# 1AC

### 1AC – Plan

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

### 1AC – Platforms Adv

Advantage 1 is Platforms

#### 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.

#### Only nascent firms foster transformative tech innovation

Hemphill, Moses H. Grossman Professor of Law, New York University School of Law, and Wu, Julius Silver Professor of Law, Science and Technology, Columbia Law School, ‘20

(C. Scott, and Tim, “Nascent Competitors,” 168 U. Penn. L. Rev. 1879)

Over the last century and a half, small, innovative firms have played a particularly important role in the process of innovation and competition. This is not to discount the important history of innovation at big firms with large research laboratories, such as Bell Labs, Xerox PARC, and research labs at General Electric and Merck.30 However, over the same period, a significant number of disruptive innovations—those that transform industry—have come out of very small firms with new technologies unproven at the time: examples include the Bell Telephone Company, RCA, MCI, Genentech, Apple, Netscape, and dozens of others.31

There is a particular competitive significance of the big innovations at the smaller firms, for they also represent competitive entry, and sometimes completely transform the industry.32 New, unproven innovators are a key source of disruptive innovation.33 Consider that Bell’s telephone did not improve the telegraph, but replaced it, or the impact of Apple’s personal computer on the computing industry. As this suggests, nascent competitors can hold the promise of offering fresh competition for the market, not just in the market. They have the capacity to displace an incumbent through a paradigm shift—for example, a new platform for developing software or decoding a genome. Nascent competition tends to be important in industries marked by rapid innovation and technological change. Software, pharmaceuticals, mobile telephony, e-commerce, search, and social network services are leading examples.

Future potency. Second, a nascent competitor is relevant due to its promise of future innovation. Its potency is not yet fully developed and hence unproven. Whether that innovation will make a difference in the marketplace is subject to significant uncertainty. That is due to the unpredictable rate and direction of technological change. This uncertainty stems from the same forces of technological progress that make innovation so valuable. The nascent competitor may fail in various ways: the unproven cure, despite highest hopes, may flunk its clinical trials; the technologies thought to be the future might, in fact, be overrated. This uncertainty may not be a quantifiable risk, like the odds in a casino, but closer to Knightian true uncertainty—in other words, not readily susceptible to measurement.34 The unpredictable path of innovation often results in product plasticity, in which products evolve and are used for purposes different than the original. For example, in the 1990s, mobile telephones gained popularity as a complement to a wired telephone, as a means for making calls on the go.35 Today, they compete with land lines, cameras, computers, televisions, and credit cards. General purpose technologies such as computing and Internet connectivity act as powerful fuel for unpredictable change.36 Uncertainty about what products the incumbent and the nascent competitor will actually offer in the future has a further consequence—uncertainty about the degree to which those products will actually compete.

#### Key to out-compete China—targeted remedies are key

Wheeler, visiting fellow in Governance Studies at The Brookings Institution, Chairman of the Federal Communication Commission (FCC) from 2013 to 2017, ‘20

(Tom, “Digital Competition With China Starts With Competition At Home,” <https://www.brookings.edu/wp-content/uploads/2020/04/FP_20200427_digital_competition_china_wheeler_v3.pdf>)

The United States and China are engaged in a technology-based conflict to determine 21st-century international economic leadership. China’s approach is to identify and support the research and development efforts of a handful of “national champion” companies. The dominant tech companies of the U.S. are de facto embracing this Chinese policy in their effort to maintain domestic marketplace control. Rather than embracing a China-like consecration of a select few companies, America’s digital competition with China should begin with meaningful competition at home and the allAmerican reality that competition drives innovation.

America’s dominant tech companies have seized upon the competition with China as a rationale for why their behavior should not be subject to regulatory oversight that would, among other things, promote competition. “China doesn’t regulate its companies” has become a go-to policy response. When coupled with “of course, we support regulation, but it must be responsible regulation,” it throws up a smokescreen that allows the dominant tech companies to make the rules governing their marketplace behavior.

At the heart of digital competition — both at home and abroad — is the capital asset of the 21st century: data. Initiatives such as machine learning and artificial intelligence are data-dependent, requiring a large data input to enable algorithms to reach a conclusion. China’s immense population of almost 1.5 billion gives it an advantage in this regard. By definition, a population that approaches five times the size of the U.S. population produces more data. The previously “backward” nature of the Chinese economy has resulted in another Chinese data advantage: New smartphone-based apps, created in place of the digital integration that China previously lacked, produce a richer collection of data. This bulk and richness of Chinese data creates an inherent digital advantage when compared to the United States.

If the United States will never out-bulk China in the quantity and quality of data, it must out-innovate China. Here, the United States has an advantage, should it choose to take it. The centralized control of the Chinese digital economy is an anti-entrepreneurial force. In contrast, innovation is the hallmark of a free and open market. But the domestic market must, indeed, be free, open, and competitive.

Currently, the American digital marketplace is not competitive. A handful of companies command the marketplace by hoarding the data asset others need to compete. As innovative as America’s tech giants may be, they represent a bottleneck that starves independent innovators of the mother’s milk of digital competition. If America is to out-innovate China, then American innovators need access to the essential data asset required for that innovation.

The nation’s response to Chinese competition must not be the adoption of China-like national champions, nor the “China doesn’t regulate its companies that way” smokescreen. American public policy should embrace the all-American concept of competition-driven innovation. This begins with breaking the bottleneck that withholds data from its competitive application. This does not necessarily mean breaking up the dominant companies, but it does mean breaking open their mercenary lock on the assets essential for competition-driven innovation.

#### Maintaining our innovative lead solves nuclear war

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.

#### 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

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

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

More Creative Alternatives

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

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

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

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

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

a. Enabling Competition Within the Platform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

over 15,500 members.357

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

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

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

### 1AC – Conduct Adv

Advantage 2 is cyber

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Antitrust in tech markets after American Express

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

Sabre/Farelogix

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

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

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

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

Qualcomm

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

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

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

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

Down the competitive effects rabbit hole

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

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

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

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

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

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

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

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

A modern antitrust in peril

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

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

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

#### First, Platform misuse undermines cyber security

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

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

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

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

How Data-opolies Harm

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Ensures cyberattacks go nuclear

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

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

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

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

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

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

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

**Hanley 7/8** --- Senior Legal Analyst with the Open Markets Institute. His research focuses on the relationship between technology platforms and antitrust. Before joining Open Markets, Daniel honed his legal experience by working for several organizations including the Connecticut Department of Consumer protection by being award a Janet D. Steiger Fellowship in 2017 from the American Bar Association and as a legal intern with the Honorable Vanessa Lynne Bryant of the U.S. District Court for the District of Connecticut.

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.

#### 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.

**Graef 19** --- Assistant Professor at Tilburg University, affiliated to the Tilburg Law and Economics Center (TILEC) and the Tilburg Institute for Law

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.

**Longley 21** --- U.S. government and history expert with over 30 years of experience in municipal government and urban planning.

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.

#### Sustained economic crisis causes war – unequal recovery guarantees lashout

Sundaram and Popov – Jomo Kwame Sundaram is a former economics professor and former UN Assistant Secretary-General for Economic Development. Vladimir Popov is a former economics researcher for the UN Secretariat.

Jomo Kwame Sundaram and Vladimir Popov, “Economic Crisis Can Trigger World War,” *Inter Press Service*, 12 February 2019, http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, there are growing concerns about the increased possibility of large-scale military conflict.

More worryingly, in the current political landscape, prolonged economic crisis, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, could easily spin out of control and ‘morph’ into military conflict, and worse, world war.

Crisis responses limited

The 2008-2009 global financial crisis almost ‘bankrupted’ governments and caused systemic collapse. Policymakers managed to pull the world economy from the brink, but soon switched from counter-cyclical fiscal efforts to unconventional monetary measures, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address underlying economic weaknesses, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This lack of structural reform has meant that the unprecedented liquidity central banks injected into economies has not been well allocated to stimulate resurgence of the real economy.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, another economic crisis — possibly more severe than the last, as the economy has become less responsive to such blunt monetary interventions — is considered likely. A decade of such unconventional monetary policies, with very low interest rates, has greatly depleted their ability to revive the economy.

The implications beyond the economy of such developments and policy responses are already being seen. Prolonged economic distress has worsened public antipathy towards the culturally alien — not only abroad, but also within. Thus, another round of economic stress is deemed likely to foment unrest, conflict, even war as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

Rising economic insecurity, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.

Thus, ethno-populist inspired chauvinistic nationalism may exacerbate tensions, leading to conflicts and tensions among countries, as in the 1930s. Opportunistic leaders have been blaming such misfortunes on outsiders and may seek to reverse policies associated with the perceived causes, such as ‘globalist’ economic liberalization.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, protracted economic distress, economic conflicts or another financial crisis could lead to military confrontation by the protagonists, even if unintended. Less than a decade after the Great Depression started, the Second World War had begun as the Axis powers challenged the earlier entrenched colonial powers.

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

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

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

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

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

Fine-tuning the proper aims of a nonpredictive antitrust

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

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

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

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

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

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

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

Nonpredictive antitrust enforcement in practice

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

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

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

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

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

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

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

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

### 1AC – Solvency

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# 2AC

## FinTech Adv

#### Iran use cryptocurrency and other tech to bypass sanctions now – U.S. developing a lead in fintech is key to solve

McCormick et al 20 – David H. McCormick is the CEO of Bridgewater Associates, a global macro investment form. He previously served in senior positions in the Treasury Department, the White House, and the Commerce Department.

David H. McCormick, Charles E. Luftig, and James M. Cunningham, “Economic Might, National Security, and the Future of American Statecraft,” *Texas National Security Review*, vol. 3, no. 3, Autumn 2020, pp. 64-65, https://repositories.lib.utexas.edu/bitstream/handle/2152/83223/04\_TNSRVol3Issue3McCormick.pdf?sequence=2.

Sanctioned countries have begun developing cryptocurrencies that do not need to flow through the U.S. financial system, thereby evading U.S. sanctions. Venezuela, for example, developed a national cryptocurrency called the Petromoneda (or Petro) in February 2018 that was backed by barrels of oil.113 However, the effort has been unsuccessful for a variety of reasons, including an executive order signed by President Donald Trump in March 2018 that prohibits transactions involving “any digital currency, digital coin, or digital token, that was issued by ... Venezuela on or after January 9, 2018.”114 Nevertheless, North Korea, Russia, Iran, and others are also reportedly exploring cryptocurrencies as part of an effort to evade sanctions.115

In addition, sanctioned countries can engage in cyber theft against financial institutions or steal cryptocurrencies as a source of funding, thereby undermining the impact of sanctions. North Korea seems to be aggressively pursuing this path. According to the U.S. Treasury Office of Foreign Assets Control, North Korean state-sponsored cyber groups have stolen over $1.1 billion dollars from financial institutions and banks in multiple countries. The groups have also reportedly stolen $571 million in cryptocurrency alone, primarily from five exchanges in Asia between January 2017 and September 2018.116

This suggests that the United States should be integrating its sanctions program within a broader cyberspace strategy. At a July 2019 hearing of the U.S. Senate Banking Committee, David Marcus, the head of Facebook’s new digital currency, suggested that fragmentation of financial services was a risk to sanctions and that, “[i]f we don’t lead, others will.”117 The United States would be in a position to lead — and maintain leverage over block-chain-based alternative financial networks — “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.”118 This reality speaks to the importance of lateral, integrated economic policies. The U.S. government requires a strategy to bridge the gap between its sanctions program and the realities of cyberspace and emerging technologies.119

#### 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.

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

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

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

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

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

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

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

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

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

Schaake is the international policy director at Stanford University’s Cyber Policy Center and an international policy fellow, Stanford Institute for Human-Centered Artificial Intelligence, ‘20

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

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

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

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

Teaming up

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Conduct Adv

#### Market definition shouldn’t matter – should prefer context-specific inquiries instead of categorical pronouncements

Panner 21 – Partner at Kellogg, Hansen, Todd, Figel & Frederick, PLLC, where he practices antitrust law.

Aaron M. Panner, “Market Definition and Anticompetitive Effects in *Ohio v. American Express*,” *The Yale Law Journal Forum*, vol. 130, 18 January 2021, pp. 610, https://www.yalelawjournal.org/pdf/PannerEssay\_8qgt26i3.pdf.

This Essay addresses whether the Court’s determination that the credit-card market is two-sided was necessary to the outcome in American Express. It is not immediately clear why the question whether a relevant market is one-sided or multi-sided should control the plaintiff’s prima facie burden of demonstrating anticompetitive effects. The Court’s conclusion that the market for credit-card services is two-sided served as shorthand for its conclusion that the plaintiffs could not establish that the challenged practice harmed competition and consumers simply by showing that it resulted in higher merchant fees, without accounting for the impact on cardholders at the front end. But the determination that the market is two-sided does not provide a satisfying answer to the question why, in general, the presence of significant indirect network effects—which the Court cited as the basis for its two-sided market definition—demands a showing of net harm.

Despite the broad and categorical tenor of parts of the Court’s opinion, American Express is best understood in the context of the vertical restraints at issue and the market context. The Court’s market-definition conclusion reflects the (in my view sound) determination that to accept proof of higher merchant fees as prima facie evidence of harm to competition from the challenged restraints would be to favor the interests of merchants over those of cardholders, without an adequate competition-policy justification. But the Court’s market-definition conclusion is best treated as dicta—the Court’s discussion of anticompetitive effects does not depend on it. Moreover, even in the context of two-sided platforms with strong indirect network effects, evidence of market effects on a single side of a two-sided platform may provide a sufficient basis for antitrust concern. What is required is careful consideration of competitive context and the nature of the challenged practice, not an approach that allocates burdens based on a categorical determination that the market is one-sided or two-sided.

#### Aff’s framework accounts for countervailing effects on both sides – court can conclude that the benefits on one side outweigh the harm on the other side, but it should be the defendant’s burden to establish those benefits – that’s Hovenkamp – here’s more ev

Panner 21 – Partner at Kellogg, Hansen, Todd, Figel & Frederick, PLLC, where he practices antitrust law.

Aaron M. Panner, “Market Definition and Anticompetitive Effects in *Ohio v. American Express*,” *The Yale Law Journal Forum*, vol. 130, 18 January 2021, pp. 618-619, https://www.yalelawjournal.org/pdf/PannerEssay\_8qgt26i3.pdf.

In many cases involving vertical restraints, a plaintiff will proceed by indirect proof: that is, by establishing that the defendant has market power in a relevant market and that the challenged restraint is of a type that will significantly restrain competition in that market. In making out such a case, market definition is appropriately treated as very important—often determinative—because, in that context, the market-definition exercise will identify relevant competitors. This is a necessary step in understanding the relative market dominance (or lack thereof) of the defendant and the likely competitive impact of a restraint. In that context, however, ignoring competitors that operate on only one side of a two-sided market would generally be a mistake, even if there are strong indirect network effects. Using market power to exclude competitors through exclusive dealing agreements, for example, should be treated as unlikely to be justifiable on the ground that preserving the ability to charge supracompetitive prices on one side of a two-sided platform (because no competitors can enter) is necessary to provide benefits to consumers on the other side.48 At the same time, the two-sided nature of the platform should mean that the possibility that the harm to competition on one side of the platform is outweighed by the benefit to competition and consumers on the other should not be categorically ruled out. But the burden of establishing those countervailing benefits is appropriately placed on the defendant in that circumstance.

## 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.

#### Thousand cuts DA—too many state suits overwhelm companies—harms marginal small firms that can’t pay up

Peterson Director of Technology and Innovation, Pelican Institute, and Bolema Executive Director, Institute for the Study of Economic Growth, W. Frank Barton School of Business, Wichita State University, ‘21

(Eric and Ted, “The Proper Role for States in Antitrust Lawsuits,” https://www.sugarsync.com/pf/D7911054\_09969505\_9958002)

For novel cases of national import, states should limit their involvement to supplementing federal resources. This approach seems to have worked well in the Microsoft lawsuit and other matters, such as the merger of T-Mobile and Sprint, where five states partnered successfully with the Justice Department to find a pro-consumer settlement with the firms. States have not fared well when they bring these types of novel lawsuits on their own.

Moreover, the current wave of tech cases suggests another reason to worry about overly active state antitrust enforcement. Specifically, due to the high number of states that can bring lawsuits, the states could overwhelm a company, even with little or no evidence of harm to consumers. Google is one of the largest companies in the world and can afford the compliance and legal expense of defending its business practices. This is not true of every company facing the threat of antitrust suits, however. Twitter, for example, has often been thrown in as “big tech” despite its relatively meager value compared to Facebook, Amazon and Google. Could it survive the flurry of lawsuits Google is facing now?

Lawsuits can be costly beyond a profit and loss statement. Every case presents an opportunity to lose in court, potentially forcing a restructure or major change to part of the business. Facing too many lawsuits, any company might choose to settle with the government rather than fight it out in court, regardless of the merits. Such lawsuits may show displeasure with the actions of big tech companies, but run the risk of diverting attention from innovation that would have benefited consumers.

## K

#### Their theory purposefully denies objective threats for the sake of analytic clarity – examining whether threats are real and whether our security responses are ethical is the only effective middle ground

Floyd ’19 - Department of Political Science and International Studies Senior Lecturer in Conflict and Security

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

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

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

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

[FOOTNOTE 21 BEGINS

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

FOOTNOTE 21 ENDS]

#### No reps !

David Shim, Assistant Professor at the Department of International Relations and International Organization of the University of Groningen, Netherlands, ’14

(*Visual Politics and North Korea: Seeing is Believing*, Routledge, pg. 25-26)

However, **particular representations** do not automatically lead to particular responses **as**, for instance, proponents of the so-called 'CNN effect' would argue (for an overview of the debates among academic, media and policy-making circles on the 'CNN effect', see Gilboa 2005; see also, Dauber 2001; Eisensee/Stromberg 2007; Livingston/Eachus 1995; O'Loughlin 2010; Perlmutter 1998. 2005; Robinson 1999, 2001). **There is** no causal relationshipbetween a specific image and a political intervention, in which a dependent variable (**the image**) would explain the outcome of an independent one (**the act**). David Perlmutter (1998: l), for instance, explicitly challenges, as he calls it, the **'visual determinism'** of images, which dominates political and public opinion. Referring to findings based on public surveys, he argues that the formation of opinions by individuals depends not on images but on their idiosyncratic predispositions and values (see also, Domke ct ah 2002; Perlmutter 2005).

Yet, it should also be noted that visuals function as unquestioned referents in international politics when underlining the necessity of such specific policy practices as sanctions, deterrents and/or military cooperation. A good example of this is satellite imagery, which plays a pivotal role in the surveillance and assessment of missile or nuclear proliferation activities by so-called 'rogue states' like Iran and North Korea. Regarded as providing compelling evidence about the stage of development of nuclear facilities or about the collaboration between suspect states, satellite images point to a nexus between visuality, knowledge and international politics wherein this way of seeing consequently enables governments to make legitimate statements, draw conclusions and take informed political action. In sum, **the visual provides the foundation for knowledge generation and. in doing so, bestows political responses with legitimacy** (cf. Moller 2007). A now famous case-in-point is Colin Powell's PowerPoint presentation at the United Nations Security Council in February 2003. In the briefing, the then US Secretary of State showed satellite images that allegedly proved the existence of Iraqi 'Weapons of Mass Destruction'. What was remarkable about Powell's presentation was that the visual emerged as the primary referent for the US government's casus belli, which, in the words of MacDonald ef ai (2010: 7-8), disclosed the fact that the 'logic of geopolitical reason is now inseparable from its visual representation' (see also, Campbell 2007c; Der Derian 2001).

The causal theory of the 'CNN effect', or what Perlmutter (1998: 1) **has called above 'visual determinism', misconceives of how the visual recasts the political realm itself** (Hansen 2011). Rather than asking whether an image caused an intervention, it should be asked instead how the visual has been involved in structuring the understandings of legitimate action, and how visual representations of different policy options affect particular security practices (Williams 2003: 527). For instance, many scholars have shown that images can provoke particularly emotive responses (Bleiker/Hutchison 2008; Crawford 2000; Hariman/Lucaites 2007; Mercer 2006; Ross 2006). Just one example of the (deliberate) evocation of an emotional reaction is the numerous fundraising campaigns that have been run by different humanitarian aid organizations over the years, in which imagery plays an essential role (Bell/Carens 2004; Dogra 2007; Manzo 2008).

## Chilling DA

#### Pounders – A] Biden’s XO – progressive favorites make cases inevitable

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] Recent court cases – thumps the aff’s legal mechanism

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.

**Merger boom is over---end of year tax changes outweigh antitrust considerations**

**Zero 21** – Senior Reporter for Mergers & Acquisitions

Brandon Zero, "What’s Next for M&A with Potential Tax Changes?," Mergers & Acquisitions, 11-4-2021, https://www.themiddlemarket.com/news-analysis/whats-next-for-ma-with-potential-tax-changes

Potential tax legislation is a much-feted driver of M&A activity as the year ends. But with dealmaking pipelines already long, it’s unclear if all tax-motivated transactions will make it over the finish line in time. Will the resulting buildup make for an equally frothy first quarter M&A environment?

[[Figure Omitted]]

SRS Acquiom’s poll of 144 financial and strategic buyers and advisors, taken during late September to early October, indicates an ongoing rush for asset sales. Over 82 percent of respondents say taxes are motivating year-end transactions, beating out other considerations including antitrust, data privacy, and Securities and Exchange Commission regulation by a wide margin.

But the impact might be a bit overstated in a climate that’s also propelled by record capital inflows and buoyant equity markets. “There’s no doubt that people on the margin—I can’t say that it’s a significant margin overall—people on the margin are deciding to go sooner,” says Solomon Partners CEO Marc Cooper. “I don’t think that’s the driver, that’s a small tailwind. Now, if people have already decided to go this year, they’re probably saying get this thing done.”

And the tax-driven M&A party might already be over. The survey results, though recently released, already capture a moment in time approaching a month in age. And there’s real reason to believe the window for 2021 dealmaking has already closed. Remember, Bain Capital Credit’s head of private credit Michael Ewald notes that firms can’t even mandate investment banks’ “D-teams” to work on deals given merger backlogs.

More telling might be whether tax changes will augur well for the new year’s deal flow. On this point, the survey respondents were roughly split. Have financial sponsors and corporates already exhausted their exit pipelines? Apollo and Blackstone recently hit new levels of divestiture activity, announced in earnings earlier this week.

“I don’t think capital gains will have an enormous impact on M&A going forward,” Cooper says. “PE will still invest, maybe some entrepreneurs might say I’m going to hold it for a while to see what happens.”

Perhaps with a similar view, poll respondents seem to think the M&A boom times will either plateau or fall off in the near future, with fewer than 5 percent predicting an increase in activity.

“The real rub on cap gains is it will change the economics of making risky investments given higher cost associated with it,” Cooper says.

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

OECD 20

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

Suspension of antitrust laws holds back recovery

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

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

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

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

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

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

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

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

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

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

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

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

Anti-competitive policies can hinder economic recovery

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

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

Crises may strengthen the case for pro-competitive structural reforms

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

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

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

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

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

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

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

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

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

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

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

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

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

School, University of Pennsylvania, ‘19

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

Scholarship at Penn Law. 2058)

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

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

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

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

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

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

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

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

A Lengthy Post-Covid Expansion?

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

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

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

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

## Reconciliation DA

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

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

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

#### Courts shield PC

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

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

#### Manchin punts the bill until next year

Nichols 11/11 – Political reporter at Axios.

Hans Nichols, “Manchin may delay Biden social spending plan over inflation,” *Axios*, 11 November 2021, https://www.axios.com/manchin-chill-bbb-6b58cd70-6c07-40f9-af4e-c944a7b3a39d.html.

Red-hot inflation data validates the instinct of Sen. Joe Manchin (D-W.Va.) to punt President Biden’s Build Back Better agenda until next year — potentially killing a quick deal on the $1.75 trillion package, people familiar with the matter tell Axios.

Why it matters: The data released Wednesday set the president and White House staff scrambling. Slowing down work on the massive tax-and-spending plan is against the fervent desire of the administration and House progressives.

With a limited number of legislative days left in the year, Manchin is content to focus on the issues that need to be addressed, Axios is told.

They include funding the government, raising the debt ceiling and passing the National Defense Authorization Act.

Manchin, like a group of House moderates, also wants to see a Congressional Budget Office analysis of the true cost of each of Biden’s proposed programs, as well as the tax proposals to fund them.

The big picture: Progressives have long worried that after centrists got their $1.2 trillion bipartisan infrastructure bill, they'd find excuses not to move on the budget reconciliation package.

It includes billions to expand the social safety net and fight climate change, among other Democratic priorities.

Business groups also are stepping up their attacks on the package, warning congressional Democrats about its overall costs, potential effects on inflation and $800 billion in corporate tax increases.

Manchin still hasn't agreed to the specifics of Biden's plan to spend $555 billion to combat climate change.

Senate Majority Leader Chuck Schumer convened a call today with senators who participated in COP26, where they discussed how climate provisions in both bills were well received in Glasgow.

During the call, the senators also strategized about how to get Manchin to agree to Biden's climate provisions — a recognition they have more work to do.

Driving the news: Prices rose 0.9% from last month for an annual inflation rate of 6.2%, according to the Bureau of Labor Statistics.

The president labeled it "worrisome, even though wages are going up."

He told a crowd in Baltimore: "[O]n the good side, we're seeing the highest growth rate in decades, the fastest decrease in unemployment ... since 1950."

White House chief of staff Ron Klain tried to couch Biden's spending plan as a long-term strategy to lower inflation.

"What it does is it makes sure that our federal spending meets the things that families really need: bringing down the cost of child care, bringing down the cost of drugs, bringing down the cost of elder care, bringing down the cost of preschool, cutting taxes for middle-class families," he told CNN's Jake Tapper:

Between the lines: Manchin has been warning about inflation since the summer.

He's argued Congress should take a “strategic pause” on the bigger package until Congress had more time to assess the effects of the nearly $5 trillion COVID stimulus spending in 2020 and earlier this year.

His statements on Wednesday amounted to an I-told-you-so.

“By all accounts, the threat posed by record inflation to the American people is not ‘transitory’ and is instead getting worse,” Manchin said. “From the grocery store to the gas pump, Americans know the inflation tax is real and D.C. can no longer ignore the economic pain Americans feel every day.”

#### Anti-monopoly action is bipartisan

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

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

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

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

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

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

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

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

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

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

#### Manchin gutted the only part of reconciliation that had a chance to prevent climate change

Davenport 10/25 – Coral Davenport covers energy and environmental policy, with a focus on climate change, from The Times's Washington bureau.

Coral Davenport, October 25 2021, “Key to Biden’s Climate Agenda Likely to Be Cut Because of Manchin Opposition,” The New York Times, https://www.nytimes.com/2021/10/15/climate/biden-clean-energy-manchin.html

WASHINGTON — The most powerful part of [President Biden’s climate agenda](https://www.nytimes.com/2021/10/25/us/politics/biden-democrats-reconciliation-bill.html) — a program to rapidly replace the nation’s coal- and gas-fired power plants with wind, solar and nuclear energy — will likely be dropped from the massive budget bill pending in Congress, according to congressional staffers and lobbyists familiar with the matter.

Senator [Joe Manchin III](https://www.nytimes.com/2021/10/18/us/politics/democrats-manchin-domestic-policy-bill.html), the Democrat from coal-rich West Virginia whose vote is crucial to passage of the bill, has told the White House that he strongly opposes the clean electricity program, according to three of those people. As a result, White House staffers are now rewriting the legislation without that climate provision, and are trying to cobble together a mix of other policies that could also cut emissions.

Climate Change in West Virginia

New data shows [West Virginia is more exposed to worsening floods](https://www.nytimes.com/2021/10/17/climate/manchin-west-virginia-flooding.html?action=click&module=RelatedLinks&pgtype=Article) than anywhere else in the country.

A White House spokesman, Vedant Patel, declined to comment on the specifics of the bill, saying, “the White House is laser focused on advancing the president’s climate goals and positioning the United States to meet its emission targets in a way that grows domestic industries and good jobs.”

A spokeswoman for [Mr. Manchin](https://www.nytimes.com/2021/10/27/us/politics/manchin-billionaires-tax.html), Sam Runyon, wrote in an email, “Senator Manchin has clearly expressed his concerns about using taxpayer dollars to pay private companies to do things they’re already doing. He continues to support efforts to combat climate change while protecting American energy independence and ensuring our energy reliability.”

West Virginia’s other senator, Republican Shelley Moore Capito, said she was “vehemently opposed” to the clean electricity program because it is “designed to ultimately eliminate coal and natural gas from our electricity mix, and would be absolutely devastating for my state.”

The $150 billion clean electricity program was the muscle behind Mr. Biden’s ambitious climate agenda. It would reward utilities that switched from burning fossil fuels to renewable energy sources, and penalize those that do not.

Experts have said that the policy over the next decade would drastically reduce the greenhouse gases that are heating the planet and that it would be the strongest climate change policy ever enacted by the United States.

“This is absolutely the most important climate policy in the package,” said Leah Stokes, an expert on climate policy, who has been advising Senate Democrats on how to craft the program. “We fundamentally need it to meet our climate goals. That’s just the reality. And now we can’t. So this is pretty sad.”

The setback also means that President Biden will have a weakened hand when he travels to Glasgow in two weeks for a major United Nations climate change summit. He had hoped to point to the clean electricity program as evidence that the United States, which is historically the largest emitter of planet-warming pollution, was serious about changing course and leading a global effort to fight climate change. Mr. Biden has vowed that the United States will cut its emissions 50 percent from 2005 levels by 2030.

The rest of the world remains deeply wary of the country’s commitment to tackling global warming after four years in which former President Donald J. Trump openly mocked the science of climate change and enacted policies that encouraged more drilling and burning of fossil fuels.

“This will create a huge problem for the White House in Glasgow,” said David G. Victor, co-director of the Deep Decarbonization Initiative at the University of California, San Diego. “If you see the president coming in and saying all the right things with all the right aspirations, and then one of the earliest tests of whether he can deliver falls apart, it creates the question of whether you can believe him.”

[Democrats](https://www.nytimes.com/interactive/2021/10/20/upshot/democrats-trim-reconciliation-bill.html) had hoped to include the clean electricity program in their sweeping budget bill that would also [expand the social safety net](https://www.nytimes.com/2021/09/06/us/politics/democrats-biden-social-safety-net.html), which they plan to muscle through using a fast-track process known as reconciliation that would allow them to pass it without any Republican votes. The party is still trying to figure out how to pass that budget bill, along with a bipartisan $1 trillion infrastructure bill.

For weeks, Democratic leaders have vowed that the clean electricity program was a nonnegotiable part of the legislation. Progressive Democrats held rallies chanting “No climate, no deal!”

Mr. Biden had hoped that enactment of the legislation would clean up the electricity sector, which produces about a quarter of the country’s greenhouse gases. He wanted a program with impacts that would last well after he leaves office, regardless of who occupies the White House.

House Speaker Nancy Pelosi said at an event in San Francisco Friday morning that she was still pushing for the strongest possible climate change provisions in the bill.

“What we’re here today about is specifically about the climate piece,” said the California Democrat. “This is our moment. We cannot — we don’t have any more time to wait.”

Democratic presidents have tried but failed to enact climate change legislation since the Clinton administration. During a year of record and deadly droughts, wildfires, storms and floods that scientists say are worsened by climate change, Democrats had hoped to finally garner enough political support to enact a strong climate law, even as scientific reports say that the window is rapidly closing to avoid the most devastating impacts of a warming planet.

[A major scientific report](https://www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html) released in August concluded that countries must immediately shift away from burning fossil fuels in order to avoid a future of severe drought, intense heat waves, water shortages, devastating storms, rising seas and ecosystem collapse. To avert catastrophe, scientists say nations must keep the average global temperature from increasing [1.5 degrees Celsius above preindustrial levels](https://www.nytimes.com/interactive/2018/10/07/climate/ipcc-report-half-degree.html). But as countries continue to pump carbon dioxide into the atmosphere, the average global temperature has already risen by about 1.1 degrees Celsius.

Even as Ms. Pelosi vowed in San Francisco to protect those climate provisions, at least four people in Washington close to the negotiations called the clean electricity program “dead.”

Senator Tina Smith, Democrat of Minnesota and the chief author of the program, said that while dropping it might win Mr. Manchin’s vote on the budget bill, it could cost hers — and those of other Democrats focused on the environment.

“We must have strong climate action in the Build Back Better budget,” she said. “I’m open to all approaches, but as I’ve said, I will not support a budget deal that does not get us where we need to go on climate action. There are 50 Democratic senators and it’s going to take every one of our votes to get this budget passed.”

Mr. Manchin, who has [personal financial ties](https://www.nytimes.com/2021/09/19/climate/manchin-climate-biden.html) to the coal industry, had initially intended to write the details of the program as the chairman of the Senate Committee on Energy and Natural Resources. Mr. Manchin was considering a clean electricity program that would reward utilities for switching from coal to natural gas, which is less polluting but still emits carbon dioxide and can leak methane, another greenhouse gas. Mr. Manchin’s home state, West Virginia, is one of the nation’s top producers of coal and gas.

But in recent days Mr. Manchin indicated to the administration that he was now completely opposed to a clean energy program, people familiar with the discussions said.

As a result, White House staffers are scrambling to calculate the impact on emissions from other climate measures in the bill, including tax incentives for renewable energy producers and tax credits for consumers who purchase electric vehicles. Unlike a clean energy program, tax incentives tend to expire after a set period of time, and do not have the market-shifting power of a more durable strategy.

Those other programs include about $300 billion to extend existing tax credits for utilities, commercial businesses and homeowners that use or generate electricity from zero-carbon sources such as wind and solar, and $32 billion in tax credits for individuals who purchase electric vehicles. It could also include $13.5 billion for electric car charging stations and $9 billion to update the electric grid, making it more conducive to transmitting wind and solar power, as well as $17.5 billion to reduce carbon dioxide emissions from federal buildings and vehicles.

But, analysts say, while those spending programs will help make it easier and cheaper for the U.S. economy to transition to a lower-emissions future, they are unlikely to lead to the same kind of rapid reduction in emissions that the clean electricity program would have.

“To clean up the electricity system as rapidly as possible, you need an incentive to add clean energy, and a penalty that is a disincentive for dirty sources of energy, ” Mr. Victor said. “A carrot and stick. These tax incentives are carrots. But there’s no more stick.”

It is also possible that Democrats may try to push through the clean electricity program as a stand-alone bill — but the timeline for doing so is narrowing, with the 2022 midterm elections approaching.

# 1AR

## Platforms Adv

#### Threat of monopoly restraint undermines innovation – vertical restraints and M&A have both contributed to historic lows in business dynamism

Khan 19 – Chair of the Federal Trade Commission and associate professor of law at Columbia Law School.

Lina M. Khan, “The Separation of Platforms and Commerce,” *Columbia Law Review*, vol. 119, 2019, pp. 1008-1010, https://columbialawreview.org/wp-content/uploads/2019/05/Khan-THE\_SEPARATION\_OF\_PLATFORMS\_AND\_COMMERCE-1.pdf.

1. Are Dominant Digital Platforms Stifling Innovation? — One risk associated with foreclosure and value appropriation by dominant digital platforms is that this conduct could deter entry and chill innovation. If independent developers or producers rely on a dominant platform to reach customers and also face the constant risk that the platform will foreclose access, appropriate their business value, or both, producers may be less likely to secure funding and develop their product in the first place. In Microsoft, the district court found that Microsoft’s exclusionary conduct not only had hobbled innovation in middleware and applications software but had discouraged competition throughout the computer industry as a whole.185 The long-term effect of its conduct was to “deter[] investment in technologies and businesses that exhibit[ed] the potential to threaten Microsoft.”186

Anecdotal evidence suggests that both actual entry and the threat of entry by digital platforms into platform-adjacent markets is dampening investment in complementary segments, now known as a “kill-zone.”187 For example, a survey of more than two dozen Silicon Valley investors revealed that Facebook’s willingness to appropriate information from and mimic the functionality of apps has created “a strong disincentive for investors” to fund services that Facebook might copy.188 One founder observed, “People are not getting funded because Amazon might one day compete with them.”189 “We don’t touch anything that comes too close to Facebook, Google or Amazon,” said a managing partner at New Enterprise Associates.190 Another venture capital investor noted that the impact of dominant digital platforms on “what can be funded, and what can succeed, is massive.”191 This concern raised by venture capitalists makes sense: A potential innovator (or a potential funder of a potential innovator) decides whether to invest based on the anticipated risk and reward of realizing the innovation. Anticipating platform discrimination or appropriation will lower expected rewards, depressing the incentive to invest. Even the uncertainty of discrimination can dissuade entry by heightening risk.

Data on investment trends do not offer a decisive answer but generally seem consistent with the story told by surveyed investors. Venture capital funding as a whole appears to be booming: In 2018, the total annual venture capital invested surpassed $100 billion for the first time since the dot-com period.192 The number of angel and seed investments, meanwhile, has been declining since 2015, signaling that it has become harder for startups to secure an initial round of financing.193 Indeed, it is late-stage deals with mature companies that account for an “outsized proportion” of total capital today,194 while startups see fewer first financings, even as the deal value for startups has increased.195 In other words, venture capital markets seem to be following a winner-take-most model: Fewer firms receive funding, but those that do are raising more capital.196 These trends come against a backdrop of falling entrepreneurship: Startup formation is at a thirty-year low, contributing to a loss of business dynamism.197

#### Current markets don’t produce the types of innovation that connect to an impact

Rizzo 21 – Head of international affairs at the Italian Competition Authority.

Andrea Minuto Rizzo, “Digital Mergers: Evidence from the Venture Capital Industry Suggests That Antitrust Intervention Might Be Needed,” *Journal of European Competition Law and Practice*, vol. 12, no. 1, 2021, pp. 8-9, https://academic.oup.com/jeclap/article/12/1/4/5908319.

However, the evidence thus far collected does suggest that current digital incumbents face very little threat of entry. Competition for the market dynamics are not necessarily symptomatic of the presence of the exploitation of market power, provided that incumbents still face, actual or potential, competitive pressures and could be substituted by a more efficient rival.44 What is needed is not just incremental innovation, but the drastic innovation that makes market leadership highly contestable. This is especially true for technology markets, where, as stated by Google itself, ‘changes tend to be revolutionary, not evolutionary’.45

Some recent studies and antitrust agency reports suggest that digital markets are becoming progressively less dynamic. Among others, the UK’s Digital Competition Expert Panel (UK Report46) observes that competition for the market does not appear to be able to solve competition issues linked to winner-take-all outcomes, as the next technological revolution is likely to focus on data that existing firms control to a large extent and that successful new entrants are generally acquired by incumbents.

Moreover, Organisation for Economic Co-operation and Development (OECD) research suggests that, in digital-intensive sectors, mark-ups are increasingly higher47 while the decline in business dynamism occurs faster than in other sectors of the economy.48

As highlighted by the Stigler report49, key players in the digital industry remained the same over the last two technology waves, staying dominant through the shift to mobile and the rise of artificial intelligence, without significant impact on market share or profit margins.

Lastly, worrying evidence emerges also from the application of profitability analysis to digital incumbents. High profits substantially and persistently above the cost of capital50 could signal that the market is not functioning properly, as in the long term, return on investment should equal the cost of capital. In that regard, the UK’s Competition and Markets Authority (CMA) has found, in the context of the sector enquiry into online platforms and digital advertising51, that the return on capital employed (ROCE) of Google and Facebook has been well above any reasonable estimate of a competitive benchmark for many years. In 2018, the estimated cost of capital for both Google and Facebook was around 9%, compared to actual returns on capital of over 40% for Google and around 50% for Facebook. Even though these results have to be interpreted with caution52, they seem to indicate that digital platforms are not facing the threat of entry and this evidence is consistent with the actual exploitation of market power.

Schumpeter53 highlighted the prospect of new competition and innovation as incessantly playing a key role in fostering dynamic competition and economic efficiency. The evidence so far described may indicate that this impulse for creative destruction is fading in digital markets.

#### Rate of innovation has slowed since the 70s

Kersten 21 – Director of the Renewing American Innovation Project at the Center for Strategic and International Studies.

Alexander Kersten, “Why Renewing American Innovation? The ‘Endless Frontier Act’ and Biden’s Bid for Maintaining U.S. Global Competitiveness,” *Center for Strategic and International Studies*, 14 April 2021, <https://www.csis.org/analysis/why-renewing-american-innovation-endless-frontier-act-and-bidens-bid-maintaining-us-global>.

Despite Silicon Valley and the millennial generation’s supposed penchant for innovative disruption, U.S. total factor productivity has been slowing since the 1970s. Productivity today is the lowest in more than a century. Innovation, historically a clear driver of U.S. productivity, means the creation of ideas and inventions that are translated into practical value and improve the quality of people’s lives directly or via their ability to grow the economy. Whether measured in terms of triadic patents (patents filed in the United States, Europe, and Japan), most available measures of productivity, or even startup company creation, the United States’ trademark innovative spirit has been gradually dampening for decades. And if not for China’s meteoric rise this century, the United States might still be sleepwalking—optimistically but without a serious plan—instead of waking up to the need for a coherent national strategy.

U.S. Complacency, and How We Got There

Noted George Mason University economist Tyler Cowen and other experts have recognized a growing “complacency” in American life as the indicator of a societal shift from the United States’ early dynamism. From the turn of the twentieth century until roughly the moon landing of 1969, the breakneck pace of groundbreaking technologies that directly affected the quality of life and the structure of U.S. society was simply astounding. Yet, since the first moon landing in 1969, only the internet and its application to more and more parts of our lives can claim to have made any meaningful impact—meaning that physically the world of 1969 is much more like that of 2021 than 1969 was of the early twentieth century. This, of course, is not meant to discredit the great advances in medicine and human genomics made in the last few decades, for example, but to show how the rate of society-changing innovations has not maintained the pace that existed from the mid-nineteenth century until roughly 1969.

## Conduct Adv

#### Rule of reason balances pro- and anti-competitive effects – only way to solve

Portuese 21 – Director of Antitrust and Innovation Policy at the Information Technology and Innovation Foundation. Doctor in law from the University of Paris II.

Aurelien Portuese, “Please, Help Yourself’: Toward a Taxonomy of Self-Preferencing,” *Information Technology and Innovation Foundation*, 25 October 2021, pp. 18-19, https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing.

CONCLUSION

The United States faces a critical turning point when it comes to antitrust law. It can continue the current system wherein it generally allows companies, even those with considerable market share, to self-preference (while not allowing active degradation of competitors), or it can go down the EU path that seeks to protect businesses, especially small firms, from competition, even if the result is a degraded consumer experience. A general, per se prohibition of self-preferencing, as proposed in the European Commission’s Digital Markets Act, would generate considerable costs and unintended consequences. Accordingly, the United States should refrain from instituting such an approach with bills such as the Klobuchar-Grassley bill and its House counterpart (Customer Non-Discrimination Act / Equality Act). Indeed, antitrust bills that aim to prohibit self-preferencing without thoughtful analysis and only for a handful of companies will likely do more harm than good. They are likely to undermine rather than strengthen competition on the merits and make consumers’ experiences worse.83

One cannot overstate the implications of the radical choice of prohibiting procompetitive self-preferencing. Unfortunately, several forces in the U.S. government seek to go down the EU path: some progressive Democrats because they despise large corporations and want a fundamentally restructured economy; some Republicans because they have let their anger toward social media sites purportedly being biased against conservative speech influence their views on antitrust; and many other elected officials simply because there is so much generated noise about the problems of “big tech.”

Policymakers need to tread carefully in this matter because going down the road of severely limiting self-preferencing would mean going down a road that will be hard to return from. This is a road that prioritizes protecting economic redistribution over economic growth; a road that protects some business interests over consumer interests. Finally, such a road would give carte blanche power to the government to hamper the U.S. innovation economy to benefit foreign competitors.

Today’s antitrust enforcers and lawmakers need to refrain from prohibiting the historically beneficial practice of self-preferencing. Indeed, imagine if antitrust officials in the 1930s and 1940s succumbed to the generated controversy over the so-called “chain store wars.” American consumers would not have benefitted from the low prices and abundance created by the rise of supermarkets and department stores. The race to efficiency led chain stores to pass on benefits to consumers at the expense of inefficient, small, less-innovative shops. To prohibit online a revolution that benefits users could only harm American consumers for the sake of protecting rent-seeking competitors willing to get through the law what they cannot get from the market. Anyone who cares about American living standards and consumer welfare should vociferously oppose such a vision that slows down competition and innovation through the prohibition of self-preferencing initially and the breakup of companies subsequently. This Neo-Brandeisian perspective jettisons American competitiveness and innovation.84

They can start by differentiating between self-preferencing and rival exclusion and commit to seeing the former as a procompetitive, proconsumer business practice that helps companies diversify their portfolios, enter new markets, challenge incumbents, and disseminate innovation through a process of imitation and disruption, which unequivocally benefits consumers. In addition, self-preferencing often is a substitute for marketing expenses, so prohibiting self-preferencing would squelch these procompetitive and pro-innovative effects.

Consequently, antitrust officials are well advised to focus on exclusionary practices only and not undermine the procompetitive effects of self-preferencing, or else the distortion of the competitive process may chill innovation at the expense of consumer benefits.

#### Plan balances incentives

Colomo 20 – Professor of Law and Jean Monnet Chair in Competition and Regulation at London School of Economics and Political Science.

Pablo Ibáñez Colomo, “Self-Preferencing: Yet Another Epithet in Need of Limiting Principles,” *World Competition*, vol. 43, 17 July 2020, pp. 33-35, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3654083.

4.2.Self-preferencing and the analysis of effects

As already explained, the Bronner-Van den Bergh Foods doctrine may be abandoned. If this is the formal or practical outcome of pending cases, the question that emerges, from a normative perspective, is whether self-preferencing practices should be deemed prima facie unlawful irrespective of their impact or whether they should be prohibited where they have, or are likely to have, anticompetitive effects. The question is particularly relevant at a time when some proposals have advanced the idea of reversing the burden of proof in relation to this very behaviour, including in the Special Advisers’ Report mentioned above.68 It is submitted, in this regard, that the prima facie prohibition of self-preferencing appears to be at odds with the case law. One can think of two main reasons in this regard.

First, according to a principle consistently confirmed by the Court, conduct should only be deemed unlawful where it serves no purpose other than the restriction of competition. By the same token, where a practice is capable of having a pro-competitive (or at least an ambivalent impact) on competition, a case-by-case analysis of its effects is necessary. There are examples of this case law both in the context of Articles 101 and 102 TFEU. As far as the former is concerned, the Court’s position seems clear following the judgments in Generics69 and Budapest Bank. 70 In the context of Article 102 TFEU, the Court took the same approach in AKZO71 and Hoffmann-La Roche. 72 If there is something that is clear about self-preferencing is that, as an expression of competition on the merits, it is typically capable of having procompetitive effects.

Second, the Court held in Budapest Bank that it is only appropriate to treat practices as prima facie unlawful where there is ‘sufficiently reliable and robust’ experience about their nature, purpose and (pro- and anticompetitive) effects.73 This line of case law would suggest caution before reversing the burden of proof, and particularly so in digital markets. As mentioned above, it is accepted – and this point was made explicit by the Special Advisers in their Report – that there is much that is not well understood about the pro-competitive effects resulting from practices implemented in high technology environments.74 In this sense, self-preferencing comes across as different from the sort of conduct that is typically treated as prima facie unlawful, such as cartel-like arrangements. 75

If one accepts, against this background, that an analysis of effects would be necessary before declaring the unlawfulness of self-preferencing, it becomes necessary to define what such effects are. 76 The notion can be defined in a variety of ways, depending on the meaning that is attached to its constituent elements. The importance of these choices cannot be underestimated. They have a major impact on the ease and frequency with which anticompetitive effects can be established. It is one thing to argue that any competitive disadvantage amounts to anticompetitive effects and another to equate anticompetitive effects with harm to consumer welfare. Similarly, there is a substantial difference between requiring evidence that the negative impact on competition is a plausible outcome and that it is certain, or virtually certain, to occur.

## K

No cards

## States CP

Extended conditionality

## Chilling DA

#### Even if a policy is limited, the uncertain environment triggers their link

Harry G. Broadman, Executive management consultant, Forbes, 7/31/21, Biden’s Antitrust Policy Mustn’t Throw Out The Baby With The Bathwater, <https://www.forbes.com/sites/harrybroadman/2021/07/31/bidens-antitrust-policy-mustnt-throw-out-the-baby-with-the-bathwater/?sh=5c80236311db>

This is because most will likely be administrative actions bound by existing law and thus open to challenge in court. Yet what is often under-appreciated under such scenarios, is that the policy uncertainty engendered during such a period may well affect decisions by investors, businesses, workers, and consumers that could run counter to those otherwise preferred.

There are two instances where antitrust policy actions during Biden’s administration could have a lasting effect.

The first is if the FTC or the DOJAD file lawsuits against certain firms charging them with anticompetitive practices. A recent example initiated toward the end of the Trump Administration was when the FTC and 46 states sued Facebook, accusing the firm of acquiring competitors WhatsApp and Instagram in order diminish competition in the social media industry. The objective was to force Facebook to divest the two entities. (While at present, the lawsuit has been rejected by the court, it is an open question as to whether Biden’s new FTC Chairwoman will refile the case.)

The second is if Congress passes new antitrust legislation that Biden signs. At present, there are three antitrust bills pending in the Senate, the two dominant ones being Senator Amy Klobuchar’s and Senator Josh Hawley’s bills. While not identical in several important dimensions, they are both focused on “big tech”. In parallel, the House is considering five antitrust bills, largely running in parallel with those being considered in the Senate.

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

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

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

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

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

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

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