# 1AC AmEx

### 1AC – Plan

**The United States federal government should increase prohibitions on anticompetitive business practices which cause net-harm on one side of platforms.**

### 1AC – FinTech Adv

Advantage 1 is FinTech

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

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

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

A. Against Platform Exceptionalism

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

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

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

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

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

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

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

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

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

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

[Begin fn76]

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

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

[End fn76]

The Court overlooked all of these problems. 77

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Private Sector Institutional Dynamics

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

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

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

Ii. The Competition Shortcomings

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

A. Entry Barriers

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

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

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

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

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

C. International Competitiveness

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

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

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

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

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

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

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

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

Maintaining U.S. Leverage

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

#### 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

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(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 – Cyber Adv

Advantage 2 is cyber

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

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(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

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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.

#### Platform misuse 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

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(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 – Search Adv

Advantage 3 is search

#### Google’s self-preferencing flagrantly violates the Sherman Act---decimates small tech firms and forecloses competition.

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Daniel, 7/8/21, “How Self-Preferencing Can Violate Section 2 of the Sherman Act,” Competition Policy International, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3868896

With this framing, Google’s conduct exemplifies how a dominant firm can use self-preferencing to monopolize a market and violate Section 2 of the Sherman Act. Numerous government reports and anecdotal accounts detail the exclusionary effects Google’s conduct has on market participants and consumers.23

Google’s market share in search far exceeds required thresholds for monopoly power under the Sherman Act.24 Multiple comprehensive investigations into the company’s operations found that Google’s market share in search is almost 90 percent.25 Other evidence also shows that Google is an “indispensable medium” and essential for a firm’s success.26 For example, Google is the top referral site for internet traffic; thus, if a site is not on Google, it is close to not existing at all on the internet for most consumers.27 Multiple accounts show that the corporation also has monopoly power in several other markets.28

Google has also engaged in “willful acquisition or maintenance of its monopoly” that harms the competitive process. In multiple instances, comprehensive reports show that Google obtained its dominant position by engaging in a surfeit of exclusionary conduct that includes the use of self-preferencing, making hundreds of acquisitions, and imposing many restrictive contracts on third parties rather than as a consequence of a “superior product, business acumen, or historic accident.”29 Specifically, concerning Google’s use of self-preferencing, two cases are particularly illustrative.

In 2011, the Federal Trade Commission investigated Google for self-preferencing its comparison shopping and local shopping sites.30 Google decided to explicitly demote the search rankings of rival sites like Yelp to promote and advantage its own digital properties, such as Google Maps and Google Shopping.31 Google effectively used its horizontal monopoly in general search (i.e. Google.com) to extend its market power into vertical search services (i.e. restaurant ratings and reviews).

In another instance, starting around 2015, Google wanted to maintain its dominant position in digital images. To do this, Google changed its search ranking algorithm and entered into agreements with Shutterstock and Getty Images to supply it with high-quality stock photos. Google’s changes and agreements significantly demoted the search ranking of Dreamstime, a rival stock photo provider. Since Google relegated Dreamstime’s site to the back pages of its search results, it effectively made Dreamstime’s site and other similarly situated sites that do not have an agreement with Google invisible to consumers and depriving consumers of an alternative service.32 Dreamstime even tried to increase their spending by millions of dollars on Google’s advertising platform, hired advertising and search consultants, and implemented a series of changes recommended by Google to improve their search ranking, all to no avail.

Both of these instances provide an adequate basis for a violation of Section 2 of the Sherman Act. In both examples, Google used self preferencing derived from its “dominant economic power” to “foreclose competition, to gain a competitive advantage, or to destroy a competitor” and harm the competitive process, — as opposed to succeeding on account of “superior service, lower costs, and improved efficiency.”34 Since Google is indispensable to third parties,35 an artificially lower search ranking from self-preferencing can be devastating for a firm’s competitive position. As such, self-preferencing not only leads to substantial foreclosure of a rival site, but it also can raise the costs to dependent firms because a firm may have to either enter into a special deal with Google or pay for advertising on Google’s search platform to ensure they are at a higher search position.36 All of this has the effect of raising a rival’s costs or forcing a dependent firm to operate in a significantly weaker bargaining position as a direct result of the firm’s market power and self-preferencing.

Google’s actions are similar to those in a previous Supreme Court case that affirmed a finding of monopolization and a violation of Section 2 of the Sherman Act in 1973.38 Like Google, Otter Tail Power Company was a vertically integrated corporation (in this case, an electrical utility) that had monopoly power in its relevant market.39 Like Google’s search engine, Otter Tail’s electrical generation and distribution infrastructure were not easily replicable by rivals.40 Like Google’s actions toward Dreamstime, Yelp, and others, Otter Tail used its “strategic dominance” and control of its infrastructure to disadvantage and foreclose municipal rivals by refusing to transmit power over its own power lines from generators to municipal utilities to protect its distribution monopoly.

The primary rationale for the Supreme Court’s decision that Otter Tail violated Section 2 of the Sherman Act is because the company “[used its] monopoly power to destroy threatened competition[.]”42 Importantly, the Court also distinguished Otter Tail’s conduct from fair competition principles in which firms, including monopolists, succeed through “superior service, lower costs, and improved efficiency” rather than the use of unfair or exclusionary tactics.

In addition to Google’s monopoly power and exclusionary tactics, other aggravating factors increase the likelihood that the corporation is seeking to maintain its monopoly in violation of the Sherman Act. First, similar to other exclusionary monopolization offenses (like exclusive dealing or tying), self-preferencing does not need to be used against every possible competitor or cause full foreclosure of a rival or dependent firm to obtain the desired adverse effect.44 For example, Google does not need to demote the search rankings of every rival vertical search engine or even remove a rival firm like Yelp or Dreamstime from their site entirely. Detailed analysis shows that less than 1 percent of users clicked on a link on the second page of a Google search result, and most user clicks are confined to the first few search results.45 Thus, getting demoted even slightly would effectively relegate a site to digital jail. Similar effects exist across other sites like Amazon.46 In fact, selective manipulation, exclusion, or demotion of a site like Yelp or Dreamstime may actually be just as, if not more of, an effective indicator to determine whether a firm is intending to exclude a rival to leverage into a market or attempting to succeed in the marketplace by providing “superior service, lower costs, and improved efficiency.”47 Additionally, excluding individual firms by self-preferencing may also prove to be an easier path to maintain a firm’s dominance.48 As the Supreme Court stated in 1959, violations of the Sherman Act are “not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

Along similar lines, since self-preferencing needs to be only applied selectively to obtain significant exclusion of a rival or dependent firm, consumers would generally be unable to know or discover that such actions are taking place.50 The founders of Google admitted this and were acutely aware that self-preferencing would also be “very difficult to detect” and have “a significant effect on the market.

Second, many technology industries, like internet search, have high barriers to entry and the GAFA corporations have durable and persistent monopoly power.52 In Google’s case, no competitor has meaningfully challenged its dominant position in almost two decades. Such a situation increases the presumption that antitrust action is warranted.

Third, self-preferencing facilitates other kinds of predatory and exclusionary behavior condemned by the antitrust laws, including tying.54 Self-preferencing can operate as a form of tying since a company like Google, by preferencing its own services (or the services of other companies) and demoting rivals, encourages users to adopt its products and services together, potentially locking them in. Thus, self-preferencing can raise barriers to entry such that a rival service is unfairly inhibited from obtaining a sufficient number of users to be a viable market participant.

Lastly, while benign forms of self-preferencing exist, such as a non-dominant grocery store changing the shelving placement of food items to favor its own in-store brands,56 there are critical differences that distinguish that conduct from Google’s and similarly situated digital giants.57 Unlike an individual grocery store, Google has monopoly power.

Also, as opposed to the physical world, in the digital realm, users confine their searches to the first set of results they are shown. In the digital realm, searching for a particular website or product is a nearly endless process. There will always be more results than a user can review. Thus, in part, there is a “paradox of choice” that exists, and consumers feel that it is not worth their time to endlessly explore options they are presented with.58 As such, users, across multiple technology platforms, confine their search to the first page they are presented with rather than engage in a more scrupulous search as they likely would for a product if they were at a physical retail outlet.59 Thus, self-preferencing in the digital realm can have significant foreclosure effects that are not analogous to physical retailers. All these aggravating factors can just as easily apply to the conduct or industries of the other digital giants.

V. CONCLUSION

Self-preferencing can violate Section 2 of the Sherman Act, as Google’s conduct shows. Fortunately, antitrust enforcers have a range of remedies at their disposal that would inhibit the use of self-preferencing or substantially weaken its adverse effects.60 Structural separation would immediately enhance competition so that the effect of any one firm’s self-preferencing would not result in near-total foreclosure of a rival and dependent firm. Interoperability requirements would also significantly inhibit the adverse effects of self-preferencing by lowering barriers to entry into an industry and allowing dependent firms or new firms to create an alternative service for consumers or other dependent firms.

#### Uniquely key to competitive innovation in tech generally, and search specifically.

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Frank, Jul. 2013, “PARADOXES OF DIGITAL ANTITRUST: Why the FTC Failed to Explain Its Inaction on Search Bias,” http://jolt.law.harvard.edu/assets/misc/Pasquale.pdf

Imagine that you own Company A, and your main competitor is the persistent (but demonstrably worse) Company B. In searches for the products you sell, you reliably end up in the top five results in the studies you’ve commissioned; your competitors at Company B are on the fifth or sixth pages. What happens if Google purchases Company B, and immediately after the purchase, Company B appears to dominate the first page of results, and your company has been relegated to later pages? You might start by appealing to Google employees who run webmaster forums there, but that (and other mechanisms of corporate due process) are quite likely to fail. Should there be some type of remedy at law?

As Google acquires more companies, this type of dispute is becoming increasingly likely. Agencies and courts around the world have already heard many complaints about anticompetitive practices at Google. But there are many economists and lawyers who would dismiss such complaints as parochial disputes, whines from also-rans unaccustomed to the harsh new realities of online competition. The etiolated state of American antitrust law makes that position popular among US elites.

Despite growing concern about online intermediaries’ power, legal authorities have done little to regulate these intermediaries over the past decade. If a search engine is abusing its position, market-oriented scholars say, economic forces will usually solve the problem.7 Can’t find something on Google? Hop over to the Bing search engine. Don’t like the new version of iTunes? Buy a subscription to a music service.

However well it worked in prior decades, this sanguine attitude runs into several problems in the digital age.8 How are users to even know if something is being hidden from them if they are coming to a firm like Apple or Google to find what they need? As antitrust authorities investigated it in 2012, Google’s spokespersons never tired of repeating that “competition is just a click away;” users had only to type in “Bing” to find another search engine. The mantra was disingenuous, since it was the entities that were trying to be found, and not consumers acting as “finders,” who had initiated the complaints against Google. Small, web-based companies had to go where the users were—and in general purpose search, that was largely Google (just as Twitter dominates microblogging, Facebook general social networking, and Apple a leading entertainment and app ecosystem).

Nevertheless, scholars have tended to assume that the more innovation happens on the Internet, the more choices users will have and the more efficient the market will become. Yet these scholars have not paid enough attention to the kind of innovation that is best for society, and whether the uncoordinated preferences of millions of web users for low-cost convenience are likely to address the many concerns raised by dominant intermediaries. This has left policymakers adrift, and quick to resort to canned stories about competition and consumer welfare that miss the stakes of a case like Google’s.

III. REASONS TO DOUBT THAT “COMPETITION IS ONLY A CLICK AWAY”

Despite persistent controversies surrounding Google, and its longstanding dominance in the search industry, leading policymakers have tended to assume that competition will eventually assuage most critics’ concerns. If consumers wanted a more open search engine, so the story goes, they would demand it. When I testified before a Congressional committee in 2008 about Google's market power, virtually every representative who questioned me assumed that a clique of twentysomethings working in a garage could develop an alternative. The representatives didn’t know much about the Internet, but the press had taught them about Larry Page and Sergey Brin’s rise from grad students to billionaires, building a corporate behemoth out of old servers and ingenuity. In the popular imagination, the Silicon Valley giants’ own rags-to-riches story forever foreshadows their own eventual displacement by another upstart.

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Is competition actually likely? In his book Planet Google, Randall Stross suggested that the company was using up to a million computers to index and map the web.11 If he’s even within an order of magnitude of the real number (a strictly protected trade secret), that ought to give pause to anyone who thinks an alternative can be cooked up in a garage. Indeed, a cursory review of the growing literature on the power usage of Google belies the “garage innovator” fantasy: its data centers use the equivalent of Salt Lake City’s voltage.12 (If your garage can hold about 190,000 people, maybe you can swing that; if it holds 2 cars, you might need a few more outlets). Companies may be able to lease computing space at Amazon or other suppliers, but it’s almost impossible to imagine a ragtag crew of grad students, even with a few million or tens of millions of dollars in venture capital funding, taking on a large firm like Google. Google is far, far more likely to purchase a start-up with valuable search technology (something it tends to do twice a month) than it is to be displaced by one.13

True, a few other giants might take Google on. Microsoft has poured money into Bing, but has so far lost billions of dollars—an unsustainable investment. Governments tried to create an alternative for a while, but the European Quaero project sputtered out. Perhaps the engineers involved concluded that the $450 million or so allocated to it could not support a viable rival to a company with $100 billion in annual revenue. Finally, even if fellow Goliaths like Facebook, Apple, and Twitter manage to squeeze Google out of the burgeoning worlds of social media, mobile computing, and microblogging, they will raise the same concerns to the extent their domination in those areas matches Google’s in general purpose search.

Beyond the infrastructural challenge, many other factors make it extremely difficult for competitors to emerge in the general purpose search space. Google’s secrecy is not only designed to keep spammers from manipulating its results; it can also prevent rival companies from copying its methods or building upon them. Unlike patents, which the patent holder must disclose and which eventually expire, it is possible for trade secrets to never be revealed, let alone enter the public domain.

Innovation in search is heavily dependent on a base of users that “train” algorithms to be more responsive.15 The more search queries a search engine gets, the better able it is to sharpen and perfect its results.16 For example, if a search engine finds that everyone in a given area clicks on the third result instead of the first result in a given day, the search engine can tailor results for that area to elevate what was once merely the third result. If other firms were able to observe this process, they might be able to develop rival, and better, computational strategies. Instead, the data is kept secret.17 The self-reinforcing “Matthew Effect” described by Robert Merton takes hold: to those who already have much, more is given.18 Incumbents with large numbers of users enjoy substantial advantages over entrants.

Competition may not lead to less secretive search engines unless the important search engine—Google—becomes more open about its own data and algorithms. It is impossible to find better interpretations and applications of data without access to it. As long as Google's search data is secret, no would-be rival will have access to this critical “raw material” for search innovation. Google’s Chief Scientist Peter Norvig has made this very point. "We don't have better algorithms than everyone else,” he has stated; “we just have more data.”19 Thus Google itself controls the chief input into better search services: the data that engineers need in order to better personalize results.20

Restrictive terms of service also deter competitors who aspire to reverse engineer and develop better versions of such services. Every time a user types in a search query, he is treated by Google as having agreed to Google’s “Terms of Service.”22 That contract forbids users to reproduce, copy, or resell any Google service for any reason, even if the behavior is manual and nondisruptive.23 Another section proscribes “creat[ing] a derivative work of . . . the Software.”24 Advertisers have faced other restrictions imposed by Google’s AdWords Terms & Conditions.25 All of these factors militate against robust competition.

Quantum leaps in technology capable of overcoming these brute disadvantages are unlikely. Search is as much about personalized service as it is about technical principles of information organization and retrieval.26 Current advantage in search is likely to be self-reinforcing, especially given that so many more people are using the services now than when Google overtook other search engines in the early 2000s.2

There are isolated consumer boycotts of Google, but a company so dominant can do without the business of, say, hardcore Rick Santorum supporters. Most of the problems described above would not even be noticed by ordinary web searchers, let alone provoke a protest. Why would the average user compare dozens of search results to assess and re-assess rival companies? Consumers lack both the incentive and the ability to detect manipulation as long as they are getting “good enough” results. Given the opacity of search algorithms, neither users nor trusted proxies can reverse engineer the hundreds of factors that go into a ranking.2

Rather than “Competition is one click away” (the mantra of Google's antitrust lawyers), a more honest shibboleth would be “worse alternatives are one click away” (the view expressed privately to the investors who have driven up Google’s stock price over the years). Google use is more like co-investment than a oneoff purchase. The more you use it, the more it can tailor its offerings to you. As Marcelo Thompson observes, “it is clear that a situation of lock-in has arisen in relation to Google's dominant position in the information environment.”29 And just as individuals “teach” the artificially intelligent algorithms what each of them wants, Google’s access to the aggregate data on search behavior helps fill in gaps where past surveillance of individuals provides no guides.

#### Tech competition key to beating China---innovation is key, NOT size.

**Wheeler 21** --- Visiting Fellow - Governance Studies, Center for Technology Innovation.

Tom, 4-16-2021, "The Chinese government embraces tech industry competition," Brookings, https://www.brookings.edu/blog/techtank/2021/04/16/the-chinese-government-embraces-tech-industry-competition/

COMPETING WITH CHINA MEANS OUT-INNOVATING CHINA

The threat of Chinese dominance in the digital sphere is real. China remains a managed economy that is using digital technology to promote its ideology and expand its economic influence throughout the world. It has established a national goal to be the world leader in artificial intelligence by 2030.

But the myth propounded by Big Tech that monopolies are the way to protect a nation’s innovative future has been exposed by the very bogeyman with which the big companies have been trying to scare us.

China’s vibrant tech community and its huge population’s embrace of digital services are indeed a competitive threat to the United States. China’s competitive advantage is their ability to out-bulk the U.S. as 1.5 billion people generate data that can then be repurposed for other applications including artificial intelligence (AI) and new products and services.

With a population one-fifth the size of China, the U.S. will never be able to out-bulk China’s data collection. The American solution must be to out-innovate China. There are two keys to such innovation: competition and access to the necessary assets.

COMPETITION BEGINS AT HOME

The solution to competition with the Chinese begins with competition in the United States. It is competition that drives innovation.

The tech companies have been selling the idea that their size and dominant market position is a national competitive advantage enabling them to push the boundaries of innovation. But what kind of innovation? The companies’ fiduciary responsibility is to their shareholders, not the national interest. This means returns to the company come first. Innovation is for the purpose of advancing shareholder value. If there is a benefit to the national interest, it is a secondary effect.

The companies with the best potential for innovative expansion—the kind of growth needed to compete with China—are smaller, innovation-focused companies. These are the companies whose fiduciary responsibility is the entrepreneurial pushing of the boundaries of development rather than the continuation of market dominance.

The Chinese government, it would seem, has embraced the benefits of good old-fashioned American competition, and moved quickly on its implementation. In the United States, however, protecting domestic American competition—and consumers—remains a work in progress that legislators, regulators, and courts have yet to resolve.

Competition built the American economy. Competition drives innovation. “Competition, competition, competition” must be our national policy.

#### Tech innovation prevents nuclear conflict—US lead is key

Kroenig and Gopalaswamy 18 – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

Rather, we should think **more broadly** about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict.

International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full displayin its ongoing intervention in Ukraine.

Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war.

If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member.

Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly.

When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

#### Erodes local businesses---ending self-preferencing necessary and sufficient to solve.

Pat **Garofalo 20** [director of state and local policy at the American Economic Liberties Project; former reporter at U.S. News and World Report], 8-30-2020, "Close to Home: How the Power of Facebook and Google Affects Local Communities," American Economic Liberties Project, https://www.economicliberties.us/our-work/close-to-home-how-the-power-of-facebook-and-google-affects-local-communities/#

Google Undermines Local Businesses:

For a local business to operate and be successful, local residents must be able to find it. There’s a long history of enabling such matchmaking between customers and businesses through newspapers, radio, TV, directories, and local advertising channels. Today, one of the key mechanisms filling this critical function is local search. Local search is the single largest category of search on Google, the world’s dominant search engine. In 2018, Google said local search grew by 50 percent over the year before, outpacing the overall search market.[18] More than 80 percent of cell phone users report searching for businesses “near me.”[19]

And yet, Google’s search properties, either general search or via its Maps subsidiary, often hurt local businesses and residents by allowing scammers to infiltrate its listings. For instance, Florida locksmith Rafael Martorell explained that the name of his business, A-Atlantic Lock and Key, was stolen by scammers on Google who pretended to be him and would charge customers five or six times what he normally charged. “One of the scammers put the name of my company, and the address that he put was my own house,” he said, alleging that such practices are an epidemic in the locksmith industry.[20]

“90 percent of our advertising, most of that for years was the Yellow Pages,” Martorell said. “Then suddenly Google came, without us noticing. And then we figured it out, we knew we had to go to Google and that is when the issues began. Because the local listings, most of them are fraudulent. Completely phony, fraudulent.”[21] The Wall Street Journal noted several other sectors in which similar scams have occurred.[22]

Since Google is so dominant in search, merchants have little alternative to battling the corporation endlessly, trying to buy ads for which they can’t ascertain the true value – and where a substantial amount of clicks can be fraudulent[23] – or simply vanishing from the vast majority of internet searches when they are either not listed or when their listing has incorrect information. (Facebook can create similar issues for small businesses via fraud, driving up costs for businesses running ads and opaque algorithm changes that limit small businesses ability to ensure their customers actually see their content.)[24][25]

Google’s size and scale leads to neglect of local needs. The corporation has eight products with more than a billion users, so the ability of a top executive to focus on any one town, or even a major city, is virtually nil. Google is slow to correct misinformation and has allowed whole neighborhoods to be renamed thanks to user mistakes. In other instances, Google has decided that an entire sector of the economy, such as third-party tech repair shops, is simply too difficult to validate, so it excludes them from search results entirely.[26]

Google’s power is immense, and in some ways, more significant than that of the government. As one businessperson told the Wall Street Journal, “if Google suspends my listings, I’m out of a job. Google could make me homeless.”[27]

Poor-quality results can even be profitable for Google. Legitimate businesses often pay for ads on Google in order to rise back above fraudulent listings. Martorell, for instance, spent $115,000 on Google ads between 2008 and 2015, before giving up on the platform and relying on local referrals.[28]

Local search is not an inherently concentrated business. There are competitors, such as Yelp, TripAdvisor, and other specialized vertical search engines that can compete over quality. And yet Google is a virtual monopoly. That’s because dominance didn’t occur naturally or through differentiating based on quality. It happened through the exercise of power and capital.

For example, Google pays to be the default search option on Safari on the iPhone. Google also provides its Android operating system and its app store Google Play to cell phone makers for free so that they make Google search the default on Android phones.[29]

This search dominance also allows Google to preference its own products providing local information over those of its competitors, even when its own organic search results indicate that Google content is of worse quality.[30]

Google’s search results have evolved over time. While the company once simply provided a list of hyperlinks to other websites, saying that it’s goal was to get consumers into Google and then out to their preferred web destination as quickly as possible, it now provides answers to specific queries and makes suggestions for content that can be accessed through Google directly, through its use of information boxes.

These include answers to factual questions, like offering that Thomas Jefferson was the third president without having to send the user to an online encyclopedia. But these boxes also allow Google to make a judgment call to preference its own content and products in harmful ways.

For example, a search for a local Thai restaurant will provide links to restaurant websites, but above the hyperlinked search results Google provides direct links to restaurants on Google Maps and Google’s restaurant reviews, as shown below:

Placement on a Google results page is critical because more than a quarter of users click the very first result of a search, while just 2.5 percent click on the tenth. Barely any users venture onto the second page of results.[31] As of 2019, less than half of Google searches result in a user clicking away from Google.[32]

Google’s ability to exclude competitors leads to the quality degradation in results, and so users end up more susceptible to fraudulent listings than they would otherwise, undermining the relationship between local businesses and local customers.

As one study on Google’s self-preferencing noted, “The easy and widely disseminated argument that Google’s universal search always serves users and merchants is demonstrably false.”[33] The European Union in 2017 fined Google €2.4 billion euros for similar self-preferencing of its Google comparison shopping products, which it placed above those of other third-party sales platforms or direct vendors.[34]

According to at least two studies, users prefer the content that Google’s algorithm would naturally show them to that shown when Google circumvents its algorithm to preference its own content. In 2015, Michael Luca, Tim Wu, Sebastian Couvidat, and Daniel Frank found that users are 40 percent more likely to engage with local search content produced by Google’s organic algorithm than they are with the content Google instead preferences in local search. (Yelp, a Google competitor, provided funding for the study.)

“Google is degrading its own search results by excluding its competitors at the expense of its users,” they wrote. “In the largest category of search (local intent-based), Google appears to be strategically deploying universal search in a way that degrades the product so as to slow and exclude challengers to its dominant search paradigm.”[35]

In a 2018 paper, Luca and Hyunjin Kim also found that users preferred organic search results to Google’s preferenced results. Furthermore, they found that other, more specialized search engines saw a fall in traffic as a result of Google’s actions tying its reviews product to its search engine.[36] “Our findings suggest early evidence that dominant platforms may, at times, be degrading products for strategic purposes, such as excluding competitors in adjacent markets that they are looking to enter or grow in,” they wrote.

The Federal Trade Commission in 2013 concluded that such behavior was anti-competitive, though it closed the investigation without action. According to documents from that investigation that were accidentally leaked to the Wall Street Journal, Google engaged in this conduct because it feared competition from specific search verticals such as Yelp and TripAdvisor. One executive in an email explicitly pointed to the threat such specific verticals posed to Google’s traffic, and therefore revenue.[37]

An inability for customers and local businesses to find each other, whether because there are too many scam listings to wade through or because Google is pushing an inferior product, hurts local economies – first, by potentially driving legitimate businesses under via depriving them of customers, and second by exposing customers to fraudulent businesses charging excessive rates. Changing Google’s business model so that it doesn’t have incentives to self-deal or tolerate scam artists will begin to rectify these problems.

#### Determines SMEs growth.

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Inge, 11-12-2019, "Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence," OUP Academic, https://academic.oup.com/yel/article/doi/10.1093/yel/yez008/5622729

The relationship between platforms and businesses is at the core of various ongoing competition investigations. Online platforms provide significant benefits to businesses by enabling them to target a wide audience that typically exceeds the territory of individual Member States and even beyond. In the absence of platforms which act as intermediaries between business users and consumers, small and medium-sized enterprises (SMEs) in particular would not have had equally effective opportunity to reach consumers. In this regard, platforms often constitute the main entry points for businesses to access certain markets. At the same time, platforms rely on the presence of businesses in order to create value for consumers. Even though platforms and businesses are thus dependent on each other in order to operate their respective services, platforms typically have a superior bargaining position in relation to their business users. This may result in an imbalance between the interests of platforms and businesses, potentially leading to unfair practices. The scope for such issues is particularly present when platforms both act as intermediaries by facilitating market access for businesses and compete with these businesses by offering their own products to consumers on their marketplaces.1

#### SMEs key to economic strength and quick recovery from decline.

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Robert, 7-26-2021, "How Small Business Drives U.S. Economy," ThoughtCo, https://www.thoughtco.com/how-small-business-drives-economy-3321945

What really drives the U.S. economy? No, it is not war. In fact, it is small business -- firms with fewer than 500 employees -- that drives the U.S. economy by providing jobs for over half of the nation's private workforce.In 2010, there were 27.9 million small businesses in the United States, compared to 18,500 larger firms with 500 employees or more, according to the U.S. Census Bureau. These and other statistics outlining small business' contribution to the economy are contained in the Small Business Profiles for the States and Territories, 2005 Edition from the Office of Advocacy of the U.S. Small Business Administration (SBA). The SBA Office of Advocacy, the "small business watchdog" of the government, examines the role and status of small business in the economy and independently represents the views of small business to federal government agencies, Congress, and the President of the United States. It is the source for small business statistics presented in user-friendly formats and it funds research into small business issues. "Small business drives the American economy," said Dr. Chad Moutray, Chief Economist for the Office of Advocacy in a press release. "Main Street provides the jobs and spurs our economic growth. American entrepreneurs are creative and productive, and these numbers prove it." Small Businesses Are Job Creators SBA Office of Advocacy-funded data and research shows that small businesses create more than half of the new private non-farm gross domestic product, and they create 60 to 80 percent of the net new jobs. Census Bureau data shows that in 2010, American small businesses accounted for: 99.7% of U.S. employer firms; 64% of net new private-sector jobs; 49.2% of private-sector employment; and 42.9% of private-sector payroll Leading the Way Out of the Recession Small businesses accounted for 64% of the net new jobs created between 1993 and 2011 (or 11.8 million of the 18.5 million net new jobs). During the recovery from the great recession, from mid-2009 to 2011, small firms -- led by the larger ones with 20-499 employees -- accounted for 67% of the net new jobs created nationwide. Do the Unemployed Become Self-Employed? During periods of high unemployment, like the U.S. suffered during the great recession, starting a small business can be just as hard, if not harder than finding a job. However, in March 2011, about 5.5% -- or nearly 1 million self-employed people – had been unemployed the previous year. This figure was up from March 2006 and March 2001, when it was 3.6% and 3.1%, respectively, according to the SBA. Small Businesses Are the Real Innovators Innovation – new ideas and product improvements – is generally measured by the number of patents issued to a firm. Among firms considered “high patenting” firms – those being granted 15 or more patents in a four-year period -- small businesses produce 16 times more patents per employee than large patenting firms, according to the SBA. In addition, SBA research also shows that increasing the number of employees correlates with increased innovation while increasing sales does not.

#### \*\*\*US economic strength key to global conflict prevention.

Lieberthal and O'Hanlon 12 (Kenneth and Michael, Senior Fellows in Foreign Policy @ Brookings, "The Real National Security Threat: America's Debt," <http://www.brookings.edu/research/opinions/2012/07/10-economy-foreign-policy-lieberthal-ohanlon>, ENDI)

Lastly, American economic weakness undercuts U.S. leadership abroad. Other countries sense our weakness and wonder about our purported decline. If this perception becomes more widespread, and the case that we are in decline becomes more persuasive, countries will begin to take actions that reflect their skepticism about America's future. Allies and friends will doubt our commitment and may pursue nuclear weapons for their own security, for example; adversaries will sense opportunity and be less restrained in throwing around their weight in their own neighborhoods. The crucial Persian Gulf and Western Pacific regions will likely become less stable. Major war will become more likely. When running for president last time, Obama eloquently articulated big foreign policy visions: healing America's breach with the Muslim world, controlling global climate change, dramatically curbing global poverty through development aid, moving toward a world free of nuclear weapons. These were, and remain, worthy if elusive goals. However, for Obama or his successor, there is now a much more urgent big-picture issue: restoring U.S. economic strength. Nothing else is really possible if that fundamental prerequisite to effective foreign policy is not reestablished.

### 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

## FinTech Adv

#### Non-unique—platform monopoly is a structural limit on high-tech innovation

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

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

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

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

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

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

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

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

#### Turn—their link is backwards for platforms—defense-friendly regime incentivizes platforms NOT to innovate

Newman, Trial Attorney, U.S. Department of Justice, Antitrust Division, ‘12

(Jordan, “Anticompetitive Product Design in the New Economy,” 39 Fla. St. U. L. Rev 682)

What all these approaches have in common is that they place a thumb on the scale in favor of defendants, at least as compared to the generally used section 2 exclusionary-conduct inquiry,258 essentially a rule-of-reason analysis. The D.C. Circuit in Microsoft III set forth the general method of analysis, complete with allocations of the burden of proof. First, the burden is on the plaintiff to make a prima facie case that the defendant has engaged in monopolistic conduct (properly defined).259 If the plaintiff does so, the burden then shifts to the defendant to show a procompetitive justification for the redesign.260 If the defendant fails to do so, the conduct is exclusionary.261 If, however, the defendant shows some plausible justification, the burden shifts back to the plaintiff to rebut that justification.262 If the plaintiff fails to do so, then the plaintiff must show that the anticompetitive harm outweighs the procompetitive justification.263 The leading treatise takes issue with the last step, at least insofar as it seems to call for courts to engage in “balancing” of close cases—advocating instead a burden-shifting analysis that, while perhaps somewhat less defendant-friendly than the above approaches, calls for “resolv[ing] close cases in favor of the defendant.”264 The various approaches described above, however, end the analysis and dismiss the claim as soon as the defendant shows any plausible justification for its behavior. This favorable treatment traditionally accorded to defendants in this area is due largely to the concerns noted above—the fear that, because (1) the markets themselves act as a check on exclusionary product redesigns (making them quite rare) and (2) antitrust courts are generally not competent to second-guess design changes, condemning product redesigns will tend to unduly stifle innovation.

Yet, as shown above, these concerns largely dissipate in the types of markets under discussion. As to the first, the nature of code-based products and the widespread availability of high-speed Internet access have combined to make the now standard method of redesigning these products—software updates—a uniquely attractive method of foreclosing rivals. This is so for three primary reasons: (1) low development and distribution costs,265 (2) low risk that consumers will reject redesigns,266 and (3) low losses incurred if these product redesigns fail.267 Additionally, new-economy markets tend to be characterized by strong positive network externalities, which may further incentivize monopolistic behavior.268 Given the confluence of these factors, it is much more likely that Ci > Pm – LR in these markets.

And with regard to the second concern, as shown above, the inherent and unique nature of code-based product redesign makes it uniquely susceptible to antitrust scrutiny.269 Given that such redesigns are more easily analyzed than traditional, physical product redesigns, it should come as no surprise that firms may be able to offer no justification for their conduct (as occurred in Microsoft III). Alternatively, they may simply settle out of court or enter into consent decrees (as may have occurred in In re Intel). At any rate, the point is that antitrust courts no longer need to simply throw up their hands and find for defendants in design-related cases.

Since these concerns largely dissipate in these markets, the need to place a thumb on the scale in favor of defendants—that is, the need for the inquiry to end as soon as the defendant makes any plau sible claim of a procompetitive benefit—dissipates as well. And in the formula expressed above, a defendant-friendly approach lowers R by reducing the risk of antitrust liability for engaging in exclusionary, design-related conduct. Absent the usual check of market forces, such an approach even further incentivizes such conduct. Firms can and almost certainly do engage in anticompetitive design in these markets; witness Microsoft’s commingling of code,270 the FTC’s theory in In re Intel, 271 or Apple’s allegedly exclusionary software updates.272 While courts are rightly reluctant to review antitrust challenges to physical product design changes, code-based product markets exhibit unique features that obviate the need for an overly defendant friendly analysis.

#### Turn—legal uncertainty bad for innovation—aff increases predictability

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

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

First, the rule-of-law principles require enhanced legal certainty that provides for firms’ dynamic capabilities and enables firms to engage in the rivalrous process. Indeed, legal uncertainties and unintelligibility generate risk-averse attitudes that prevent innovative products and services from being produced. The legal loopholes and regulatory vagueness constitute the basis for market uncertainties. This entrepreneurial risk prevents more aggressive competition from taking place and a bolder, innovative culture to emerge. The principles are pivotal to the ability of our institutions to create growth. To generate minimal uncertainty constitutes the fundamental premise on which competition through innovation can thrive.

Antitrust rules must retain their generalities and principle-based approach in order to be adapted and avoid accusations of being obsolete. Simultaneously, antitrust rules need a case-by-case application of the very meaning of these rules. Therefore, the role of the courts remains crucial. Nothing can prevent courts from judicially reviewing and elaborating, in an evolutionary process, antitrust enforcement. The dynamic nature of antitrust enforcement also pares down to the beautiful work of the court. Precedents are not legal constraints; they are the basis for an evolutionary interpretation of antitrust laws.

#### Pounders – A] current FTC approach 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.

#### B] Mechanism and internal link – recent court rulings, litigation, and reaffirmation of quick-look paradigm

Cornell 9/16 – Head of the U.S. antitrust practice at global antitrust powerhouse Clifford Chance LLP

Tim Cornell, 20 years of antitrust experience, has advocated on behalf of dozens of clients before the US Federal Trade Commission, the US Department of Justice, and the federal courts, with Robert Houck, Peter Mucchetti, and Brian Yin, Antitrust Litigation 2021, Last Updated September 16, 2021, <https://practiceguides.chambers.com/practice-guides/antitrust-litigation-2021/usa/trends-and-developments>

NCAA: a Unanimous Decision for a Divided Court

On 21 June 2021, the Supreme Court unanimously held that restrictions imposed by the National Collegiate Athletic Association (NCAA) limiting the "education-related benefits" that member schools could provide to student athletes violated federal antitrust law, re-affirming the virtues of the Court's long-standing "rule of reason" analysis and making clear that the antitrust laws apply to anticompetitive agreements in labor markets. [Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).] While the holding was a major blow to the NCAA, it has important implications beyond college sports—especially for its discussion of how courts could use a "quick look" form of the rule of reason analysis.

In NCAA v. Alston, former and current student-athletes sued the NCAA in class action litigation. They argued that the NCAA's rules restricting compensation were agreements between member schools that unreasonably restrained trade, in violation of Section 1 of the Sherman Act. [15 U.S.C. Section 1.]. The California district court applied a rule of reason analysis, considering:

whether the challenged restraints had substantial anticompetitive effects;

procompetitive rationales; and

whether these procompetitive effects could be achieved through less anticompetitive means.

After trial, the district court upheld the NCAA's restrictions capping undergraduate scholarships and compensation related to athletic performance, accepting that both improve consumer choice among sports enthusiasts by maintaining a distinction between amateur and professional sports. But the court held that the policy limiting "education-related benefits" did not fulfill that objective and violated the law. The Court of Appeals for the Ninth Circuit agreed.

The Supreme Court affirmed. The NCAA argued that the lower courts should have applied an "abbreviated deferential review" of its challenged restraints. Writing for a unanimous Court, Justice Gorsuch explained that the lower courts had properly applied the full rule of reason analysis, given the "complex questions" about the consumer benefits of the challenged policies. In doing so, Justice Gorsuch pointed out that the "market realities" had changed since 1984, when the Court assumed (without deciding) that different NCAA restrictions were justifiable. Justice Kavanaugh's concurrence went further, chastising the NCAA for holding themselves as "above the law" and potentially inviting future plaintiffs to again challenge the NCAA's remaining compensation restrictions (which the plaintiffs had not appealed to the Court).

The majority opinion notably recognised that the "quick look" rule of reason analysis can apply to determine that a challenged restraint is not anticompetitive. Historically, courts have used "quick look" analysis to condemn restraints, when “an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect.” [Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999)]. The Court declined to apply the NCAA's requested quick look, but recognised that certain restraints may be "so obviously incapable of harming competition that they require little scrutiny."

While clearly a blow to the NCAA, the opinion will likely have ripple effects in other industries and contexts. It would not be surprising for more parties to advocate for "quick look" rule of reason analysis – particularly to absolve challenged restraints. And on the other end of the spectrum, the Department of Justice has already cited Justice Kavanaugh's concurrence to argue that price-fixing in labor markets should be per se unlawful. All this makes clear that attorneys and clients must be familiar with this case to be prepared when dealing with future antitrust issues.

#### Our i/l outweighs – plaintiff burden caps type II error, but type I error is durable and likely now

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.

## Cyber Adv

No cards

## Search Adv

No cards

## T – Prohibit

#### 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

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, ‘06

(“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.

#### Practices, are specific business arrangements.

Kurita 04 – Professor, Faculty of Law and Economics, Chiba University, Japan

Makoto Kurita, “Chinese Anti-Monopoly Law: Effectiveness and Transparency of Competition Law Enforcement – Causes and Consequences of a Perception Gap Between Home and Abroad on the Anti-Monopoly Act Enforcement in Japan,” Washington University Global Studies Law Review, Vol. 3, Issue 2, 2004, LexisNexis

Antitrust or AMA violations must be specific restrictive "practices," as distinguished from restrictive "situations." For example, under antitrust laws, exclusive dealing must be an arrangement between a supplier and its distributors not to deal in competing products. Similarly, under the AMA, exclusive dealing is a practice by a supplier dealing with its distributors on the condition that the distributors do not deal with competing products. On the other hand, a situation where distributors, based on their respective business judgment, deal with the products of a specific supplier is not a violation of the AMA or the antitrust laws. However restrictive or exclusionary such a situation is, it cannot be deemed a violation because there is no "practice." Foreign complainants sometimes allege such a situation, but not a practice. Therefore, such allegations are meaningless in the context of an AMA violation.

## States CP

#### States can’t do the plan – they’re bound by federal decisional precedent

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

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

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

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

State Levels of Adherence

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

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

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

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

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

#### Even if the CP results in uniform LAW, patchwork ENFORCEMENT undermines innovation

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

State-to-State Conflicts

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

A Case Study

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

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

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

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

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

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

## 2AC – Notice and Comment 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.

#### Uncertainty – it introduces a new agency out of the blue, which undermines business confidence – 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

## Regulation CP

#### Regulatory programs cannot address all platform conduct

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(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

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(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.

#### Self-preferencing regulations fail---inconsistent standards and legal uncertainty chill innovation.

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Rod, 6/24/20, "Self-Preferencing – Legal and Regulatory Uncertainty for the Digital Economy (and Beyond?)," Competition Policy International, https://www.competitionpolicyinternational.com/self-preferencing-legal-and-regulatory-uncertainty-for-the-digital-economy-and-beyond/

First, is ex ante regulation actually needed to tackle self-preferencing behavior? In light of the innovative approach being taken by the Commission when investigating self-preferencing behavior through ex post competition enforcement (as set out above), it remains unclear why ex ante regulation is required and what additional type of conduct such regulation would seek to prevent.

Second, if the desire to impose regulation stems from the perceived need to ensure regulators can act quickly to resolve self-preferencing behavior in markets that are susceptible to “tipping” and enduring market power, this begs the question: which markets (and which companies within those markets) should be subject to such regulation? Common to most of the reports and policy proposals noted above is the concept that a regulatory prohibition on self-preferencing would not apply to all dominant companies, but instead to a subset of companies (some of which may not be dominant in a competition law sense) that hold some form of “strategic market status” or important “gateway” or “bottleneck” position. However, there remains considerable uncertainty around how regulators will determine in an evidenced, consistent, proportionate, and fair way which companies fall within such definitions.

For example, the DECP Report noted that: “a key component of this system is to develop a clear legal test for the characteristics of a company’s market position above which regulatory powers are appropriate – termed in this review a strategic market status. This needs to be carefully designed to identify where companies operating platforms are in a position to exercise potentially enduring market power, without granting an excessively broad scope and bringing within the bounds of regulation those companies who are effectively constrained by the competitive market.”33 As part of this, the DECP Report states: “this should be along the lines of identifying digital markets where strategic market status may materialise due to characteristics including significant direct or indirect network effects, limited offsetting effects of multi-homing and differentiation, and significant sources of non-contestability.”34 Looking at social media, content and messaging platforms, for example, the CMA’s Interim Report itself acknowledges extensive multi-homing by users, while market developments demonstrate ample evidence of the frequent entry and expansion of differentiated services (e.g. Snapchat, TikTok, Zoom, and Telegram). Given these factors, it remains unclear that any regulatory regime prohibiting self-preferencing should apply to platforms whose core business is providing social media, content and messaging services. Moreover, if the competition concern lies in tackling situations where a company is an important “gateway” to other businesses, this could be relevant to many different types of digital businesses (e.g. app stores, marketplaces, classifieds websites / apps, etc.), and even non-digital markets.

Third, who bears the burden of proof in relation to self-preferencing behavior? Many of the proposals noted above in effect imply a blanket ban on self-preferencing save to the extent that a dominant player can prove that any such conduct is objectively justified. Given the very limited circumstances in which competition authorities have accepted an objective justification defense in abuse of dominance investigations, this places a very high burden of proof on dominant platforms. Further consideration is needed as to whether this legal framework would fairly reflect the pro-competitive benefits and efficiencies that come from vertical integration, expansion into complementary business areas, and innovation by digital platforms.

## K

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

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(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.

#### Cap is sustainable – emissions peaked in 2019

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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.

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

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(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.

#### Markets are a computational necessity – we should make them more democratic instead of rejecting them

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Eric A. Posner and E. Glen Weyl, “Epilogue: After Markets?” *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, Princeton University Press 2018, Epub (email [arg5180@gmail.com](mailto:arg5180@gmail.com) for relevant text).

Markets as Miracles

As we saw in chapter 1, many economists who were committed to the market economy also considered themselves “socialists.” Yet in the early twentieth century, socialism became identified with central planning, thanks to the role of Marxism and the French Revolution in inspiring and justifying the economic policies of the Soviet Union. Central planning also received a boost from World War I, where national control of the economy for the purpose of war production was more successful than advocates of laissez-faire could ever have imagined. This led to a heated debate about whether central planning should be used in peacetime as well.

In the popular imagination, central planning could not succeed because it provided individuals with no incentives to work. People needed the prospect of riches, or at least wages, to get them out of bed in the morning. Yet incentives were quite strong in the Soviet Union, stronger, in many ways, than they are in capitalist countries. While there was less chance under Communism to grow rich, any prisoner of the Gulag knew the fate of those who “malingered.”

Another popular argument against central planning was advanced by Nobel Laureate Friedrich Hayek in 1945. Hayek argued that no central planner could obtain information about people’s tastes and productivity necessary to allocate resources efficiently.1 The genius of the market was the way that the price system could, in disaggregated fashion, collect this information from everyone and supply it to those who needed to know it, without the involvement of a government planning board.

A related version of this argument, less well-known than Hayek’s but actually more compelling, was made a few decades earlier. The brilliant economist Ludwig von Mises argued that the fundamental problem facing socialism was not incentives or knowledge in the abstract but communication and computation.2 To see what Mises meant, consider an illustrative parable proposed by Leonard Read in his 1958 essay, “I, Pencil.” 3

Read tells the “life story” of a pencil. Such a simple thing, one would at first think. And yet as you begin to reflect, you realize the enormously complex layers of thought and planning it would require to make a pencil from scratch. The wood must be chopped, cut, shaped, polished, and honed. The graphite must be mined, chiseled, and shaped. The ferrule—the collar that connects the wood shaft and the eraser—is an alloy of dozens of metals, each of which must be mined, melted, combined, and reformed. And so forth.

Yet what is most remarkable about the pencil is not its complexity but the complete lack of understanding that anyone involved in the manufacture of the eventual pencil has about any of these steps in the process. The lumberjack knows only that there is a market for his wood and some price that induces her to buy the needed tools, cut down trees, and sell lumber down the line of production. The lumberjack may never even know that the wood is used for a pencil. The pencil factory owner knows only where to purchase the needed intermediate materials and how to run a line assembling them. The knowledge and planning of the pencil’s creation emerge organically from the process of market relations.

Now suppose that we were to try to replicate the market relationships with a central planning board. The board would determine how much wood to chop and when, the number of workers to employ at each stage of production, the correct places and times to produce, ship, and build. Yet, to do this effectively the board would have to understand a great many things. It would have to learn from each of these specialized producers the unique knowledge of her domain of expertise that allows her to earn a living—for example, whether the lumber would have a more valuable use elsewhere in the economy (to build houses or ships or children’s toys) than as an input for pencils. Absorbing all this information and constantly receiving and processing the necessary updates to keep abreast of evolving conditions in each of these steps of the process, would overwhelm the capacity of even the most skilled managers.

And even if the board somehow had an unlimited capacity to absorb this information, it would still have the unmanageable problem of trying to act on this sea of data. Prices, supply and demand, and production relations in markets arise through a complex interplay of individuals each helping to optimize a tiny part of a broad social process. If, instead, a single board had to plan this entire dance, it would force a small number of individuals to contemplate an endless sequence of choices and plans. Such elaborate calculations are beyond the capacity of even the most brilliant group of engineers.

Mises wrote decades before the rise of the fields of computer science and information theory and lacked any way to formalize these intuitive ideas. Many of Mises’s arguments were dismissed by mainstream economists, whose increasingly narrow mathematical approach to the field Mises disdained. Mises’s critics, including Oskar Lange, Fred Taylor, and Abba Lerner, argued that the market mechanism was but one of many ways (and far from the most efficient way) to organize an economy. They viewed the economy purely mathematically, rather than computationally, and saw no difficulty in principle with solving a (very large) system of equations relating the supply and demand of various goods, resources, and services.

In a simplified picture of the economy, ordinary people perform dual functions as producers (workers, suppliers of capital, etc.) and consumers. As consumers, people have preferences regarding different goods and services. Some people like chocolate, others like vanilla. As producers, they have different talents and capacities. Some people are good at doing math, others at mollifying angry customers. In principle, all we need to do is figure out people’s preferences and their talents, and assign jobs to people who do them best, while distributing the value created by production in the form of goods and services that people really want. Rewards and penalties need to be determined to give people incentives to reveal their preferences and talents, and to ensure that they actually do what they are supposed to do. All of this can be represented mathematically and solved. That’s why socialist economists viewed the economy as a math problem the solution of which only required a computer.

Yet the later development of the theory of computational and communication complexity vindicated Mises’s insights. What computational scientists later realized is that even if managing the economy were “merely” a problem of solving a large system of equations, finding such solutions is far from the easy task that socialist economists believed. In an incisive computational analysis of central planning, statistician and computer scientist Cosma Shalizi illustrates how utterly impossible “solving” a modern economy would be for a central planning board. As Shalizi notes in his essay, “In the Soviet Union, Optimization Problem Solves You,” the computer power it takes to solve an economic allocation problem increases more than proportionately in the number of commodities in the economy.4 In practical terms, this means that in any large economy, central planning by a single computer is impossible.

To make these abstract mathematical relationships concrete, Shalizi considers an estimate by Soviet planners that, at the height of Soviet economic power in the 1950s, there were about 12 million commodities tracked in Soviet economic plans. To make matters worse, this figure does not even account for the fact that a ripe banana in Moscow is not the same as a ripe banana in Leningrad, and moving it from one place to the other must also be part of the plan. But even were there “merely” 12 million commodities, the most efficient known algorithms for optimization, running on the most efficient computers available today, would take roughly a thousand years to solve such a problem exactly once. It can even be proven that a modern computer could not achieve even a reasonably “approximate” solution—and, of course, today there are far more goods, services, transport choices, and other factors that would go into the problem than there were in the Soviet Union in the 1950s. Yet somehow the market miraculously cuts through this computational nightmare.

Markets as Parallel Processors

But all of this raises a question. If the problem is so hard to solve, how is it possible for the market to solve it? Consider Lange’s quote from our epigraph.5 The market is just a set of rules enforced by the government—not much different from a computer algorithm, although a very complex one. It’s true that no single person invented the market. Yet the rules of the market are well understood, and economists are constantly telling people to implement them. Imagine that a new country is created, and its leaders ask a western economist how best to create an economy. The economist will tell them how to set up a market—the rules of contract and property law, for example. (Indeed, economists have been running around the halls of government of developing countries and the floors of start-ups for decades doing just this.) Aren’t the economists just supplying a kind of computer program to the leaders, who by implementing it are engaging in a style of centralized planning?

To understand how the market solves the “very large system of equations,” you need to know the key ideas of distributed computing and parallel processing. In these systems, complicated calculations that no one computer could perform are divided into small parts that can be performed in parallel by a large number of computers distributed across different geographic locations. Distributed computing and parallel processing are best known for their role in the development of “cloud computing,” but their greatest application has gone unnoticed: the market economy itself.

While the human brain is wired differently from a computer, computational scientists estimate that a single human mind has a computational capacity roughly ten times greater than the most powerful single supercomputer at the time of this writing.6 The combined capacity of all human minds is therefore tens of billions of times greater than this most powerful present-day computer. The “market” is then in some sense a giant computer composed of these smaller but still very powerful computers. If it allocates resources efficiently, it does so by harnessing and combining their separate capacities.

Adopting this perspective, we must ask how the market is “programmed” to achieve this outcome. The economy consists of a variety of resources and human capacities at a range of locations, along with a system for transmitting data about these resources among individual human beings. A standard approach in parallel processing is to take information local to one location in, say, a picture or puzzle and assign this to one processor, integrating these inputs on still other processors in a hierarchical fashion. Now apply this image to the economy. In every place, we take one of the computers (humans) available to us and assign it to collect information about that location’s needs and resources and report some parsimonious “compressed” summary of all that data to other computers. For example, there might be a hierarchical arrangement of computers, with those responsible for particular locations on the ground reporting to a higher “layer” that integrates local areas and then upward from there.

Consider the following example. A person works on a farm and is in charge of ensuring that the farm is productive and that her family is happy. This person sends information about the farm and her family, not in its full richness and complexity, but in broad strokes, to district managers. One manager specializes in understanding the resources that farms need to operate—seeds, fertilizer— while another understands the resources that people living on farms need in order to be happy, including food and clothing. These managers would then aggregate these data and convey them to the next layer, perhaps a national wheat distributor or a regional supplier of products for use on farms. At every level of this chain, some information would need to be lost for the parallel processing to remain parallel and tractable: the farm manager could not detail every way in which a slightly better paved road would help in conveying goods to market or how slightly cleaner water would protect her crops. But at least she could report the largest and most important needs and hope that the loss of information only slightly reduces the efficiency of the resulting solution.

This arrangement has a flavor of central planning but also resembles a market economy. People specialize in different parts of the production chain and operate under limited information, yet are able to coordinate their behavior because the information takes a certain form. While people are experts on local conditions, they know little about economic conditions elsewhere. They know that grain prices are high and tractor prices are low, but not why this is the case. When they buy a tractor or sell grain, they don’t tell the vendor or purchaser their life story, all the conditions on their farm, and so forth. They just place an order or offer so much grain at the going price.

This “price system” thus greatly simplifies communication between different parts of the economy. In fact, economists have shown that prices are the minimum information that a farmer needs to plan her operations effectively. So long as every important way that the farm could benefit or draw down resources from the outside world has a price attached to it, this is all the information the farmer needs to make economic decisions. Any greater information would be a waste, from a purely economic efficiency perspective, though it might be interesting from time to time to develop personal relationships. Conversely, if these prices were not available, there would be no way for a farmer to know whether it pays to use new tractors or rely instead on more labor, nor would she know how many seeds to plant for next season. The farmer without such prices could easily produce too little or waste resources on a tractor that could be better used for more labor, seed, or even consumption.

In this sense, prices are the “minimum” information necessary for rational economic decision-making.7 No other system of distributed computing can be equally productive and yet require less communication.

Markets elegantly exploit distributed human computational capacity. In doing so they allocate resources in ways that no present computer could match. Von Mises was right that central planning by a group of experts cannot replace the market system. But his argument was mistakenly taken as implying that the market is “natural” rather than a human-created program for managing economic resources. In fact, there is nothing natural about market institutions. Human beings create markets—in their capacity as judges, legislators, administrators, and even private business people who frequently set up organizations that create and manage markets.

Markets are powerful computers, but whether they produce the greatest good or not depends on how they are programmed. We advocate “Radical Markets” because we believe that in the present stage of technological and economic development, when cooperation has grown too large to be managed by moral economies, the market is the appropriate computer to achieve the greatest good for the greatest number. If we see it as such, we can fix the bugs in the market’s code and enable it to generate more wealth that is distributed more fairly.

By sharpening our understanding of the role and value of markets, the computational analogy clarifies our claim that the solutions we propose are based on extending the reach of markets. The COST on wealth radicalizes markets as it puts greater responsibility on individuals to articulate their values and gives them greater ability to claim things they value highly. QV does the same in the political sphere. Our ideas on migration give individuals more scope for determining the best path for where they live and work. Our proposals on antitrust and data valuation break up centralized power and place greater responsibility on individuals and small firms to compete, innovate, and make rational economic choices to allow for the distributed computation of optimal economic allocations. But all these proposals raise the question: if the market is just a computer program that harnesses the power of individual human intellects, will it still be necessary as computer power increases?

## FTC Tradeoff DA

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

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

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

#### B] *Amex* requirement eats up agency resources

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

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

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

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

**The aff’s support of FTC endeavors encourages broader privacy litigation that hamstrings enforcement now**

**Hoofnagle et al. 19** – Chris Jay Hoofnagle is an Adjunct Professor of Information and Law; Woodrow Hartzog is a Professor of Law and Computer Science at Northeastern University; Daniel J. Solove is the John Marshall Harlan Research Professor of Law at George Washington University Law School

Chris Jay Hoofnagle, Woodrow Hartzog, and Daniel J. Solove, "The FTC can rise to the privacy challenge, but not without help from Congress," Brookings, 8-8-2019, https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/

Despite the FTC’s balanced and consistent enforcement, it is not realizing the **full potential of its authority**. The agency should take **more ground-breaking** and **norm-nudging cases**. Most of its modern cases are slam dunks because the agency is **risk-averse** and **fears blowback** from Congress. Indeed, in a different era when Congress **backed the FTC**, the FTC took on cases that were more **normatively consequential**. But in recent decades, it has proceeded more **cautiously and incrementally**, negotiating consent orders and only **rarely litigating**.

Aside from doing more to advance norms, the FTC has powers that could create more deterrence, if used. The DC Circuit recently affirmed a broad power to impose personal liability on people who directly participate in or control deceptive practices. This would seem to be an excellent remedy for **platform companies** like Facebook and Google. These companies continue to be founder-controlled in a real sense, and the founders have demonstrated **little or inconsistent respect** for users’ **privacy interests**. In its investigations, the FTC has uncovered numerous emails by executives in which they discuss information predations. Holding these executives more responsible could have a dramatic deterrent effect.

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

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

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

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

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

# 1AR

## FinTech Adv

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

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

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

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

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

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

#### Net better for innovation

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

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

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

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

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

Rule of Reason for Dynamic Antitrust

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

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

#### Structurally limits type 1 errors

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

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

Supporters of AmEx III's two-sided netting requirement presume that this burden shifting framework is inarguably better equipped to avoid judicial errors. 19 1 But, more accurately, it would produce a tradeoff in errors. It reduces the likelihood of type one errors (mistaken finding of liability), while increasing the likelihood of type two errors (mistaken denial of liability). While one may reasonably posit that it is preferable to err on the side of non-intervention, the two error types are not equally likely. A defendant is much better informed about the broader function of its restraint and its comparative effects across the two sides. That would suggest a defendant can more capably demonstrate a plausible crossplatform efficiency than a plaintiff can refute one. As such, in cases that turn on considerations of procompetitive justifications (stage two), type one errors will be substantially less likely to arise, given that the defendant need not quantify the relevant efficiencies.

## Cyber Adv

No cards

## Search Adv

No cards

## Regs CP

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

Shelanski, JD, PhD, Professor @ the Georgetown University Law Center, Partner, Davis Polk & Wardell, former ORIA Administrator, former FCC Chief Economist, former Director of the FTC Bureau of Economics, ‘11

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

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

#### Discovery is key – regulators don’t know all the facts in advance

ABA 13 – American Bar Association

“The Role Of Discovery In The U.S. Legal System,” Antitrust Discovery Handbook, https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/398729434/5030659\_sample.pdf

“Discovery” in the context of U.S. trial practice refers to the process by which parties to a legal proceeding gain access to facts which may directly or indirectly support their claims or defenses. In the United States, there are five basic forms of discovery: depositions, interrogatories, requests for production of documents (or permission to inspect), physical and mental examinations, and requests for admission. Discovery is not the process by which the court discovers the facts; discovery is the process by which the parties discover the facts which are then presented to the court by the parties. The adversarial process is intended to ensure that the relevant facts are brought to the attention of the court. The identity of the person responsible for collecting the facts is a fundamental difference between adversarial and inquisitorial systems of justice common in most foreign jurisdictions. This difference explains much of the hostility by foreign jurisdictions to U.S. discovery requests.

The increase in the amount of litigation in the United States involving foreign parties has increased the frequency of the need to collect evidence located outside the United States. Antitrust law is one particular field which has experienced such increase. In cases involving parties or witnesses outside the United States, the collection of evidence located abroad becomes imperative in the adjudication of the case. This publication is designed to assist those involved in U.S. litigation in understanding the legal and practical parameters of collecting evidence located in a foreign jurisdiction.1

One recurring theme in this publication is the general hostility of foreign courts to U.S.-style discovery. There are two primary sources of this hostility. The first is that most civil law countries use an inquisitorial system of justice characterized by an active judge. In such systems, the judge questions the witnesses and decides which documents to request. The gathering of the evidence is perceived as a sovereign function best left to an active judge. In contrast, the U.S. judicial system is characterized by a neutral judge and an active bar. It rests on the assumption that justice is achieved through the presentation of the facts before a passive judge or jury by opposing parties.2 Access to all relevant facts (even inadmissible ones) therefore becomes an essential element in achieving this result. Discovery is the means by which each party involved in litigation may obtain the evidence necessary to resolve its dispute. The discovery rules codified in state and federal civil procedure law achieve this objective by providing for the right to petition the court to compel discovery and granting the court the right to do so. Leaving aside the debate over the better system—adversarial or inquisitive3 —it is fair to observe that civil law systems are wary of granting lawyers the responsibility of collecting evidence.4

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

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

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

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

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

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

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

#### And, internalization of regs distracts from innovation – companies will spend so much avoiding broad mandates that they won’t undertake R&D

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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

## FTC DA

#### Resources are constrained – companies have more money

Romm and Zakrzewski 9/9 – Tony Romm is the Washington Post’s congressional economic policy reporter. Cat Zakrzewski is a technology policy reporter for The Washington Post covering Washington’s efforts to regulate Silicon Valley.

Tony Romm and Cat Zakrzewski, “Democrats eye new $1 billion effort to crack down on Big Tech in sprawling economic package,” *The Washington Post*, 9 September 2021, https://www.washingtonpost.com/us-policy/2021/09/09/democrats-tech-reconciliation/.

The new spending could represent a roughly 30 percent increase in the commission’s total projected appropriations over the next decade — money that could add more legal firepower to an agency whose resources are badly outmatched by many of the companies it regulates.

Democrats announced their plan as part of a broader effort to craft a roughly $3.5 trillion economic package that encompasses President Biden’s fuller economic agenda. Party lawmakers envision the package as a sweeping overhaul of the country’s health care, education and tax laws, fulfilling promises they made during the 2020 elections.

Once the total spending plan is finalized, Democrats hope to pass it using a legislative maneuver known as reconciliation. The move allows the measure to be enacted without risk of a Republican filibuster in the narrowly divided Senate, provided that Democrats stay united in their cause.

While much of the proposal remains unsettled, the process for now has opened the door for Democratic lawmakers to seek to advance some of their long-stalled policy priorities — including their repeated commitments to take aim at Big Tech.

Democrats for years have criticized Amazon, Apple, Facebook and Google, arguing that some of the country’s most profitable companies have become too powerful — sometimes at the expense of their users. On Capitol Hill, Democrats have spearheaded sprawling antitrust investigations into the tech giants and called on top federal agencies to take a more aggressive stance against the industry.

But Democrats at times have found agencies including the FTC ill-equipped for the digital age. The roughly century-old watchdog’s laws predate Silicon Valley, and its $351 million appropriation in 2021 amounts to a fraction of the billions of dollars earned annually by the corporate giants it oversees.

The proposal is set for consideration by the House Energy and Commerce Committee, led by Rep. Frank Pallone Jr. (D-N.J.), starting next week, as Democrats race to finalize their bill by Sept. 15.

The new proposal would not remake the FTC’s powers, since the reconciliation process limits legislation to proposals that directly impact federal spending.

The proposal comes as Biden’s FTC chair, Lina Khan, is under intense pressure from members of her party to bring more aggressive action against tech giants. Khan, who was sworn in as FTC chair in June, has a reputation as a critic of tech giants’ power, and Democrats have praised her rise to lead the agency as a sign that the industry would be subject to greater antitrust enforcement.

At a July hearing, Khan told the House Energy and Commerce Committee that the agency’s current resources are strained amid a crush of merger applications.

#### A slew of merger applications and employment issues deck enforcement

Feiner 4/20 – News associate for CNBC. Quoting Rebecca Kelly Slaughter, current FTC commissioner and former acting FTC chair.

Lauren Feiner, “FTC commissioners agree they should act to protect consumer privacy if Congress doesn’t,” *CNBC*, 20 April 2021, https://www.cnbc.com/2021/04/20/ftc-commissioners-agree-they-should-protect-consumer-privacy.html.

Expanding resources

Another theme of the hearing was about the need for greater resources at the FTC to pursue strong enforcement.

During the coronavirus pandemic, Slaughter said, the commission did see a brief dip in merger filings, but they’ve since returned to record levels. She said March saw the second-highest number of merger filings in a month at more than 300, following November’s record over more than 400 filings.

Even with a growing workload, the FTC has not been able to hire on more help. Slaughter said employment at the agency has remained flat while merger filings are at about double the level as they were 10 years ago.

“The absence of resources means that our enforcement decisions are harder,” she said. “If we think that we have a real case, a real law violation in front of us, but a settlement on the table that is maybe OK but doesn’t get the job done, we have to make difficult decisions about whether it’s worth spending a lot of taxpayer dollars to go sue the companies who are going to come in with many, many law firms worth of attorneys and expensive economic experts, versus taking that settlement.”

#### FTC commissioners agree

Vittorio and Kern 9/29 – Andrea Vittorio is a tech reporter for Bloomberg Law. Rebecca Kern is a tech and cyber policy reporter for Bloomberg Government.

Andrea Vittorio and Rebecca Kern, “Past FTC Officials Back Resource Boost for Consumer Privacy Work,” *Bloomberg Law*, 29 September 2021, https://news.bloomberglaw.com/privacy-and-data-security/past-ftc-officials-back-resource-boost-for-consumer-privacy-work.

Former Federal Trade Commission officials lined up behind a Democrat proposal in Congress to boost agency resources for policing consumer privacy as the tech industry’s collection and use of data outpaces enforcement.

The commission is underfunded and understaffed, especially when it comes to having in-house technologists who can oversee companies’ data handling and their compliance with agency enforcement orders, said David Vladeck, a law professor at Georgetown University who previously directed the FTC’s consumer protection bureau.

“That’s an endemic problem, and it’s going to be an enduring problem unless Congress allocates more resources to the FTC,” Vladeck said Wednesday at a hearing held by the Senate Commerce, Science and Transportation Committee.

House Democrats have included a $1 billion proposal to create a new privacy bureau within the FTC as part of a budget reconciliation measure. A privacy bureau was also proposed in the latest privacy bill from Sen. Maria Cantwell (D-Wash.), who leads the Senate Commerce Committee.

The FTC doesn’t have the resources or the expertise to “keep pace” with technology platforms and protect consumers’ personal information, Cantwell said during the hearing.

#### Court wins key to funding—squo ineffective enforcement diverts resources

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

In a striking number of instances, this pattern has emerged in discussions of antitrust policy.137 In current discussions about the future of the U.S. antitrust regime, advocates of fundamental reform sometimes portray the federal antitrust enforcement agencies as decrepit—perhaps to underscore the need for basic change.138 The proponents of root-and-branch transformation often suggest that only a complete makeover of the antitrust system will enable antitrust law to fulfill its intended role. The implication is that, because the antitrust system has failed so miserably, there are few, if any, positive lessons to be derived from experience since the retrenchment of U.S. policy began in the late 1970s, and certainly none since 2000.

This style of argument has several potential costs. One danger is that it overlooks genuine accomplishments and, in doing so, ignores experience that suggests how to build successful programs in the future. Consider three examples that deserve close study in building future cases that seek to expand the reach of the antitrust system. The first is the development of the FTC’s pharmaceutical and nonpharmaceutical health-care program from the mid-1970s forward; this initiative used the full range of the agency’s policy tools—cases, rules, reports, and advocacy—to change doctrine and alter business behavior.139 A second example is the FTC’s effort over the past two decades to restore the effectiveness of the quick look as an analytical tool in the wake of the Supreme Court’s decision in Federal Trade Commission v. California Dental Association. 140 A third example is the FTC’s successful litigation of three cases before the Supreme Court over the past decade.141

The programs that accounted for these results were not accidental. Each program began with a careful examination of the existing framework of doctrine and policy to identify desired areas of extension. This stock-taking guided the identification of potential candidates for cases and the application of other policy-making tools.142 Each program built incrementally upon the bipartisan contributions of agency leadership and the sustained commitment of staff across several presidential administrations headed by Democrats and Republicans.

If one assumes (as a number of reform proponents assert) that the FTC was a useless body in the modern era, there would be little purpose in studying these examples, or anything else it did, as there would be nothing useful to learn. The paint-it-black interpretation of modern antitrust history makes the costly error of tossing aside experience that might inform the successful implementation of new reforms.

A second notable cost of the catastrophe narrative, most relevant to the discussion of human capital, is its demoralizing effect on the agency’s existing managers and staff. To see one’s previous work portrayed as substandard, or worse, tends not to inspire superior effort. It breeds cynicism and distrust, where managers and staff understand that the critique badly distorts what they have done. Proponents of basic change must realize that the success of their program to expand antitrust intervention will require major contributions from existing staff and managers.

**FTC fails at regulating privacy now, but aff solves by restricting platform conduct**

**Hoofnagle et al. 19** – Chris Jay Hoofnagle is an Adjunct Professor of Information and Law; Woodrow Hartzog is a Professor of Law and Computer Science at Northeastern University; Daniel J. Solove is the John Marshall Harlan Research Professor of Law at George Washington University Law School

Chris Jay Hoofnagle, Woodrow Hartzog, and Daniel J. Solove, "The FTC can rise to the privacy challenge, but not without help from Congress," Brookings, 8-8-2019, https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/

Clearly, the number of cases the agency is doing now is **not enough**. On average, the FTC announces about 15-20 Section 5 enforcement settlements per year. It could start by doing on the order of 100 cases, and then study the deterrent effect among small and large companies. But it needs **far more resources** to scale up like this. Regardless of whether it adopts comprehensive privacy legislation that expands FTC enforcement authority, Congress should significantly expand the agency’s appropriations to enforce existing law.

Additionally, as **threats from platforms evolve** and become clear, the FTC might need to go **beyond pushing back** against deception and unfair actions that cause harm, and also target manipulation and abusive practices. Platforms and apps are now regularly deploying manipulative interfaces, sometimes called “dark patterns,” to wheedle, pressure, and convince people to act against their own interests for the benefit of the company. These dark patterns are often not outright deceptive nor do they necessarily cause the significant kind of harm contemplated by unfairness rules. Rather, they leverage people’s own limitations against them in an adverse way. Congress could embolden the FTC to fight these dark patterns by modifying Section 5 to prohibit “abusive” trade practices in addition to deceptive and unfair ones, which would mirror the powers of the CFPB.

The real thing that upset the two dissenting commissioners and many critics is that the FTC didn’t change Facebook’s business model; it just created a better paper trail for when Facebook surveils its users. However, if the FTC is going to **get serious about privacy**, Congress is going to have to get serious about **limiting platform power**, among other issues. The FTC can’t boldly do all the things that **must be done** without Congress also **taking action**.