the existing structure.

The Justice Department has the power under existing law to challenge banking mergers and acquisitions for violation of the antitrust laws even when the Fed has first found the BHCA's antitrust tests satisfied.489 For example, in December 1990, the Justice Department challenged the acquisition of First Interstate of Hawaii, Inc. by First Hawaiian, Inc. under the BHCA even though the Fed had approved the transaction. The suit was settled by the agreement of the parties to a divestiture plan proposed by the Justice Department.490 In July 1991, the Justice Department challenged an acquisition by Fleet/Norstar of assets from the FDIC after the transaction was approved by the Fed under the Bank Merger Act.491 As these two cases show, the Justice Department has sufficient regulatory authority to police the antitrust aspects of bank acquisitions effectively without the BHCA statutory protections.

2. Federal Trade Commission Act

Secondary to the core antitrust laws, and of more potential than experiential significance in regulating bank holding company behavior in the absence of the BHCA, is the Federal Trade Commission Act (FTC Act). \492 In its broad scope the FTC Act is inapplicable to banks. 493 The FTC, however, may require banks to produce documentary evidence required during agency investigations. 494 The FTC Act's basic function is the prevention of precisely the type of activity that banks and their nonbank affiliates were accused of in the initial drafting of and amendments to the BHCA 495 - the perpetration of "unfair methods of competition." 496

## DPA CP

#### Uncertainty. It introduces a new, unpredictable process over antitrust out of the blue. Best studies prove it wrecks R&D investment.

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Yuchen, Daxin Dong, Jiaxin Wang, “The Negative Impact of Uncertainty on R&D Investment: International Evidence,” International Evidence, Sustainability 2021, 13, 2746. https://doi.org/10.3390/ su13052746

In summary, in this study, we reported a significantly negative impact of uncertainty on R&D investment at the country level. The analyses were based on a sample covering 109 countries from 1996 to 2018. It was also found that uncertainty reduced the number of annual new patent applications. The adverse impact of uncertainty on R&D was not only significant statistically, but also economically. According to the estimation results, if the uncertainty index rises by one unit (one standard deviation), the scale of R&D investment and the number of patent applications will decline by 15.6% (2.1372%) and 22.7% (3.1099%), respectively. Further analyses demonstrated that the effect of uncertainty was not uniform across all countries. In some country groups, the effect was strong and statistically significant. However, in several country groups, the effect was moderate and insignificant. However, we always observed a negative effect. Overall, Hypothesis 1 in our study is verified, and Hypothesis 2 is contradicted.

The study results provided strong support to some previous studies which reported a negative impact of uncertainty on R&D investment, including Arif Khan et al. [5], Cho and Lee [11], Czarnitzki and Toole [8], Goel and Ram [12], Ivus and Wajda [1], Jung and Kwak [15], Nan and Han [17], Wang et al. [4], and Xu [20]. The results did not support several studies that reported a positive effect of uncertainty, such as Atanassov et al. [3], Gu et al. [13], Han et al. [14], Jiang and Liu [6], Meng and Shi [16], Ross et al. [9], Stein and Stone [18], Tajaddini and Gholipour [7], and Vo and Le [19]. Our study utilized a wide sample of more than 100 countries and examined the country-level aggregate R&D investment. This feature enabled our study to better depict the overall situation in the world, compared to most of the extant studies, which have only focused on the R&D of business corporations within one country.

The findings in this study have important policy implications. First, in order to keep abreast of the R&D investment dynamics, governments and economic agents should pay attention to the degree of uncertainty in the economy. The negative impact of uncertainty on R&D is a phenomenon that widely exists in different countries over the world, as shown by our analyses on the full sample, as well as various subsamples. If governments can effectively monitor the variations in uncertainty and evaluate the relevant market responses, they will be able to understand the current situation and forecast future tendency of aggregate R&D investment in a better way. Being more informed will facilitate governments to make proper public policies if necessary. After understanding the link between uncertainty and R&D, firms can reasonably expect that other enterprises in the industry will adjust investment accordingly when uncertainty changes. During the procedure of making their own R&D investment plans, firms should not neglect the potential responses of the competitors and partners to varying uncertainty.

Second, given the importance of innovation and technological advancement for sustainable economic and social development, it is necessary to reduce the degree of macro uncertainty. Governments should avoid frequent variations of economic policies and the abrupt implementation of substantial reforms. The communication and information sharing among governments and private sectors should be reinforced to reduce noises, mitigate misunderstanding, and enhance trust and confidence. Countries should also improve their institutional and economic infrastructure—for example, by reducing frictions in financial markets and strengthening governmental effectiveness—in order to increase the resistibility of economic system to unexpected shocks. In the case that the major origins of the uncertainty can be identified—such as the coronavirus pandemic in the current period—urgent actions should be carried out to deal with the problems

## Notice and Comment CP

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## Cap K

#### Net benefit is contingent market logics – those are key to growth and innovation, but avoid the totalizing political economy they criticize

Coniglio, antitrust attorney in the Washington, DC office of Sidley Austin LLP, ‘20

(Joseph V., “Economizing the Totalitarian Temptation: A Risk-Averse Liberal Realism for Political Economy and Competition Policy in a Post-Neoliberal Society,” 59 Santa Clara L. Rev. 703)

The implication of the foregoing is that the most pressing task for competition policymakers may not involve a rethinking of first principles. The principles of neoliberal competition policy may have ultimately been proven justified by an unprecedented period of economic growth, technological progress and reductions in poverty, and should presumably remain operative as long as they remain the best framework for bringing about these ends. Neither, as we have suggested, must the capitalist entrepreneur be lost in the process. The totalitarian temptation to submit to general state control of the economy-whether it be in the form of communism from below or fascism from above should be resisted so as to preserve and build upon the great prosperity Western Civilization has managed to achieve.

This statement will no doubt be highly unsatisfactory to many critics of neoliberalism who seek more fundamental and revolutionary changes. Surely, they suggest, there must be some principled basis for critiquing the neoliberal status quo with which so many are frustrated. Indeed, there very well may be, and none of the arguments in this article should be understood to the contrary. The goal of this article has been limited to a tailored defense of neoliberal principles only as they relate to competition policy, broadly understood. It does not suggest that neoliberal monetary, trade, and fiscal policies are also sound-let alone a neoliberal social order, where all the core institutions within society are organized according to the neoliberal principles of wealthmaximization, empiricism, and the rest.129 This is to say that even if neoliberalism is a sound theory as applied to the area of competition policy, neoliberal monetary policy, for example, may be problematic and a just target for contemporary critics. Similarly, claiming that competition policy should be enforced using a consumer welfare standard does not mean that all the organs of law and civil society should be oriented to maximize wealth or consumer welfare, even if this economic inquiry is nonetheless informative. 30 It is well known that several prominent neoliberals have expanded the neoliberal policy apparatus beyond the regulation of market capitalism with which antitrust is concerned to domains typically understood to be beyond a purely utilitarian purview.' 3 ' However, whatever the merits of these broader neoliberal policy programs, the competition policy baby, so to speak, should not be thrown out with the bathwater.

#### Tech and adaptation prevent apocalyptic collapse – reject pessimistic fear mongering

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Ronald. March 12. “Climate Change Problems Will Be Solved Through Economic Growth” <https://reason.com/blog/2018/03/12/climate-change-problems-will-be-solved-t>

"It is, I promise, worse than you think," David Wallace-Wells wrote in an infamously apocalyptic 2017 New York Magazine article. "Indeed, absent a significant adjustment to how billions of humans conduct their lives, parts of the Earth will likely become close to uninhabitable, and other parts horrifically inhospitable, as soon as the end of this century."

The "it" is man-made climate change. Temperatures will become scalding, crops will wither, and rising seas will inundate coastal cities, Wallace-Wells warns. But toward the end of his screed, he somewhat dismissively observes that "by and large, the scientists have an enormous confidence in the ingenuity of humans....Now we've found a way to engineer our own doomsday, and surely we will find a way to engineer our way out of it, one way or another."

Over at Scientific American, John Horgan considers some eco-modernist views on how humanity will indeed go about engineering our way out of the problems that climate change may pose. In an essay called "Should We Chill Out About Global Warming?," Horgan reports the more dynamic and positive analyses of two eco-modernist thinkers, Harvard psychologist Steven Pinker and science journalist Will Boisvert.

In an essay for The Breakthrough Journal, Pinker notes that such optimism "is commonly dismissed as the 'faith that technology will save us.' In fact, it is a skepticism that the status quo will doom us—that knowledge and behavior will remain frozen in their current state for perpetuity. Indeed, a naive faith in stasis has repeatedly led to prophecies of environmental doomsdays that never happened." In his new book, Enlightenment Now, Pinker points out that "as the world gets richer and more tech-savvy, it dematerializes, decarbonizes, and densifies, sparing land and species." Economic growth and technological progress are the solutions not only to climate change but to most of the problems that bedevil humanity.

Boisvert, meanwhile, tackles and rebuts the apocalyptic prophecies made by eco-pessimists like Wallace-Wells, specifically with regard to food production and availabilty, water supplies, heat waves, and rising seas.

"No, this isn't a denialist screed," Boisvert writes. "Human greenhouse emissions will warm the planet, raise the seas and derange the weather, and the resulting heat, flood and drought will be cataclysmic. Cataclysmic—but not apocalyptic. While the climate upheaval will be large, the consequences for human well-being will be small. Looked at in the broader context of economic development, climate change will barely slow our progress in the effort to raise living standards."

Boisvert proceeds to show how a series of technologies—drought-resistant crops, cheap desalination, widespread adoption of air-conditioning, modern construction techniques—will ameliorate and overcome the problems caused by rising temperatures. He is entirely correct when he notes, "The most inexorable feature of climate-change modeling isn't the advance of the sea but the steady economic growth that will make life better despite global warming."

Horgan, Pinker, and Boisvert are all essentially endorsing what I have called "the progress solution" to climate change. As I wrote in 2009, "It is surely not unreasonable to argue that if one wants to help future generations deal with climate change, the best policies would be those that encourage rapid economic growth. This would endow future generations with the wealth and superior technologies that could be used to handle whatever comes at them including climate change." Six years later I added that that "richer is more climate-friendly, especially for developing countries. Why? Because faster growth means higher incomes, which correlate with lower population growth. Greater wealth also means higher agricultural productivity, freeing up land for forests to grow as well as speedier progress toward developing and deploying cheaper non–fossil fuel energy technologies. These trends can act synergistically to ameliorate man-made climate change."

Horgan concludes, "Greens fear that optimism will foster complacency and hence undermine activism. But I find the essays of Pinker and Boisvert inspiring, not enervating....These days, despair is a bigger problem than optimism." Counseling despair has always been wrong when human ingenuity is left free to solve problems, and that will prove to be the case with climate change as well.

#### Totalization DA—complete rejection of neoliberal competition policy fails and creates international instability

Coniglio, antitrust attorney in the Washington, DC office of Sidley Austin LLP, ‘20

(Joseph V., “Economizing the Totalitarian Temptation: A Risk-Averse Liberal

Realism for Political Economy and Competition Policy in a Post-Neoliberal Society,” 59

Santa Clara L. Rev. 703)

Progressivism, by contrast, sees powerful administrative and welfare states as necessary to protect the interests of the working classes, and is hostile to the existence of both plutocratic and concentrated corporate power. In the United States, the paradigmatic progressive political program was the New Deal. Whereas the first part of the New Deal included a host of regulations empowering the administrative state and placing regulatory obligations on business, the second part of the New Deal included Social Security and tax increases.77 Even though progressivism might therefore provide an adequate check against the imposition of fascism by an alliance of private power, the elimination of any substantial checks against the abuse of public power risks progressive institutions being utilized by intellectual elites rousing the working classes to bring about, and achieve power in,78 a socialist political economy.79

In addition to this risk aversion to totalitarian political economy, a certain realism about the present historical moment represents another basis for critiquing some of the theories of competition policy discussed above. While Burke's "age of chivalry" may be lost and utopia never to come, humanity lives better than it once did, and that should count for something. This is to say that, in lieu of believing that a liberal and democratic end of history remains the birthright of all mankind, or attempting to turn back globalization, policymakers should be concerned about losing what unprecedented but fragile progress modernity has actually made in improving the lives of many, many millions who were once in poverty both in the West and around the world.

The hyper-neoliberal approach-namely, that increased technological progress will prove a sufficient condition for sustaining the neoliberal order-can be faulted on these realist grounds, as the full implications of the New Economy and on liberal economic order are not yet fully understood. It may be that the golden age of technological progress and economic growth is already gone and therefore of little promise toward continued middle class expansion. ° It may be that the social consequences of rapid innovation in the Internet economy are in large part increased group polarization and extremism that, in a heterogeneous society, ultimately leads to fragmentation, violence, and the breakdown of liberal economic order.8' Finally, it may be that even notwithstanding a liberal effect of democratizing access to ideas, goods, and people, a reinvigorated bureaucracy concerned about me- quality chills continued technological progress.82 All of these possibilities, and still many more, make the hyper-neoliberal paradigm too speculative for policymakers to stake the future of liberal economic order on.

An unabashed program of industrial policy, by contrast, suffers from a more subtle form of idealism. On the one hand, the recognition of nation states as self-interested actors in competition with one another within a sovereignty-based framework has long been a dominant view for thinking about international order in "realist" terms.83 Over the neoliberal period, however, the immersion of the contemporary nation state within a globalized economy of ideas, goods, people and supply chains has resulted in not only unprecedented economic growth and prosperity around the world, but relative peace.84 A turn toward industrial policy, even in the limited case of antitrust, risks contributing to the undermining of not only economic growth and neutral rules-based legal frameworks-such as antitrust as an apolitical, value neutral, and technocratic enterprise 8 5 -but also global peace and stability, with potentially destructive consequences for humanity similar to those that obtained prior to the advent of the liberal international order.

#### Alt fails—it’s vague and undefined—can’t generate coherent way to contest neoliberal concentration

Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Law School and the Wharton School, ‘18

(Herbert, “Whatever Did Happen to the Antitrust Movement?” Faculty Scholarship at

Penn Law. 1964)

As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output, and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.17

Nevertheless, mantras such as “industrial concentration” or “big business” have great political force. These terms provide almost nothing in the way of administrable rules while yet evoking an image of something big, bad, and powerful that government must bring under control. For example, here is the plank of the 2016 Democratic Party’s platform on antitrust:

Large corporations have concentrated their control over markets to a greater degree than Americans have seen in decades—further evidence that the deck is stacked for those at the top. Democrats will take steps to stop corporate concentration in any industry where it is unfairly limiting competition. We will make competition policy and antitrust stronger and more responsive to our economy today, enhance the antitrust enforcement arms of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and encourage other agencies to police anti-competitive practices in their areas of jurisdiction.

We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy. We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce. We support President Obama’s recent Executive Order, directing all agencies to identify specific actions they can take in their areas of jurisdiction to detect anticompetitive practices—such as tying arrangements, price fixing, and exclusionary conduct—and to refer practices that appear to violate federal antitrust law to the DOJ and FTC.18

The antitrust plank never references low consumer prices, or anything having to do with product quality. That is not because Democrats are not interested in low consumer prices.19 Rather, they apparently believe that antitrust has little to do with it. The references to prices occur in other sections of the platform, devoted to such subjects as health and safety and the high price of pharmaceutical drugs. Those sections make no reference to antitrust law.20 The only references to “consumers” occur in planks pertaining to unionization, affordable housing, Wall Street, banks and Dodd-Frank, and clean energy.21 So according to the platform, while legal policy generally is concerned with high consumer prices, antitrust policy apparently is not. By contrast, the 2016 Republican platform never references antitrust, although it does contain a plank promoting a “competitive America,” but focused entirely on lowering tax rates.22

The antitrust plank in the 2016 Democrat platform is actually one of the most detailed to appear in any platform by a major political party.23 The catchphrases that it uses, however—“corporate concentration,” “unfairly limiting competition,” or “abusive behavior by dominant companies”—can mean practically anything depending on assumptions. The platform is peppered with references to “fair” or “fairness,” including the antitrust plank, but with no reference point indicating how fairness should be assessed. Is it “fair” that consumers be asked to pay high prices in order to accommodate the shortcomings of some businesses; or conversely, is it “fair” that small businesses suffer simply because they are not able to compete with larger firms on price or quality; or is it “fair” that firms heavily invested in old brick-andmortar distribution lose out to more technologically entrepreneurial firms? “Fairness” as an antitrust concern means nothing without a reference point or set of measurement tools.

As for specific practices, the antitrust plank in the Democrat platform singles out “tying arrangements, price fixing, and exclusionary conduct,” saying nothing about mergers, other vertical restraints, or anticompetitive patent practices. In fact, the platform never mentions patents, although it makes frequent references to innovation, largely in the context of proposed government intervention to stimulate production24 or to finance research and development and educate people for more technically demanding jobs.25 Of the three anticompetitive practices that it singles out, “price fixing” is completely uncontroversial and has always been a central focus of nearly every articulation of antitrust policy, left, center, and right—including in Bork’s The Antitrust Paradox. 26 The term “exclusionary conduct” is so vague that it is meaningless. Both socially harmful and socially beneficial conduct can be “exclusionary.” The inclusion of “tying arrangements” is mystifying. Tying is ubiquitous in modern economies and is an essential characteristic of networks and technology.27 Further, the vast majority of it is procompetitive because it increases output without excluding anyone. Finally, the number of antitrust tying cases is small in comparison with merger cases, which make up a large portion of antitrust enforcement activity. A major party platform that identifies “tying arrangements” but not “mergers” as a fundamental concern requires an explanation. Most importantly, it seems to miss the whole point of competitive markets, which is to produce a high output of quality, competitively priced goods.

At least in part, the Democratic Party platform reflects the reappearance of movement antitrust. While it is hardly the only expression, and certainly not the most extreme, it represents a troublesome development—namely, the idea that America needs higher prices in order to give smaller firms a fair chance. The platform also gives a reader the strong impression that its slogans were selected in order to achieve maximum political traction with the illiterati, and perhaps that is all that can be expected of a political platform. In the process, however, it does antitrust policy a great disservice by making its legitimate targets almost impossible to define and not providing ammunition for attacking them when they are defined. Its supporters generally disparage the use of economics, sometimes suggesting that antitrust policy should be governed by political theory instead.28 Exactly how political theory gets one to specific antitrust rules is not completely clear, but it involves excluding the opinions of antitrust experts concerning the public’s interest.29

Movement antitrust argues variously for abandoning the measurement of competition by reference to output and price,30 or even abandoning consumer welfare as an antitrust proscription altogether.31 It accuses retailers such as Amazon of engaging in “predatory pricing” without providing a coherent definition of the practice.32 It never explains how a nonmanufacturing retailer such as Amazon could ever recover its investment in belowcost pricing by later raising prices, and even disputes that raising prices to higher levels ever needs to be a part of the strategy, thus indicating that it is confusing predation with investment.33 Charging low but profitable prices indefinitely is not unlawful “predatory pricing”‘ nor is forcing suppliers to price competitively.

## Regulation CP

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

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

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

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

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

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

#### Regulatory programs cannot address all platform conduct

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

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

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

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

#### If they try to, it’s too broad and harms innovation

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)

Few platforms are natural monopolies. If the market contains room for competition among multiple incumbent firms, regulation is usually a poor alternative. 70 It rarely comes close to mimicking competitive behavior. Regulation necessarily generalizes and applies the same rules to several firms in an area, while antitrust requires a fact-specific inquiry for each firm. This is particularly important if the firms in question are quite diverse.

Regulation also entrenches existing technologies and, in doing so, bolsters existing incumbents. For example, the Federal Communications Commission’s (FCC) longstanding willingness to protect AT&T’s dominant position from all rivals very likely held back innovation in telecommunications for decades.71 Of course, proper regulatory design might mitigate this. But if viable and robust competitive alternatives are available, regulation usually is not the best answer.

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

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

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

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

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

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

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

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

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

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

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

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

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

Teaming up

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Japan DA

#### Court won’t apply antitrust extraterritorially

Hall et al 18 – Co-head of dispute resolution and litigation at Norton Rose Fulbright US LLP.

Thomas J. Hall, Seth M. Kruglak, and Thomas J. McCormack, “US courts retreat from applying major federal statutes to extraterritorial activity,” *Norton Rose Fulbright*, no. 7, December 2018, pp. 6-7, https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/corporate-and-commercial-disputes-review---issue-7.pdf?revision=0f8ad5aa-81ce-4991-9946-002f2f07f9db&revision=0f8ad5aa-81ce-4991-9946-002f2f07f9db.

The presumption against the extraterritorial reach of federal statutes

The Supreme Court’s presumption against extraterritoriality stems from the conservative majority’s strict adherence to the principle that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” Morrison v Nat’l Australia Bank Ltd., 561 US 247, 255 (2010). Accordingly, “unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect,” the Court will “presume it is primarily concerned with domestic conditions.” If a statute has no clear, affirmative indication that it applies extraterritorially, the Court will then examine the statute’s “focus” to determine whether the application of the statute in the case at hand involves a domestic application of the statute in question. RJR Nabisco, Inc. v European Cmty., 136 S. Ct. 2090, 2101 (2016).

The Supreme Court has stated that the presumption “serves to avoid the international discord that can result when US law is applied to conduct in foreign countries” and “also reflects the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind.” Therefore courts must apply “the presumption across the board, regardless of whether there is a risk of conflict between the American statute and a foreign law.”

#### Trump-era trade policies either thump the link or prove it’s resilient

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Mireya Solís, “Reinventing the Trading Nation: Japan, the United States, and the future of Asia-Pacific trade,” *Brookings Institution*, November 2019, pp. 11-13, https://www.brookings.edu/wp-content/uploads/2019/11/FP\_20191112\_trading\_nation.pdf.

NEGOTIATING TRADE AGAIN: THE FUTURE OF THE U.S.-JAPAN ECONOMIC PARTNERSHIP

Although U.S.-Japan relations are robust and strong, trade once again had the potential to be a divisive issue among the two allies. The differences in the trade philosophy animating each government were on display in the Abe-Trump joint statement released in fall 2018 giving the green light for bilateral talks. President Trump emphasized reciprocity and the reduction of the bilateral trade deficit as his main concerns, while Prime Minister Abe endorsed the principle of rules-based trade. Both sides also took the opportunity to reference sensitive areas. For the United States, the achievement of market access outcomes that increase American manufacturing production and jobs, and for Japan, a ceiling on agricultural liberalization to be on par with its existing economic partnership agreements.23

In the months prior to the launch of the trade negotiations, each side characterized differently the scope of the proposed bilateral agreement. Japan insisted the negotiations aim for a trade agreement on goods as well as some services where early achievements are possible. Tokyo was interested in narrower (and faster) negotiations that fend off problematic demands from the Trump administration on issues such as currency manipulation, FTAs with non-market economies, and “voluntary” export restraints; while reserving the TPP as the most comprehensive rulebook in order to incentivize an eventual American return to the deal. In contrast, Washington aimed for a comprehensive FTA that can be negotiated in stages, with a particular interest on an early harvest agreement in agriculture to appease American farmers losing market share in Japan.

Japan and the United States have pursued contrasting trajectories on trade since they parted ways on the TPP. Therefore, their most pressing objectives motivating the bilateral negotiations were different this time. For Japan, it was about deflecting U.S. unilateralism. In effect, avoiding the harm to a major economic sector if a 25% national security tariff were to hit the 1.7 million vehicles exported annually to the United States (equivalent to a third of all Japanese brand cars sold in the American market). For the United States, it was about catching up with Japan’s trade leadership. In essence, preventing the marginalization of American farmers from lucrative markets now that Japan demonstrated it could mobilize others in support of rules-based trade.

The high-stakes trade talks moved uncannily fast with Prime Minister Abe and President Trump announcing a final deal by the time they met on the sidelines of the UNGA meeting in late September 2019. Described as a first stage outcome, American and Japanese negotiators hammered out two separate agreements: one on market access and the other on the digital economy. Ratification will also move expeditiously: Japan has already started deliberations in the Diet and the ruling coalition has the votes to pass the agreement; while the U.S. Congress will not vote on the deal given that the executive branch has availed itself — for the first time ever — of limited tariff proclamation authority to negotiate an entire trade agreement (section 103 of Trade Promotion Authority).24 Four months after the expected entry into force in January 2020, both sides have promised to come back to the negotiation table to hammer a truly comprehensive trade agreement.

The mini trade deal has important upsides for the U.S.-Japan relationship. American farmers — long the casualties of the tariff war with China and the decision to abandon TPP — will find relief with some of the improved terms of access to the large Japanese market. The chances that the Trump administration will impose punitive tariffs on Japanese cars have gone down. Both sides stand to benefit greatly from avoiding trade friction that could hinder the alliance at a time of profound geopolitical change and the proliferation of security risks in Asia. And yet, the bilateral trade agreement is inferior to the original TPP project, both in terms of economic benefits and the potential for the U.S.-Japan partnership to improve global governance.

Given the centrality of the digital economy, it is certainly a positive for the United States and Japan to reconfirm their shared vision on the importance of free data flows and unhindered e-commerce. But even here, the (CP)TPP has greater potential: it has hammered out a compromise on high level standards that both developed and developing countries can abide by. In terms of reciprocal tariff reductions, the bilateral market access agreement is decidedly TPP-minus. Japan excluded rice, refused to allow participation for 33 goods in the broader CPTPP import quotas, did not make allowances in dairy to avoid restrictions based on Geographical Indicators (GI), and made no concessions on soybeans.25 On the other hand, American beef and pork producers are big winners in this negotiation receiving the same tariff preferences than their competitors from CPTPP nations. USTR Lighthizer’s negotiation strategy — making no concessions in autos and focusing first on agricultural outcomes — meant that Japan scaled back some farm commitments available in the original TPP, and that some American industries were put on the waiting list for a future negotiation (pharmaceuticals and the services sector).

Four pages long (plus annexes and side letters), the market access agreement stands out in many ways for its omissions. On the positive side, there are no provisions on export quotas, as Japan remained steadfast in its opposition to such quantitative restraints. There are, however, two other major omissions that are of concern to Japan: U.S. commitments on tariff liberalization of automobiles and an explicit pledge to retire for good the threat of punitive tariffs on cars. Since autos represent a third of the value of Japanese exports to the United States, the mini trade deal is not in compliance with the WTO’s injunction that preferential trade agreements must liberalize substantially all trade. The leaders’ joint statement of September 25, 2019 made only an indirect reference to the 232 threat, noting that as long as both parties faithfully implement commitments, neither one will adopt measures contrary to the spirit of the agreements.26 Also missing from the trade deal is an explicit dispute settlement mechanism to adjudicate differences, with provisions instead for a consultation process and an expedited exit mechanism with four months’ notice.

In the span of few years, Japan and the United States have sharply reoriented their trade strategies as they navigate the dilemmas of a trading nation in their quest to ink trade agreements that can reconcile the goals of economic competitiveness, social legitimacy, and political viability. In the recent past, these two countries have twice met at the negotiation table — and the outcomes of each negotiation have been dramatically different. In the original TPP project, the United States and Japan were ready to forge a regional trade architecture; in the mini trade deal they settled for the minimum necessary to avoid friction in bilateral relations. However, the broader horizons of coordinated economic statecraft for Japan and the United States still beckon. These two nations have an abiding interest in working as partners to improve international economic governance through the dissemination of digital economy standards, the supply of high-quality infrastructure finance in the developing world, and the codification of rules that alleviate the distortions of state capitalism in the trading system. Equally pressing and consequential is for the allies to work towards achieving a high-quality comprehensive bilateral trade agreement and engineer an American return to the regional economic architecture.

**Japan loves the plan**

**Kihara and Wada 20** – Journalists for Reuters

Leika Kihara and Takahiko Wada, "Japan to join forces with U.S., Europe in regulating Big Tech firms: antitrust watchdog head," Reuters, 10-18-2020, https://www.reuters.com/article/us-japan-economy-ftc-idUKKBN2740DZ

TOKYO (Reuters) - Japan will join forces with the United States and Europe to take on any market abuses by the four Big Tech companies, the new head of its antitrust watchdog said on Monday, a sign Tokyo will join global efforts to regulate digital platform operators.

Kazuyuki Furuya, chairman of Japan's Fair Trade Commission (FTC), also said Tokyo could open a probe into any merger or business tie-up involving fitness tracker maker Fitbit FIT.N if the size of such deals are big enough.

“If the size of any merger or business-tie up is big, we can launch an anti-monopoly investigation into the buyer’s process of acquiring a start-up (like Fitbit),” he told Reuters. “We’re closely watching developments including in Europe.”

EU antitrust regulators in August launched an investigation into a $2.1 billion deal by Alphabet GOOGL.O unit Google's bid to buy Fitbit that aimed to take on Apple AAPL.O and Samsung 005930.KS in the wearable technology market.

Japan is laying the groundwork to regulate platform operators. Among them are big tech giants dubbed "GAFA" - Google, Apple, Amazon AMZN.O and Facebook FB.O - that face various antitrust probes in western nations.

Multi-national companies like GAFA have similar business practices across the globe, which makes global coordination crucial, Furuya said.

“We’ll work closely with our U.S. and European counterparts, and respond if to any moves that hamper competition,” he said.

“This is an area I will push through aggressively,” he said, adding the FTC was ready to open probes if digital platformers abuse their dominant market positions against consumers.

Furuya, who assumed the post in September, also said the FTC would conduct research into Japan’s mobile phone market to see whether there is any room for improvement to spur competition.

Any such move would help Prime Minister Yoshihide Suga’s push to slash Japan’s mobile phone charges, which he has repeatedly criticised as too high.

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

Hovenkamp, James B. Dinan University Professor, Penn Law and the Wharton

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

Scholarship at Penn Law. 2058)

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

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

# 1AR

## Platforms

Kick

## Conduct

#### If China and Russia can use AI to challenge the U.S. order, extinction’s guarenteed

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Robert Kagan, “The Twilight of the Liberal World Order,” Brookings Big Ideas for America edited by Michael O’Hanlon, Brookings Institution Press (2017): <https://www.jstor.org/stable/10.7864/j.ctt1kk66tr.31>

The liberal world order established in the aftermath of World War II may be coming to an end, challenged by forces both without and within. The external challenges come from the ambition of dissatisfied large and medium-size powers to overturn the existing strategic order dominated by the United States and its allies and partners. Their aim is to gain hegemony in their respective regions. China and Russia pose the greatest challenges to the world order because of their relative military, economic, and political power and their evident willingness to use it, which makes them significant players in world politics and, just as important, because the regions where they seek strategic hegemony—Asia and Europe—historically have been critical to global peace and stability. At a lesser but still significant level, Iran seeks regional hegemony in the Middle East and Persian Gulf, which if accomplished would have a strategic, economic, and political impact on the international system. North Korea seeks control of the Korean peninsula, which if accomplished would affect the stability and security of northeast Asia. Finally, at a much lower level of concern, there is the effort by ISIS and other radical Islamist groups to establish a new Islamic caliphate in the Middle East. If accomplished, that, too, would have effects on the global order.

However, it is the two great powers, China and Russia, that pose the greatest challenge to the relatively peaceful and prosperous international order created and sustained by the United States. If they were to accomplish their aims of establishing hegemony in their desired spheres of influence, the world would return to the condition it was in at the end of the 19th century, with competing great powers clashing over inevitably intersecting and overlapping spheres of interest. These were the unsettled, disordered conditions that produced the fertile ground for the two destructive world wars of the first half of the 20th century. The collapse of the British-dominated world order on the oceans, the disruption of the uneasy balance of power on the European continent due to the rise of a powerful unified Germany, combined with the rise of Japanese power in East Asia all contributed to a highly competitive international environment in which dissatisfied great powers took the opportunity to pursue their ambitions in the absence of any power or group of powers to unite in checking them. The result was an unprecedented global calamity. It has been the great accomplishment of the U.S.-led world order in the 70 years since the end of the Second World War that this kind of competition has been held in check and great power conflicts have been avoided.

The role of the United States, however, has been critical. Until recently, the dissatisfied great and medium-size powers have faced considerable and indeed almost insuperable obstacles in achieving their objectives. The chief obstacle has been the power and coherence of the order itself and of its principal promoter and defender. The American-led system of political and military alliances, especially in the two critical regions of Europe and East Asia, has presented China and Russia with what Dean Acheson once referred to as “situations of strength” in their regions that have required them to pursue their ambitions cautiously and in most respects to defer serious efforts to disrupt the international system. The system has served as a check on their ambitions in both positive and negative ways. They have been participants in and for the most part beneficiaries of the open international economic system the United States created and helped sustain and, so long as that system was functioning, have had more to gain by playing in it than by challenging and overturning it. The same cannot be said of the political and strategic aspects of the order, both of which have worked to their detriment. The growth and vibrancy of democratic government in the two decades following the collapse of Soviet communism has posed a continual threat to the ability of rulers in Beijing and Moscow to maintain control, and since the end of the Cold War they have regarded every advance of democratic institutions, including especially the geographical advance close to their borders, as an existential threat—and with reason. The continual threat to the basis of their rule posed by the U.S.-supported order has made them hostile both to the order and to the United States. However, it has also been a source of weakness and vulnerability. Chinese rulers in particular have had to worry about what an unsuccessful confrontation with the United States might do to their sources of legitimacy at home. And although Vladimir Putin has to some extent used a calculated foreign adventurism to maintain his hold on domestic power, he has taken a more cautious approach when met with determined U.S. and European opposition, as in the case of Ukraine, and pushed forward, as in Syria, only when invited to do so by U.S. and Western passivity. Autocratic rulers in a liberal democratic world have had to be careful.

The greatest check on Chinese and Russian ambitions, however, has come from the combined military power of the United States and its allies in Europe and Asia. China, although increasingly powerful itself, has had to contemplate facing the combined military strength of the world’s superpower and some very formidable regional powers linked by alliance or common strategic interest, including Japan, India, and South Korea, as well as smaller but still potent nations like Vietnam and Australia. Russia has had to face the United States and its NATO allies. When united, these military powers present a daunting challenge to a revisionist power that can call on no allies of its own for assistance. Even were the Chinese to score an early victory in a conflict, they would have to contend over time with the combined industrial productive capacities of some of the world’s richest and most technologically advanced nations. A weaker Russia would face an even greater challenge.

Faced with these obstacles, the two great powers, as well as the lesser dissatisfied powers, have had to hope for or if possible engineer a weakening of the U.S.-supported world order from within. This could come about either by separating the United States from its allies, raising doubts about the U.S. commitment to defend its allies militarily in the event of a conflict, or by various means wooing American allies out from within the liberal world order’s strategic structure. For most of the past decade, the reaction of American allies to greater aggressiveness on the part of China and Russia in their respective regions, and to Iran in the Middle East, has been to seek more reassurance from the United States. Russian actions in Georgia, Ukraine, and Syria; Chinese actions in the East and South China seas; Iranian actions in Syria, Iraq, and along the littoral of the Persian Gulf—all have led to calls by American allies and partners for a greater commitment. In this respect, the system has worked as it was supposed to. What the political scientist William Wohlforth once described as the inherent stability of the unipolar order reflected this dynamic—as dissatisfied regional powers sought to challenge the status quo, their alarmed neighbors turned to the distant American superpower to contain their ambitions.

The system has depended, however, on will, capacity, and coherence at the heart of the liberal world order. The United States had to be willing and able to play its part as the principal guarantor of the order, especially in the military and strategic realm. The order’s ideological and economic core order—the democracies of Europe and East Asia and the Pacific—had to remain relatively healthy and relatively confident. In such circumstances, the combined political, economic, and military power of the liberal world would be too great to be seriously challenged by the great powers, much less by the smaller dissatisfied powers.

In recent years, however, the liberal order has begun to weaken and fracture at the core. As a result of many related factors—difficult economic conditions, the recrudescence of nationalism and tribalism, weak and uncertain political leadership and unresponsive mainstream political parties, a new era of communications that seems to strengthen rather than weaken tribalism—there has emerged a crisis of confidence in what might be called the liberal enlightenment project. That project tended to elevate universal principles of individual rights and common humanity over ethnic, racial, religious, national, or tribal differences. It looked to a growing economic interdependence to create common interests across boundaries and the establishment of international institutions to smooth differences and fa cilitate cooperation among nations. Instead, the past decade has seen the rise of tribalism and nationalism; an increasing focus on the “other” in all societies; and a loss of confidence in government, in the capitalist system, and in democracy. We have been witnessing something like the opposite of the “end of history” but have returned to history with a vengeance, rediscovering all the darker aspects of the human soul. That includes, for many, the perennial human yearning for a strong leader to provide firm guidance in a time of seeming breakdown and incoherence.

This crisis of the enlightenment project may have been inevitable. It may indeed have been cyclical, due to inherent flaws in both capitalism and democracy, which periodically have been exposed and have raised doubts about both—as happened, for instance, throughout the West in the 1930s. Now, as then, moreover, this crisis of confidence in liberalism coincides with a breakdown of the strategic order. In this case, however, the key variable has not been the United States as the outside power and its willingness, or not, to step in and save or remake an order lost by other powers. Rather it is the United States’ own willingness to continue upholding the order that it created and which depends entirely on American power.

That willingness has been in doubt for some time. Increasingly in the quarter-century after the end of the Cold War, Americans have been wondering why they bear such an unusual and outsized responsibility for preserving global order when their own interests are not always apparently served and when, indeed, the United States seems to be making sacrifices while others benefit. The reasons why the United States took on this abnormal role after the calamitous two world wars of the 20th century have been largely forgotten. As a consequence, the American public’s patience with the difficulties and costs inherent in playing such a role has worn thin. Thus, whereas previous unsuccessful wars, in Korea in 1950 and Vietnam in the 1960s and 1970s, and previous economic downturns, such as in the mid- to late 1970s, did not have the effect of turning Americans against global involvement, the unsuccessful wars in Iraq and Afghanistan and the financial crisis of 2007–09 have had that effect. President Obama pursued an ambivalent approach to global involvement, but the main thrust of his approach was retrenchment. His actions and statements were a critique of previous American strategy and reinforced a national mood favoring a much less active role in the world and much narrower definition of American interests.

With the election of Donald Trump, a majority of Americans have sig naled their unwillingness to continue upholding the world order. Trump was not the only candidate in 2016 to run on a platform suggesting a much narrower definition of American interests and a lessening of the burdens of American global leadership. “America First” is not just an empty phrase but a fairly coherent philosophy with a long lineage and many adherents in the American academy. It calls for viewing American interests through a narrow lens. It suggests no longer supporting an international alliance structure, no longer seeking to deny great powers their spheres of influence and regional hegemony, no longer attempting to uphold liberal norms in the international system, and no longer sacrificing short-term interests—in trade for instance—in the longer-term interest of preserving an open economic order.

Coming as it does at a time of growing great power competition, this new approach in American foreign policy is likely to hasten a return to the instability and clashes of previous eras. These external challenges to the liberal world order and the continuing weakness and fracturing of the liberal world from within are likely to feed on each other. The weakness of the liberal core and the abdication by the United States of its global responsibilities will encourage more aggressive revisionism by the dissatisfied powers, which may in turn exacerbate the sense of weakness and helplessness and the loss of confidence of the liberal world, which will in turn increase the sense on the part of the great power autocracies that this is their opportunity to reorder the world to conform to their interests.

History suggests that this is a downward spiral from which it will be difficult to recover absent a major conflict. It was in the 1920s, not the 1930s, that the most important and ultimately fatal decisions were made by the liberal powers. Above all, it was the American decision to remove itself from a position of global responsibility, to reject strategic involvement to preserve the peace in Europe, and neglect its naval strength in the Pacific to check the rise of Japan. The “return to normalcy” of the 1920 U.S. election seemed safe and innocent at the time, but the essentially selfish policies pursued by the world’s strongest power in the following decade helped set the stage for the calamities of the 1930s. By the time the crises began to erupt in that decade, it was already too late to avoid paying the high price of global conflict.

One thing for the new administration to keep in mind: History tells us that revisionist great powers are not easy to satisfy short of complete capitulation. Their sphere of influence is never quite large enough to satisfy their pride or their expanding need for security. The “satiated” power that Bismarck spoke of is rare—even his Germany, in the end, could not be satiated. And of course, rising great powers always express some historical grievance. Every people, except perhaps for the fortunate Americans, have reason for resentment at ancient injustices, nurse grudges against old adversaries, seek to return to a glorious past that was stolen from them by military or political defeat. The world’s supply of grievances is inexhaustible.

These grievances, however, are rarely solved by minor border changes. Japan, the aggrieved “have-not” nation of the 1930s, did not satisfy itself by swallowing Manchuria in 1931. Germany, the aggrieved victim of Versailles, did not satisfy itself by bringing the Germans of the Sudetenland back into the fold. And, of course, Russia’s historical sphere of influence does not end in Ukraine. It begins in Ukraine. It extends to the Baltics, to the Balkans, and to heart of Central Europe. The tragic irony is that, in the process of carving out these spheres of influence, the ambitious rising powers invariably create the very threats they use to justify their actions. The cycle only ends if and when the great powers that make up the existing power structure, in today’s case, the United States, decide they have had enough. We know those moments as major power wars.

The new administration seems to be fixated almost entirely on the threat of radical Islam and may not believe its main problem is going to be great power confrontation. In fact, it is going to have to confront both sets of challenges. The first, addressing the threat of terrorism, is comparatively manageable. It is the second, managing great power competition and confrontation, that has historically proved the most difficult and also the most costly when handled badly.

The best way to avoid great power clashes is to make the U.S. position clear from the outset. That position should be that the United States welcomes competition of a certain kind. Great powers compete across multiple planes—economic, ideological, and political, as well as military. Competition in most spheres is necessary and even healthy. Within the liberal order, China can compete economically and successfully with the United States; Russia can thrive in the international economic order upheld by the liberal powers, even if it is not itself liberal.

But security competition is different. The security situation undergirds everything else. It remains true today as it has since the Second World War that only the United States has the capacity and the unique geographical advantages to provide global security. There is no stable balance of power in Europe or Asia without the United States. And while we can talk about soft power and smart power, they have been and always will be of limited value when confronting raw military power. Despite all of the loose talk of American decline, it is in the military realm where U.S. advantages remain clearest. Even in other great powers’ backyards, the United States retains the capacity, along with its powerful allies, to deter challenges to the security order. But without a U.S. willingness to use military power to establish balance in far-flung regions of the world, the system will buckle under the unrestrained military competition of regional powers.

If history is any guide, the next four years are the critical inflection point. The rest of the world will take its cue from the early actions of the new administration. If the next president governs as he ran, which is to say if he pursues a course designed to secure only America’s narrow interests; focuses chiefly on international terrorism—the least of the challenges to the present world order; accommodates the ambitions of the great powers; ceases to regard international economic policy in terms of global order but only in terms of America’s bottom line narrowly construed; and generally ceases to place a high priority on reassuring allies and partners in the world’s principal strategic theaters—then the collapse of the world order, with all that entails, may not be far off.

## Process CP

No cards

## Cap K

#### Market-based mechanisms are key to sustainability – we can solve environmental harm by pricing in negative externalities, but the alt would be worse for the environment

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Mark Budolfson, “Arguments for Well-Regulated Capitalism, and Implications for Global Ethics, Food, Environment, Climate Change, and Beyond,” *Ethics and International Affairs*, vol. 35, no. 1, 2021, pp. 89-92, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/96F422D04E171EECDEF77312266AE9DD/S0892679421000083a.pdf/arguments-for-well-regulated-capitalism-and-implications-for-global-ethics-food-environment-climate-change-and-beyond.pdf.

Applications to Food, Environment, and Climate Change

Let us turn to a concrete example. It is often claimed that we need less capitalism, less growth, and less globalization if we are to successfully address such challenges as climate change, population growth, air and water pollution, feeding the world, ensuring sustainable development for the world’s poorest people, and other interrelated challenges at the environmental nexus.22

However, if the argument for well-regulated capitalism is sound, then these claims are wrong. Just because the aforementioned challenges may require pervasive changes throughout the economy does not mean that they require large changes to the basic structure of the economy such as a move away from capitalism.

Climate change—like many large-scale environmental harms—is the perfect example to illustrate why large environmental challenges that require pervasive changes to the economy need not require large changes to the economy’s basic structure. The key point is that in that an unregulated marketplace polluters do not pay the true cost to society of their pollution, which incentivizes too much pollution; the best solution for society in the case of climate change and many other large environmental challenges is simply to use markets to regulate the relevant pollution by putting an appropriate price on emissions (reflecting the cost to society), so that people and firms have to pay the true cost of their emissions. This could be accomplished by putting a simple tax on emissions, or by instituting a more complicated market-based system.23

In more detail, the problem of climate change arises because humans do not have to pay the cost of the harms from greenhouse gas (GHG) emissions when they engage in emitting activities. As a result of not having to pay the true cost of these activities, we make decisions that lead to too many emissions, and a worse outcome than we could achieve if we behaved differently, which would require pervasive changes throughout the economy. But according to mainstream economics, the best solution to this problem is a textbook example of well-regulated capitalism that applies the theory of externalities to achieve pervasive changes across the economy at the least cost to society: We should tax24 GHG emissions at a rate equal to the harm they inflict if emitted, because this will (to a first approximation) create the right incentives to cause all of the pervasive changes throughout every aspect of the economy in the way that best achieves the optimal level of GHG emissions for society.25 And because one ton of GHG emissions does the same harm regardless of where it is emitted on the earth, there is just a single price that we should use as a tax on all emissions regardless of where they occur.

Many economists, including Nobel laureate William Nordhaus, argue that pricing the externality in this simple way is not only necessary to solving climate change but also essentially sufficient.26 Other economists argue that investments in public goods like basic knowledge and infrastructure might also be necessary, as well as measures to address equity and justice (such as investing the revenues from a carbon tax in a progressive way, having different carbon prices in different regions that collectively lead to the same globally optimal reductions that could be achieved with a single uniform global price, or even putting additional weight on co-benefits from air pollution reductions via climate policy in places where minorities have historically been unjustly saddled with disproportionately high exposure to pollutants). These additional measures would be taken on the grounds that climate policy will be enacted in a “nonideal”/“second-best” context in which background distortions, inequity, and injustice make them necessary to achieve the best outcome.27 But these measures are all part and parcel to well-regulated capitalism.

Furthermore, getting rid of capitalism would involve harm to the world’s poorest and most vulnerable people that could exceed the harm that is at stake for the world in connection with climate change and other environmental harms. Evidence for this claim is provided by taking the quantitative magnitude of health, wellbeing, and justice gains due to capitalism, according to the argument for premise 1 above, projecting trends into the future, and comparing these gains to the quantitative magnitude of health, wellbeing, and justice losses at issue in connection with climate change and other environmental harms, as provided by leading estimates.28 Again, according to the argument for well-regulated capitalism, the essence of our situation is that humanity is better off with our current flawed forms of capitalism than we would be without capitalism; however, we are not as well off as we could be if we properly regulated the externalities that are causing environmental harms, so there is no argument in favor of the status quo. Instead, we should properly regulate externalities, and thus move toward well-regulated capitalism, which would yield the optimal trade-off for humanity between the benefits of capitalism and the costs of pollution and other ills.

Viewed through the lens of the argument for well-regulated capitalism, other environmental challenges have a similar structure, such as food-systems challenges (including feeding the world without destroying the environment), air and water pollution, ensuring sustainable development for the world’s poorest, and other interrelated challenges at the environmental nexus. These problems are more complicated than climate change because they each involve multiple externalities and multiple background distortions, where the magnitude of those is sometimes highly location dependent, and issues of equity and justice are exceedingly complex. But the basic mechanisms for the best solutions are the same according to proponents of the argument for well-regulated capitalism, and indeed the best responses all require capitalism in order to work well and avoid a cure that is worse than the disease.

As a point of optimism in connection with these often-discouraging challenges, the relationship between the wealth of a society and environmental degradation often has an inverted U shape: As society initially gets wealthier, environmental degradation increases, until a point of peak degradation, after which the environment improves as society becomes rich enough to invest more and more in environmental quality rather than in basic needs. In the richest nations of the world, the peak of degradation arguably happened in the mid- to late twentieth century, and can be seen in measures of, for example, air and water pollution.29 In some emerging economies like China, there is hope that the peak has been reached and environmental degradation will now decline as society becomes richer and richer. For other developing nations, the peak has not been reached yet. Moreover, different forms of degradation (such as industrial air pollution and agricultural water pollution) might peak at different points within a nation. Putting this together, there is reason to hope that environmental challenges will reach a peak in our lifetime, and if we can meet them with well-regulated capitalism, they will begin to progressively improve over time in line with the end of extreme poverty for the entire world. Capitalism has brought these problems to a head because it has caused the world to get richer so quickly. But according to the argument for well-regulated capitalism, this is a good problem to have, as it is a symptom of a global society that is on the cusp of growing its way out of poverty and out of widespread environmental degradation. According to this argument, we should want to grow our way out of both of these problems as quickly as possible, rather than keep both problems around indefinitely by moving away from capitalism.30

#### Absolute decoupling is happening now – solves oil

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Zeke Hausfather, “Absolute Decoupling of Economic Growth and Emissions in 32 Countries,” *The Breakthrough Institute*, 6 April 2021, https://thebreakthrough.org/issues/energy/absolute-decoupling-of-economic-growth-and-emissions-in-32-countries.

Over the past 15 years, however, something has begun to change. Rather than a 21st century dominated by coal that energy modelers foresaw, global coal use peaked in 2013 and is now in structural decline. We have succeeded in making clean energy cheap, with solar power and battery storage costs falling 10-fold since 2009. The world produced more electricity from clean energy — solar, wind, hydro, and nuclear — than from coal over the past two years. And, according to some major oil companies, peak oil is upon us — not because we have run out of cheap oil to produce, but because demand is falling and companies expect further decline as consumers increasingly shift to electric vehicles.

The world has long been experiencing a relative decoupling between economic growth and CO2 emissions, with the emissions per unit of GDP falling for the past 60 years. This is the case even in countries like India and China that have been undergoing rapid economic growth. But relative decoupling alone is inadequate in a world where global CO2 emissions need to peak and decline in the next decade to give us any chance at limiting warming to well below 2℃, in line with Paris Agreement targets.

Thankfully, there is increasing evidence that the world is on track to absolutely decouple CO2 emissions and economic growth — with global CO2 emissions potentially having peaked in 2019 and unlikely to increase substantially in the coming decade. While an emissions peak is just the first and easiest step towards eventually reaching the net-zero emissions required to stop the world from continuing to warm, it demonstrates that linkages between emissions and economic activity are not an immutable law, but rather simply a result of our current means of energy production.

In recent years we have seen more and more examples of absolute decoupling — economic growth accompanied by falling CO2 emissions. Since 2005, 32 countries with a population of at least one million people have absolutely decoupled emissions from economic growth, both for terrestrial emissions (those within national borders) and consumption emissions (emissions embodied in the goods consumed in a country). This includes the United States, Japan, Mexico, Germany, United Kingdom, France, Spain, Poland, Romania, Netherlands, Belgium, Portugal, Sweden, Hungary, Belarus, Austria, Bulgaria, El Salvador, Singapore, Denmark, Finland, Slovakia, Norway, Ireland, New Zealand, Croatia, Jamaica, Lithuania, Slovenia, Latvia, Estonia, and Cyprus. Figure 1, below, shows the declines in territorial emissions (blue) and increases in GDP (red).

To qualify as having experienced absolute decoupling, we require countries included in this analysis to pass four separate filters: a population of at least one million (to focus the analysis on more representative cases), declining territorial emissions over the 2005-2019 period (based on a linear regression), declining consumption emissions, and increasing real GDP (on a purchasing power parity basis, using constant 2017 international $USD). We chose not to include 2020 in this analysis because it is not particularly representative of longer-term trends, and consumption and territorial emissions estimates are not yet available for many countries.

There is a wide range of rates of economic growth between 2005-2019 among countries experiencing absolute decoupling. Somewhat counterintuitively, there is no significant relationship between the rate of economic growth and the magnitude of emissions reductions within the group. While it is unlikely that there is not at least some linkage between the two factors, there are plenty of examples of countries (e.g., Singapore, Romania, and Ireland) experiencing both extremely rapid economic growth and large reductions in CO2 emissions.

One of the primary criticisms of some prior analyses of absolute decoupling is that they ignore leakage. Specifically, the offshoring of manufacturing from high-income countries over the past three decades to countries like China has led to “illusory” drops in emissions, where the emissions associated with high-income country consumption are simply shipped overseas and no longer show up in territorial emissions accounting. There is some truth in this critique, as there was a large increase in emissions embodied in imports from developing countries between 1990 and 2005. After 2005, however, structural changes in China and a growing domestic market led to a reversal of these trends; the amount of emissions “exported” from developed countries to developing countries has actually declined over the past 15 years.

This means that, for many countries, both territorial emissions and consumption emissions (which include any emissions “exported” to other countries) have jointly declined. In fact, on average, consumption emissions have been declining slightly faster than territorial emissions since 2005 in the 32 countries we identify as experiencing absolute decoupling. Figure 2, below, shows the change in consumption emissions (teal) and GDP (red) between 2005 and 2019.

There is a pretty wide variation in the extent to which these countries have reduced their territorial and consumption emissions since 2005. Some countries — such as the UK, Denmark, Finland, and Singapore – have seen territorial emissions fall faster than consumption emissions, while the US, Japan, Germany, and Spain (among others) have seen consumption emissions fall faster. Figure 3 shows reductions in consumption and territorial emissions for each country, with the size of the dot representing the size of the population in 2019.

Absolute decoupling is possible. There is no physical law requiring economic growth — and broader increases in human wellbeing — to necessarily be linked to CO2 emissions. All of the services that we rely on today that emit fossil fuels — electricity, transportation, heating, food — can in principle be replaced by near-zero carbon alternatives, though these are more mature in some sectors (electricity, transportation, buildings) than in others (industrial processes, agriculture).

This is not to say that infinite economic growth is desirable (or even possible), particularly given that the global population is expected to start to shrink by the end of the 21st century (and well before that in most currently wealthy countries). There will be some tradeoffs between economic growth and climate mitigation — particularly if the world is to meet ambitious mitigation targets. But it is possible to envision a world that is prosperous, equal, and at net-zero emissions; indeed, all of the future emissions scenarios used by the Intergovernmental Panel on Climate Change (IPCC) do just that.

It is also useful to look at a few specific cases of larger countries that have absolutely decoupled emissions and GDP over the past 15 years.

Emissions reductions in the US have been a result of a wide variety of factors; this includes the switch from coal generation to lower-carbon natural gas, the rapid expansion of wind and solar generation, reduced industrial energy consumption, reduced electricity use in buildings, and reductions in transportation emissions — particularly as a result of increased vehicle fuel economy and reduced miles driven per-capita. Since 2005, US territorial emissions have fallen around 15%, with consumption emissions falling around 18% (much larger reductions were seen in 2020, and some of this is expected to persist). At the same time, GDP has increased by around 29%.

In the UK, territorial emissions have fallen by nearly 40% and consumption emissions have fallen by around 30%, while GDP has increased by 22%. Similar to the US, there are a wide variety of drivers of UK emissions reductions, though renewable energy generation, reductions in electricity use, and reductions in industrial and residential energy use are the largest contributors.

In Germany, territorial emissions have fallen around 15%, and consumption emissions have fallen by around 20%, while GDP has increased by 24%.

In France, territorial emissions have fallen by around 25%, and consumption emissions have fallen by a similar amount, while GDP has increased by 16%. It is a bit notable that France has seen larger emission reductions — as a percentage of total emissions — than Germany over this period, likely due in part to Germany’s choice to prioritize shutting down nuclear power plants over coal ones.

The Japanese emissions trajectory has been a bit more variable since 2005 than the prior countries we have examined, decreasing during the financial crisis, rebounding during the recovery and in the aftermath of the Fukushima disaster as a sizable portion of its clean electricity generation was shut down, before decreasing in more recent years. Over the full period, territorial emissions have fallen by a bit over 10%, while consumption emissions have fallen by around 13%

These 32 countries show that it is possible to have economic growth at the same time that CO2 emissions decline, even accounting for embodied emissions in goods imported from overseas. However, these are mostly relatively wealthy countries whose economies tend to be increasingly driven by lower-energy information technology and service sectors. We have relatively few examples of low- or middle-income countries with a focus on energy-intensive manufacturing experiencing absolute decoupling to date.

That said, with the rapid cost reductions of clean energy and an expected peak in Chinese emissions in the next five to ten years, it is only a matter of time before absolute decoupling becomes the norm. The extent to which this will occur rapidly enough to avoid dangerous levels of warming depends on both the degree of technological progress and the willingness of governments worldwide to invest in mitigating climate change.

#### Private sector will solve environmental + social problems – there’s a huge financial incentive to innovate to solve structural issues

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Rebecca Henderson, “Reimagining Capitalism,” *Management and Business Review*, vol. 1, no. 1, Winter 2021, pp. 20-22, https://poseidon01.ssrn.com/delivery.php?ID=745086022072096124008095008113098011033038073093037044085070071124097010092025112065023050121119108017105126065125025076114122103053093022043090005025080094083027024041036013012022101098102087106008066015004097114119098094103023019093091085106001092085&EXT=pdf&INDEX=TRUE.

But business also has a central role in building a just and more sustainable world. Governments are national, while our problems are global. Politicians tend to focus on the short term, while we need to focus on the long. Waiting for governments to act is ever more clearly a recipe for disaster. Business is arguably the most powerful institution on the planet. Only firms can drive the innovation we need at a scale that can solve today’s environmental problems and generate the jobs upon which decent lives are built.

The good news is that business has a compelling economic reason for solving the big problems. It will be much easier to make money in a world in which the climate is relatively stable, in which the coasts are not underwater and in which agricultural collapse is not routinely triggering the migration of hostile, hungry populations. Moreover the private sector benefits from a world with significantly less poverty and inequality. Societies that have reduced inequality and poverty have generally increased access to education and capital and, through some combination of minimum wage laws, lowered entry barriers, and organized labor representation, maintained relatively high wages while using tax revenues to ensure that no one is left too far behind.

Throughout history, many firms have opposed these kinds of measures. The East India Company was a legally entrenched monopolist and fought tooth and nail to maintain its position, corrupting English politics for nearly a hundred years. Very few firms have actively campaigned for higher taxes, stronger unions, or increased social spending. But there is overwhelming evidence that the private sector as a whole is much better off in more open and more equal societies.

Countries governed by corrupt oligarchs can grow very fast and within them, individual companies can do very well. In Nigeria, for example, between 2006 and 2015, an extractive government that catered to oil interests (and received massive kickbacks from their operations) saw its GDP grow at an average of 7.6 percent per year. Likewise Turkmenistan, which harshly repressed religious and political freedom, grew at 11 percent. In a weak economy, small reforms can unleash significant potential, but growth under crony regimes is highly unstable and often stalls once the economy approaches the global production possibility frontier. Genuinely open markets, well established property rights, and a free media provide a much stronger foundation for new entrants and for the kind of creative destruction that generates substantial value. Widespread access to education and health care accelerates this virtuous circle by creating deep pools of talent and strong domestic demand. In states with inclusive institutions, GDP per capita has historically been much higher than in states with extractive institutions, and the gap has broadened over time.

The economic case for solving big problems is therefore reasonably straightforward. It is nonetheless a collective case and operates at the most basic level. It may therefore seem unlikely that any but the most visionary and confident business leaders would attempt to act on it. So what are some practical ways in which the private sector can respond to these incentives and, in so doing, both make a difference and meet their responsibilities to their investors? Could these actions in turn add up to real change?

It seems likely that the current move towards shared value, or towards the simultaneous creation of private profit and public benefit, is a critical first step. The evidence that there are broad opportunities to create shared value is extensive. Walmart saved about $1bn a year by redesigning its trucking fleet to reduce energy use. An alternative meat company recently became the most successful $200m+ IPO of the last twenty years. And Tesla is well on its way to becoming the world’s most valuable automobile company. Firms that adopt high road employment strategies, which create jobs that pay well, treat employees with dignity and respect, grant them significant discretion to shape their own work, and build a collective sense of purpose, have repeatedly found that the strategy creates significant economic value.

Although such actions are sometimes derided as greenwashing or dismissed as too small or local to have any real impact, they often drive broader change. In the first place, they act as demonstration projects: proving that a private business can solve a public problem, driving the technology along the learning curve, demonstrating that new business models are feasible, and helping to develop a network that new entrants can use. Solar and wind power have both become multibillion-dollar businesses and, in many parts of the world, renewable energy is now cheaper than conventional fossil fuels. Although we still face significant barriers to decarbonizing the world’s energy system, it now appears that it can be done at reasonable cost, given the right regulatory environment. Ten years ago that was not at all clear, and without the enthusiastic and active participation of the private sector, we could not have advanced so far. In agriculture, firms at the leading edge are demonstrating how much more profitable sustainable farming can be than more conventional techniques. For example, when Unilever committed itself to make 100% of its branded tea sustainable, demonstrating as it did so that the yields from sustainable production were often significantly higher than those of conventional production, every other major branded tea company followed suit, tipping the entire industry towards sustainable production. Innovations of this kind often strongly affect consumer attitudes as well, increasing demand for more sustainable products.

In the second place, firms can drive change through coordinated action. While there are many opportunities for firms to make money and address social or environmental problems at the same time, there are also many opportunities that can only be exploited if firms act together. The move to preserve the world’s fisheries is a prime example. While every firm will benefit if everyone reduces their catch, no single firm can profit from doing so alone.

In principle, an industry in such a position can both increase its profits and generate significant social benefits by choosing to self-regulate. Many fisheries can be almost completely restored if they are given a couple of years to recover. Fisherpeople who can jointly agree to restrain themselves in the short term will usually find themselves much better off in the long term than those who cannot. Indeed, right now, nearly half the world’s fisheries are governed by some form of self-regulatory arrangement. Cooperative arrangements to tackle the twin problems of sustainability and unacceptable labor practices have also emerged in cocoa, palm oil, beef, timber, and soy, while similar agreements are underway in the textile and IT industries and in mining and minerals.

In some cases, these voluntary self-regulatory arrangements have been extremely successful. The International Chamber of Commerce, for example, is an entirely voluntary body that regulates the world’s trade, while cooperative arrangements significantly reduced deforestation in the Brazilian Amazon for many years. But these efforts are often unstable. Without any real penalty for failing to cooperate, firms are often tempted to renege on their commitments and revert to business as usual.

Who – or what - might be capable of enforcing cooperation between firms, essentially forcing them all to do the right thing and leaving no one at a competitive disadvantage if they do? There are two possibilities. The first is investors. A very large fraction of the world’s financial assets are controlled by roughly twelve firms. These firms are so large that they cannot diversify away from the threat of catastrophic risks such as climate change. Some of the world’s wealthiest owners are similarly exposed. The Japanese government pension fund, for example, is worth more than $1.6 trillion and owns roughly 1 percent of the world’s equity markets. Hiro Mizuno, who was its chief investment officer until early 2020, came to believe that solving problems like social inclusion and climate change was central to his fiduciary duty because they posed severe risks to his long-term returns.

The emergence of ESG metrics (Environmental, Social, and Governance) could give investors the means to insist that firms tackle environmental and social problems, and to track their performance as they do. More and more, investors are working together to push the firms they own to address both social and environmental risks. For example, more than 450 investors, representing $40 trillion in assets, have banded together to form Climate Action 100+, a group devoted to pushing the world’s 100 largest emitters to set concrete targets for reducing carbon emissions and transitioning to a carbon free economy.