# 1NC vs Dartmouth LV

## OFF

### 1NC – T – Prohibit

#### Interp:

#### 1. A prohibition is distinct from regulation – it requires ending something fully, which excludes regulating within the bounds of prescribed rules.

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### 2. “business practice” requires a pattern of conduct

Lucas 88 – Judge, California Supreme Court

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

\*\* Italics in original.

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

#### 3. “Expand the scope” means broadening the range of claims that can be brought – that is distinct from just increasing the amount of claims that can be brought

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

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

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

#### Violation: the aff bans a corporate structure, not a pattern of conduct – that does not affect the scope of antitrust liability

#### Vote neg – allows affs that tinker with existing regs, but don’t expand the scope of antitrust laws. Makes the topic bidirectional and a limits disaster for the neg.

### 1NC – Antitrust DA

#### Frenzy of deals now because Biden’s antitrust push won’t be implemented for years

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

"The order itself will be less likely to have a chilling effect on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were bracing for a tougher antitrust environment under Biden even before last week's executive order. Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

#### Immediately expanding scope of antitrust liability brings that to a halt—undermines dynamism and global competitiveness

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### Internal link goes one way—large-firm dynamism is the only way to maintain tech leadership vis-à-vis china—key to competitiveness and AI

Lee, senior lecturer at the University of Hong Kong Faculty of Business and Economics, ‘19

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- effective antitrust measures could stifle the ability of American tech companies to compete with their Chinese challengers. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing consumer welfare, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But the wider the antitrust authorities reach, the more likely they are to damage the tech giants' global competitiveness. This applies especially in the key field of artificial intelligence, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, lots of data. Such data can only be collected at scale, which conflicts with hipster antitrust notions of size. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a disadvantage to China.

The idea of size is one of many fundamental differences separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed so-called "super apps" that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, that lead is shrinking, and if China does overtake the U.S. in artificial intelligence, it will likely be a result of advantages in data and government policy.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have broader implications beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able to close the growing competitive chasm.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to shape user privacy norms, establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that aggressive antitrust sanctions would risk inhibiting American companies from maintaining the scale necessary to compete with their Chinese rivals.

AI supremacy will be a defining feature of superpower status. And if future researchers one day examine how the U.S. lost the war for artificial intelligence, the hindsight of history may show that the current antitrust debate was the fatal turning point.

#### Tech innovation prevents nuclear conflict—US leadership key

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1NC – Section 5 CP [P4D]

#### The Federal Trade Commission should:

**PLANK 1**

--determine that “unfair methods of competition” pursuant to section 5 of the FTC Act includes conduct that does not separate platforms from commerce for platforms in the private sector

--bring associative enforcement actions

**PLANK 2**

--issue cease and desist letters to companies engaging in platform conduct that does not separate platforms from commerce for platforms, stating that their practice violates the core antitrust laws

#### Congress granted the FTC broad authority to regulate anticompetitve practices under section 5 – the CP prevents a slew of anticompetitive practices

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau.

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

Under progressive leadership, one federal agency, the FTC, could resurrect antitrust law as “a comprehensive charter of economic liberty.”22 Modern administrative law and Congressional delegation of policymaking authority grant the FTC expansive power to interpret the antitrust provision of Section 5 of the FTC Act.23 In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to police “unfair methods of competition” that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system.24 Congress intended the FTC’s antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic stage before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.25

Since the early 1980s, the FTC has championed antitrust law centered on economic efficiency. In 2015, the FTC codified this approach in a Statement of Enforcement Principles laying out its interpretation of Section 5’s prohibition on unfair methods of competition.26 The FTC stated that it would use its Section 5 authority to advance “consumer welfare,” which is functionally similar to the allocative efficiency goal, and apply the rule of reason framework.27 In articulating this narrow interpretation of Section 5, the FTC contradicted Congress’s political economic vision in 1914, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the FTC adopted a convoluted test that cannot advance the Congressional vision underlying Section 5.

Despite being a champion of the efficiency paradigm since 1981, the FTC under progressive leadership in the future could still change course and be true to the Congressional intent from when the agency was created more than a century ago. In setting out an interpretation of Section 5, whether through enforcement actions or rulemakings, the FTC should anchor Section 5 in the expansive political economic vision of Congress. By enacting the FTC Act, Congress sought to prevent—rather than remedy after the fact—three principal harms from concentrated economic power: wealth transfers from consumers and producers to monopolies, oligopolies, and cartels; private blockades against entry and competition in markets; and the accumulation of economic and political power in corporate hands. To advance Congress’s antitrust vision, the FTC should adopt presumptions of illegality for a variety of competitively suspicious conduct, such as mergers in concentrated industries, exclusionary practices by firms with market dominance or near-dominance, and restraints on retail competition; and challenge monopolies and oligopolies that inflict significant harm on the public. When seeking to preserve or restore competitive market structures, the FTC should pursue simple structural remedies over complicated behavioral fixes.

#### Khan wants more authority---BUT, success is constrained now.

**Zakrzewski 21** --- Technology policy reporter, Northwestern University, BS in Journalism.

Cat, 6-17-2021, "Will Lina Khan bring a reckoning to Silicon Valley? She’ll face major challenges.," https://www.washingtonpost.com/technology/2021/06/17/lina-khan-ftc-actions/

Lina Khan’s rise to chair of the Federal Trade Commission has been celebrated by Silicon Valley’s critics as the dawn of a new age of tougher antitrust enforcement.

She was sworn into office with one of the most ambitious visions of any chair at the agency, following years of high-profile proposals to dismantle large tech companies’ power that she spelled out both in her academic writing and in her guiding of a congressional investigation into Big Tech’s power.

But her promise is about to collide with the reality of the FTC, an agency more than 100 years old that has come under fire in recent years for failing to police privacy and competition abuses.

“She wants to take a car that she thinks has been driving at about five miles per hour and make it go 250,” said William Kovacic, a former chairman of the agency.

Khan is entering the agency at a critical moment, with pressure mounting from members of both political parties to rein in tech companies. That’s resulting in greater scrutiny of the FTC’s track record.

Khan inherits a key antitrust lawsuit against Facebook, which seeks to break the social network up over allegations that it copied, acquired and killed its rivals. The lawsuit is being watched as a test of Washington’s ability to check Silicon Valley’s power amid a broader debate about reforming tech regulations.

She’ll also be running an agency that lawmakers and experts for years have warned is under-resourced and lacking deep technical expertise, at a time when companies are growing ever more powerful and wealthy and building bigger lobbying forces in Washington.

And there will be immediate pressure for Khan to do more: Anti-monopoly groups have called on the agency to pursue similar competition complaints against other tech giants, including the e-commerce titan Amazon. (Amazon CEO Jeff Bezos owns The Washington Post.)

But those efforts will confront a U.S. judicial system that for decades has held a fairly narrow view of what constitutes an antitrust harm, which could be a major hurdle to achieving Khan’s sweeping vision of competition enforcement.

“She’s got some things that can be done under existing law, but nothing like what she wants to get done,” said Herbert Hovenkamp, an antitrust professor at the University of Pennsylvania’s law school.

Amid this backdrop, Khan is likely to face immediate, intense pressure from anti-monopoly groups that have been calling for greater antitrust enforcement. Their expectations are incredibly high.

#### Gives the FTC an opportunity to assert Chevron---solves institutional expertise deficits in antitrust.

**Carlson 14** --- Vanderbilt University, J.D.; University of Oxford, M.Sc. (forthcoming); Colorado College, B.A.

Christian, 2014, “Antitrusting the Federal Trade Commission: Why Courts Should Defer to Federal Trade Commission Antitrust Decision Making”, Vanderbilt University Law.

As it turns out, the answers to these questions are not so simple. The FTC was founded to rein in judicial decision-making and place the expert decisions with the experts. However, the FTC does not serve the institutional role that Congress sought in 1914. One Senator sought "an administrative body of practical men thoroughly informed in regard to business, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations."' This Senator's charge, and the charge of his fellow Congressman, has not been heeded.

Courts have acted contrary to congressional desires and not deferred to the independent expert body tasked with preventing unfair competition, the FTC. This is particularly troubling today, as modern antitrust economics have made courts increasingly less able to make normatively appropriate decisions. 2 Courts themselves have recognized this, erecting procedural and substantive barriers to protect themselves from disturbing the market status quo.3 Yet, at the same time, they have chosen not to defer to the FTC, the expert body tasked with regulating the market.4 Courts have usurped agency decision-making power with occasionally questionable results.5 The FTC should assert, and courts should grant, Chevron deference when the FTC makes antitrust legal decisions in order to mitigate judicial error and protect FTC expert decisions from the generalist judiciary's institutional shortcomings.

#### Allows the FTC to crack down on pay-for-delay.

**Zeisler 14** --- J.D. Candidate 2014, Columbia Law School; B.S., B.A. 2012, University of British Columbia.

Royce, 2014, HEVRON DEFERENCE AND THE FTC: HOW AND WHY THE FTC SHOULD USE CHEVRON TO IMPROVE ANTITRUST ENFORCEMENT, Columbia Law Review.

As a final example, this Note examines pay-for-delay liability. 162 The history of this problem can be summarized briefly. For over a decade, the FTC has cracked down on pay-for-delay settlements. 163 During this time, appellate courts consistently rejected the FTC's theory of liability because of the statutory presumptions inherent to patent law and the Hatch-Waxman Act.164 Eventually, the FTC succeeded in creating a circuit split, giving rise to the Actavis decision, where the Court held that a settlement "can sometimes violate the antitrust laws."16 5 From the perspective of this Note, what makes pay-for-delay important is that it provides a retrospective lesson-the FTC could not have forced this change earlier by taking advantage of Chevron deference-as well as a prospective opportunity- the FTC has a unique occasion to promulgate notice-and-comment rules.

Turning first to the retrospective lesson, understanding the logic of these courts' holdings leads to the conclusion that the FTC could not have used notice-and-comment rulemaking or Chevron deference to hasten this change. The FTC's rulemaking grant does not permit direct regulation of patents, nor does it empower interpretations of the HatchWaxman Act. 167 Circuits that have ruled against pay-fordelay settlements would also find that the FTC lacked authority to promulgate such regulations. In a sense, there is an inverse Chenery principle at work. In Chenery, the Supreme Court explained that the SEC's mandate included the ability to proceed either through litigation or adjudication.168 In the pay-for-delay context, the FTC can proceed with neither rulemaking nor litigation. Once a court determines that a substantive legal issue falls outside of an agency's mandate through litigation, rulemaking is also likely to be found inappropriate. As a larger jurisprudential insight, this reveals a powerful method that courts can use to check the FTC. If a court can justify a presumption on broader regulatory grounds, and not merely antitrust law, then the FTC lacks authority to regulate this conduct.

Moving to the post-Actavis antitrust regime, the FTC is now in a different situation. In Actavis, the Court created a new sphere of antitrust liability and left "to the lower courts the structuring of the present rule-of-reason antitrust litigation. 1 69 Faced with this new precedent, the FTC has three reasons to begin exercising its rulemaking authority. First, the FTC correctly identified reverse settlements as potentially anti-competitive while lower courts remained skeptical. The FTC's characterization of this conduct will carry a certain rhetorical force that can be leveraged toward more assertive regulation. Second, and building on the first point, the FTC's institutional advantages and capabilities to form presumptions in this regulatory arena are at their height. Indeed, as Professor Hemphill argues, the FTC's ability to aggregate data gives it the unique ability to form the presumptions required for understanding the pay-for-delay regulatory structure. 170 Third, FTC regulation can provide crucial guidance to businesses. In creating, but not defining, the scope of liability, the Court has created considerable uncertainty around settlements. 171 Concededly, while FTC regulation cannot shield a corporation from liability under the Sherman Act, it can provide initial guidance for conduct likely to lead to liability in this unsettled area.

#### Biologics innovation is key to US lead in mRNA development

Biopharma-Reporter 8/03 - News & analysis on the clinical development and manufacture of large molecule drugs

“mRNA and beyond: Opportunities for US biologics,” 03-Aug-2021, https://www.biopharma-reporter.com/Article/2021/08/03/Opportunities-for-US-manufacturing-in-biologics

The success of mRNA vaccine technology could be one of the new opportunities for US pharmaceutical manufacturing looking forward, with pandemic investments helping turbocharge the sector. Production of a number of drugs are likely to remain in lower cost production hubs, such as China and India. But biologics may tell a different story: with different dynamics for small volume, high margin treatments. There’s an opportunity for the US to lead in advanced biologicals; as well as manufacturing in viral vectors and cell and gene therapies, according to CPhI’s insight’s report ‘US Pharma Market 2022 and Beyond’, prepared for this year’s CPhI’s event. But first, the country must overcome current capacity restraints through increased efficiencies and investments.

A chunky boost of capital from Operation Warp Speed was designated to increasing development and manufacturing capacity in the US. “We expect to see the approval of mRNA-based cancer therapies in the next few years," notes Peter Shapiro, Senior Director of Drugs and Business Fundamentals at GlobalData, in the report. "Furthermore, these mRNA therapies will be able to use the same manufacturing equipment as mRNA vaccines now that the industry has shelled out the high CapEx cost for this equipment, and trained more staff in sophisticated pharma manufacturing.” Moderna, for example, has wasted no time in setting out a host of mRNA opportunities for the coming years. A mRNA quadrivalent flu vaccine has already started a Phase 1/2 clinical trial – dosing its first participants last month; with an HIV vaccine set to follow into the clinic later this year. Other programs include mRNA vaccines for CMV and RSV. A key advantage of the platform is not only its speed and flexibility in capacity for COVID-19 vaccine production: but also that the same tech could be applied to mRNA therapeutics.

Viral vectors – already in short supply pre-pandemic for gene therapies and gene-modified therapies – are now also required for viral vector vaccines (namely AstraZeneca and J&J). As of May, there were 14 therapies/vaccines that use a viral vector marketed in the EU, Japan, US and UK, according to GlobalData – who predicts this number will soar over the next six years to more than 100 (and with more than 3,000 in the longer term development pipeline). Meanwhile, there are only 87 viral vector contract manufacturing facilities available worldwide. “Adding to the shortage of supply is the current inefficiency in manufacturing – including low titres and complexity – with both biopharma innovators and contract manufacturers working on both upstream and downstream process innovations," notes the CPhI report. "One suggestion from our experts is for [regulatory] agencies to approve standardized viral platforms that could be used interchangeably by therapy developers, potentially speeding up cell and gene therapies’ development, approval, and technology transfer to CMOs.” With pressure on viral vector manufacturing coming from both COVID-19 vaccines and the increased number of gene therapies, manufacturing in this sector will have to increase through scaling up facilities, developing more efficient processes both upstream and downstream, and more investment from contract manufacturing organisations.

Biologics and cell and gene manufacturing are ‘potentially entering a hugely profitable period’, notes the report. But for this to be realised, greater capacity is needed. "In fact, the pandemic has further aggravated capacity constraints as priority is given to COVID vaccines. Anyone with available capacity in the US is likely to be booked up well in advance and able to charge a premium. For the CDMO space, this presents huge opportunities with a large number of acquisitions in the last year as well as increased capital coming in from VCs," notes the CPhI report.

And technological advances will have a particularly important role to play. “Our experts predict that the US is going to play a key role in the development of advanced manufacturing technologies improving the technology base in general and potentially lowering costs. While the country cannot compete on labour costs, it has the scope to bring new efficiencies to advanced biologics manufacturing,” notes the report. Cell and gene therapy, API manufacturing and injectable dose manufacturing are the best immediate opportunities for reshoring in the US, notes the report. “There are opportunities for the US to lead in particular for advanced biologicals. But there are also medium and long-term opportunities for manufacturers capable of manufacturing mRNA-based vaccines and therapies and vector manufacturing for recombinant vector vaccines, gene therapy and gene modified cell therapy." Peter Shapiro, Senior Director of Drugs and Business Fundamentals at GlobalData.

Across the biologics space, the industry is continually looking for new innovations in upstream and downstream processing, with organisations like the National Institute for Innovation in Manufacturing Biopharmaceuticals (NIMBL) pushing continuous bioprocessing. This is potentially an even bigger breakthrough than in the small molecule space as production costs are significantly higher and any innovation that lowers this will potentially make US manufacturers more competitive domestically and internationally. “Innovation in manufacturing will be required for the production volumes necessary for the widespread use of advanced biologics, as well as the reduction in price of these therapies; just as innovation was previously involved in the popularization of monoclonal antibodies. There are already large market-based incentives for success in increasing the efficiency and volumes of advanced biologic production,” commented Shapiro.

#### Solves inevitable extinction—New scalable tech breakthroughs are key

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In the decades to come, advanced bioweapons could threaten human existence. Although the probability of human extinction from bioweapons may be low, the expected value of reducing the risk could still be large, since such risks jeopardize the existence of all future generations. We provide an overview of biotechnological extinction risk, make some rough initial estimates for how severe the risks might be, and compare the cost-effectiveness of reducing these extinction-level risks with existing biosecurity work. We find that reducing human extinction risk can be more cost-effective than reducing smaller-scale risks, even when using conservative estimates. This suggests that the risks are not low enough to ignore and that more ought to be done to prevent the worst-case scenarios. How worthwhile is it spending resources to study and mitigate the chance of human extinction from biological risks? The risks of such a catastrophe are presumably low, so a skeptic might argue that addressing such risks would be a waste of scarce resources. In this article, we investigate this position using a cost-effectiveness approach and ultimately conclude that the expected value of reducing these risks is large, especially since such risks jeopardize the existence of all future human lives. Historically, disease events have been responsible for the greatest death tolls on humanity. The 1918 flu was responsible for more than 50 million deaths,1 while smallpox killed perhaps 10 times that many in the 20th century alone.2 The Black Death was responsible for killing over 25% of the European population,3 while other pandemics, such as the plague of Justinian, are thought to have killed 25 million in the 6th century—constituting over 10% of the world’s population at the time.4 It is an open question whether a future pandemic could result in outright human extinction or the irreversible collapse of civilization. A skeptic would have many good reasons to think that existential risk from disease is unlikely. Such a disease would need to spread worldwide to remote populations, overcome rare genetic resistances, and evade detection, cures, and countermeasures. Even evolution itself may work in humanity’s favor: Virulence and transmission is often a trade-off, and so evolutionary pressures could push against maximally lethal wild-type pathogens.5,6 While these arguments point to a very small risk of human extinction, they do not rule the possibility out entirely. Although rare, there are recorded instances of species going extinct due to disease—primarily in amphibians, but also in 1 mammalian species of rat on Christmas Island.7,8 There are also historical examples of large human populations being almost entirely wiped out by disease, especially when multiple diseases were simultaneously introduced into a population without immunity. The most striking examples of total population collapse include native American tribes exposed to European diseases, such as the Massachusett (86% loss of population), Quiripi-Unquachog (95% loss of population), and the Western Abenaki (which suffered a staggering 98% loss of population).9 In the modern context, no single disease currently exists that combines the worst-case levels of transmissibility, lethality, resistance to countermeasures, and global reach. But many diseases are proof of principle that each worst-case attribute can be realized independently. For example, some diseases exhibit nearly a 100% case fatality ratio in the absence of treatment, such as rabies or septicemic plague. Other diseases have a track record of spreading to virtually every human community worldwide, such as the 1918 flu,10 and seroprevalence studies indicate that other pathogens, such as chickenpox and HSV-1, can successfully reach over 95% of a population.11,12 Under optimal virulence theory, natural evolution would be an unlikely source for pathogens with the highest possible levels of transmissibility, virulence, and global reach. But advances in biotechnology might allow the creation of diseases that combine such traits. Recent controversy has already emerged over a number of scientific experiments that resulted in viruses with enhanced transmissibility, lethality, and/or the ability to overcome therapeutics.13-17 Other experiments demonstrated that mousepox could be modified to have a 100% case fatality rate and render a vaccine ineffective.18 In addition to transmissibility and lethality, studies have shown that other disease traits, such as incubation time, environmental survival, and available vectors, could be modified as well.19-21 Although these experiments had scientific merit and were not conducted with malicious intent, their implications are still worrying. This is especially true given that there is also a long historical track record of state-run bioweapon research applying cutting-edge science and technology to design agents not previously seen in nature. The Soviet bioweapons program developed agents with traits such as enhanced virulence, resistance to therapies, greater environmental resilience, increased difficulty to diagnose or treat, and which caused unexpected disease presentations and outcomes.22 Delivery capabilities have also been subject to the cutting edge of technical development, with Canadian, US, and UK bioweapon efforts playing a critical role in developing the discipline of aerobiology.23,24 While there is no evidence of staterun bioweapons programs directly attempting to develop or deploy bioweapons that would pose an existential risk, the logic of deterrence and mutually assured destruction could create such incentives in more unstable political environments or following a breakdown of the Biological Weapons Convention.25 The possibility of a war between great powers could also increase the pressure to use such weapons—during the World Wars, bioweapons were used across multiple continents, with Germany targeting animals in WWI,26 and Japan using plague to cause an epidemic in China during WWII.27 Non-state actors may also pose a risk, especially those with explicitly omnicidal aims. While rare, there are examples. The Aum Shinrikyo cult in Japan sought biological weapons for the express purpose of causing extinction.28 Environmental groups, such as the Gaia Liberation Front, have argued that ‘‘we can ensure Gaia’s survival only through the extinction of the Humans as a species . we now have the specific technology for doing the job . several different [genetically engineered] viruses could be released’’(quoted in ref. 29). Groups such as R.I.S.E. also sought to protect nature by destroying most of humanity with bioweapons.30 Fortunately, to date, non-state actors have lacked the capabilities needed to pose a catastrophic bioweapons threat, but this could change in future decades as biotechnology becomes more accessible and the pool of experienced users grows.31,32 What is the appropriate response to these speculative extinction threats? A balanced biosecurity portfolio might include investments that reduce a mix of proven and speculative risks, but striking this balance is still difficult given the massive uncertainties around the low-probability, high-consequence risks. In this article, we examine the traditional spectrum of biosecurity risks (ie, biocrimes, bioterrorism, and biowarfare) to categorize biothreats by likelihood and impact, expanding the historical analysis to consider even lower-probability, higherconsequence events (catastrophic risks and existential risks). In order to produce reasoned estimates of the likelihood of different categories of biothreats, we bring together relevant data and theory and produce some first-guess estimates of the likelihood of different categories of biothreat, and we use these initial estimates to compare the cost-effectiveness of reducing existential risks with more traditional biosecurity measures.We emphasize that these models are highly uncertain, and their utility lies more in enabling order-of-magnitude comparisons rather than as a precise measure of the true risk. However, even with the most conservative models, we find that reduction of low-probability, high-consequence risks can be more cost-effective, as measured by quality-adjusted life year per dollar, especially when we account for the lives of future generations. This suggests that despite the low probability of such events, society still ought to invest more in preventing the most extreme possible biosecurity catastrophes.

The Impact Spectrum of Various Biothreats Here, we use historical data to analyze the probability and severity of biothreats. We place biothreats in 6 loose categories: incidents, events, disasters, crises, global catastrophic risk, and existential risk. Together they form an overlapping spectrum of increasing impact and decreasing likelihood (Figure 1).\* The historical use of bioweapons provides useful examples of some categories of biothreats. Biocrimes and bioterrorism provide examples of incidents.{Biological warfare provides examples \*While noting that the use of bioweapons can have a wide range of other impacts, including sociopolitical and economic, here we consider their impact purely in terms of fatalities. { There is considerable uncertainty involved with the dataset on the historical use of biological weapons, including considerable variation in key terms and assumptions, likely knowledge gaps, and motivations for both claiming natural events as unnatural, and vice versa. The numbers used here are intended as indicative and are used to place boundaries on the likelihood and impact of different types of biothreat. As noted elsewhere in this article, the conclusions drawn are considered by orders of magnitude, which helps to address these uncertainties. RISKS AND COST-EFFECTIVENESS OF BIOSECURITY 374 Health Security of events and disasters. These historical examples provide indicative data on likelihood andimpact thatwe can thenfeedinto a cost-effectiveness analysis. We should note that these data are both sparse and sometimes controversial. Where possible, we usemultiple datasets to corroborate our numbers, but ultimately the ‘‘true rate’’ of bioweapon attacks is highly uncertain. Biocrimes and Bioterrorism Historically, risks of biocrime{ and bioterrorismx have been limited. A 2015 Risk and Benefit Analysis for Gain of Function Research detailed 24 biocrimes between 1990 and 2015 (0.96 per year) and an additional 42 bioterrorism incidents between 1972 and 2014 (1 per year).36 This is consistent with other estimates of biocrimes and bioterrorism frequency, which range from 0.35 to 3.5 per year (see supplementary material, part 1, at http://online.liebertpub. com/doi/suppl/10.1089/hs.2017.0028). Most attacks typically result in no more than a handful of casualties (and many of these events include hoaxes, threats, and attacks that had no casualties at all). For example, the anthrax letter attacks in the United States in 2001, perhaps the most high-profile case in recent years, resulted in only 17 infections with 5 fatalities.37 The 2015 Risk and Benefit Analysis for Gain of Function Research detailed only a single death from the recorded biocrimes.\*\* Only 1 of the bioterrorism incidents in the report had associated deaths (the 2001 anthrax letter attacks).36 Based on this data, for the purposes of this article, we assume that we could expect 1 incident per year resulting in up to tens of deaths. Biological Warfare Academic overviews of biological warfare{{ detail 7 programs prior to 1945.38 A further 9 programs are recorded between 1945 and 1994.39 For most of the last century, at least 1 program was active in any given year (Table 1). The actual use of bioweapons by states is less common: Over the 85 years covered by these histories (1915 to 2000), 18 cases of use (or possible use) were recorded, including outbreaks connected to biological warfare (see supplementary material, part 2, at http://online.liebertpub.com/ doi/suppl/10.1089/hs.2017.0028). Extrapolating this out (dividing 18 by 85), we would have about a 20% chance per year of biowarfare. It is worth noting the limitations of these data. Most of these events occurred before the introduction of the Biological Weapons Convention and were conducted by countries that no longer have biological weapons programs. Since many of these incidents occurred during infrequent great power wars, we revise our best guess to around 10% chance per year of biowarfare. We use 2 sets of data to estimate the magnitude of such events. The first dataset was Japanese biological warfare in China,40 where records indicate a series of attacks on towns resulted in a mean of 330 casualties per event and 1 case in which an attack resulted in a regional outbreak causing an estimated 30,000 deaths (see supplementary material, part 3, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017. 0028). The second data set came from disease events that were Figure 1. A spectrum of differing impacts and likelihoods from biothreats. Below each category of risk is the number of human fatalities. We loosely define global catastrophic risk as being 100 million fatalities, and existential risk as being the total extinction of humanity. Alternative definitions can be found in previous reports,33 as well as within this journal issue.34 { Biocrimes can be considered to be ‘‘the use of a biological agent to kill or make ill a single individual or small group of individuals, motivated by revenge or the desire for monetary gain by extortion, rather than by political, ideological, religious or other beliefs.’’35 x Bioterrorism can be considered to be ‘‘the deliberate release of viruses, bacteria or other agents used to cause illness or death in people, but also in animals or plants. It is aimed at creating casualties, terror, societal disruption, or economic loss, inspired by ideological, religious or political beliefs.’’35 \*\*A number of other biocrimes involved deliberately infecting another individual with HIV, the results of which were not evident and have not been included in this analysis. {{Biological warfare can be considered to be the ‘‘ability to use biological agents in warfare.’’35 MILLETT AND SNYDER-BEATTIE Volume 15, Number 4, 2017 375 alleged to have an unnatural origin.41 In one case study, a point source release of anthrax resulted in at least 66 deaths. In a second case study, a regional epidemic of the same disease resulted in more than 17,000 human cases. While these events were not confirmed as having been caused by biological warfare, contemporary or subsequent analysis has suggested that such an origin was at least feasible. Combined, these figures provide an estimated impact of between 66 to 330 and 17,000 to 30,000. For the purposes of this analysis, we are assuming the lower boundary figures from biological warfare are indicative of events, with a likelihood of 10% per year and an impact ranging between tens and thousands of fatalities. The upper boundary figures from biological warfare are indicative of disasters, with a likelihood of 1% per year and an impact range of thousands to tens of thousands of fatalities.{{ Global Catastrophic and Existential Risk Unlike standard biothreats, there is no historical record on which to draw when considering global catastrophic or existential risks. Alternative approaches are required to estimate the likelihood of such an event. Given the high degree of uncertainty, we adopt 3 different approaches to approximate the risk of extinction from bioweapons: utilizing surveys of experts, previous major risk assessments, and simple toy models. These should be taken as initial guesses or rough order-of-magnitude approximations, and not a reliable or precise measure. Model 1: Survey of 2008 Global Catastrophic Risk Conference An informal survey at the 2008 Oxford Global Catastrophic Risk Conference asked participants to estimate the chance that disasters of different types would occur before 2100. Participants had a median risk estimate of 0.05% that a natural pandemic would lead to human extinction by 2100, and a median risk estimate of 2% that an ‘‘engineered’’ pandemic would lead to extinction by 2100.42 The advantage of the survey is that it directly measures the quantity that we are interested in: probability of extinction from bioweapons. The disadvantage is that the estimates were likely highly subjective and unreliable, especially as the survey did not account for response bias, and the respondents were not calibrated beforehand. We therefore also turn to other models that, while indirect, provide more objective measures of risk.xx Table 1. The duration of state-run offensive biological weapons programs detailed in key historical reviews up to 1945 and from 1945 to 2000.5,6 State Duration (Review up to 1945) Duration (Review from 1945-2000) Canada 1925-1945 1945-1969 France 1921-1926 and 1935-1940 1947-1972 Germany 1915-1918 — Hungary — 1938-1944 Iraq — 1974-1990 Japan 1931-1945 — Poland — 1945-1960? South Africa — 1981-1994 Soviet Union 1920-1945 1945-1992 United Kingdom 1925-1945 1945-1957 United States 1942-1945 1945-1969 {{Whilst there are no documented examples, it is possible that if an attack similar to the one that caused the plague epidemic in China were to be carried out in a modern mega-city, even relatively low infectivity and case fatality rates could result in disasters or even crises. For example, the population of Dhaka, Bangladesh, is approaching 20 million. A disaster would require around 0.5% of its population to die, and a crisis would equate to 5% of the city’s population. xxA more rigorous survey examined the probability of a bioweapons attack in a 10-year timeframe with more than 100 illnesses43 and found that opinions varied widely between 1% and 100%, with a mean of 57.5%. While this survey had a superior methodology to the one we cite in model 1, it did not focus on attacks that could result in global catastrophic risk. RISKS AND COST-EFFECTIVENESS OF BIOSECURITY 376 Health Security Model 2: Potentially Pandemic Pathogens Recent controversial experiments on H5N1 influenza prompted discussions as to the risks of deliberately creating potentially pandemic pathogens. These agents are those that are highly transmissible, capable of uncontrollable spread in human populations, highly virulent, and also possibly able to overcome medical countermeasures.44 Previous work in a comprehensive report done by Gryphon Scientific, Risk and Benefit Analysis of Gain of Function Research,36 has laid out very detailed risk assessments of potentially pandemic pathogen research, suggesting that the annual probability of a global pandemic resulting from an accident with this type of research in the United States is 0.002% to 0.1%. The report also concluded that risks of deliberate misuse were about as serious as the risks of an accidental outbreak, suggesting a 2-fold increase in risk. Assuming that 25% of relevant research is done in the United States as opposed to elsewhere in the world, this gives us a further 4-fold increase in risk. In total, this 8-fold increase in risk gives us a 0.016% to 0.8% chance of a pandemic in the future each year (see supplementary material, part 4, at http://online.liebertpub .com/doi/suppl/10.1089/hs.2017.0028). The analysis in Risk and Benefit Analysis of Gain of Function Research suggested that lab outbreaks from wildtype influenza viruses could result in between 4 million and 80 million deaths,36 but others have suggested that if some of the modified pathogens were to escape from a laboratory, they could cause up to 1 billion fatalities.45 For the purposes of this model, we assume that for any global pandemic arising from this kind of research, each has only a 1 in 10,000\*\*\* chance of causing an existential risk. This figure is somewhat arbitrary but serves as an excessively conservative guess that would include worst-case situations in which scientists intentionally cause harm, where civilization permanently collapses following a particularly bad outbreak, or other worst-case scenarios that would result in existential risk. Multiplying the probability of an outbreak with the probability of an existential risk gives us an annual risk probability between 1.6 · 10–8 and 8 · 10–7. {{{ Model 3: Naive Power Law Extrapolation Previous literature has found that casualty numbers from terrorism and warfare follow a power law distribution, including terrorism from WMDs.46 Power laws have the property of being scale invariant, meaning that the ratio in likelihood between events that cause the deaths of 10 people and 10,000 people will be the same as that between 10,000 people and 10,000,000 people.{{{ This property results in a distribution with an exceptionally heavy tail, so that the vast majority of events will have very low casualty rates, with a couple of extreme outliers. Past studies have estimated this ratio for terrorism using biological and chemical weapons to be about 0.5 for 1 order of magnitude,47 meaning that an attack that kills 10x people is about 3 times less likely (100.5) than an attack that kills 10x–1 people (a concrete example is that attacks with more than 1,000 casualties, such as the Aum Shinrikyo attacks, will be about 30 times less probable than an attack that kills a single individual). Extrapolating the power law out, we find that the probability that an attack kills more than 5 billion will be (5 billion)–0.5 or 0.000014. Assuming 1 attack per year (extrapolated on the current rate of bioattacks) and assuming that only 10% of such attacks that kill more than 5 billion eventually lead to extinction (due to the breakdown of society, or other knock-on effects), we get an annual existential risk of 0.0000014 (or 1.4 · 10–6). We can also use similar reasoning for warfare, where we have more reliable data (97 wars between 1820 and 1997, although the data are less specific to biological warfare). The parameter for warfare is 0.41,47 suggesting that wars that result in more than 5 billion casualties will comprise (5 billion)–0.41 = 0.0001 of all wars. Our estimate assumes that wars will occur with the same frequency as in 1820 to 1997, with 1 new war arising roughly every 2 years. It also assumes that in these extreme outlier scenarios, nuclear or contagious biological weapons would be the cause of such high casualty numbers, and that bioweapons specifically would be responsible for these enormous casualties about 10% of the time (historically bioweapons were deployed in WWI, WWII, and developed but not deployed in the Cold War— constituting a bioweapons threat in every great power war since 1900). Assuming that 10% of biowarfare escalations resulting in more than 5 billion deaths eventually lead to extinction, we get an annual existential risk from biowarfare of 0.0000005 (or 5 · 10–7).

Perhaps the most interesting implication of the fatalities following a power law with a small exponent is that the majority of the expected casualties come from rare, catastrophic events. The data also bear this out for warfare and terrorism. The vast majority of US terrorism deaths occurred during 9/11, and the vast majority of terrorism injuries in Japan over the past decades came from a single Aum Shinrikyo attack. Warfare casualties are dominated by the great power wars. This suggests that a typical individual is far more likely to die from a rare, catastrophic attack as opposed to a smaller scale and more common one. If our goal is to reduce the greatest expected number of fatalities, we may be better off devoting resources to preventing the worst possible attacks. Why Uncertainty Is Not Cause for Reassurance Each of our estimates rely to some extent on guesswork and remain highly uncertain. Technological breakthroughs in areas such as diagnostics, vaccines, and therapeutics, as well as vastly improved surveillance, or even eventual space colonization, could reduce the chance of disease-related extinction by many orders of magnitude. Other breakthroughs such as highly distributed DNA synthesis or improved understanding of how to construct and modify diseases could increase or decrease the risks. Destabilizing political forces, the breakdown of the Biological Weapons Convention, or warfare between major world powers could vastly increase the amount of investment in bioweapons and create the incentives to actively use knowledge and biotechnology in destructive ways. Each of these factors suggests that our wide estimates could still be many orders of magnitude off from the true risk in this century. But uncertainty is not cause for reassurance. In instances where the probability of a catastrophe is thought to be extremely low (eg, human extinction from bioweapons), greater uncertainty around the estimates will typically imply greater risk of the catastrophe, as we have reduced confidence that the risk is actually at a low level.48 [Footnote] For example, let’s say our best guess for a risk is 0.01%, and that we are highly uncertain about this. Even just a 10% chance of underestimating the risk by an order of magnitude will double the risk—with a revised best guess of around 0.02%—while it would take a full 90% chance of overestimating the risk by an order of magnitude to cut the risk in half to around 0.005%. Model uncertainty with respect to low-probability, high-consequence risks is therefore typically additional cause for concern. See Ord et al48 for a more in-depth analysis of this problem. [End footnote] Given that our conservative models are based on historical data, they fail to account for the primary source of future risk: technological development that could radically democratize the ability to build advanced bioweapons. If the cost and required expertise of developing bioweapons falls far enough, the world might enter a phase where offensive capabilities dominate defensive ones. Some scholars, such as Martin Rees, think that humanity has about a 50% chance of going extinct due in large part to such technologies.49 However, incorporating these intuitions and technological conjectures would mean relying on qualitative arguments that would be far more contentious than our conservative estimates. We therefore proceed to assess the cost-effectiveness on the basis of our conservative models, until superior models of the risk emerge. How Bad Would Human Extinction Be? Human extinction would not only end the 7 billion lives in our current generation, but also cause the loss of all future generations to come. To calculate the humanitarian cost associated with such a catastrophe, one must therefore include the welfare of these future generations. While some have argued that future generations ought to be excluded or discounted when considering ethical actions,50 most of the in-depth philosophical work around the topic has concluded that future generations should not be given less inherent value.51-55 Therefore, for our calculations, we include future lives in our cost-effectiveness estimate.\*\*\*\* The large number of future generations at stake mean that reducing existential risk even by a small amount may have very large expected value. The Earth is thought to be habitable for roughly another billion years;56 our closest relative, homo erectus, lasted over 1.6 million years,57 and the typical mammalian species also lasts on the order of 1 to 2 million years.58 Following Matheny,29 if we were to assume that humanity would otherwise maintain a global population of 10 billion for the next 1.6 million years, human extinction would jeopardize on the order of 1.6 · 10^16 life years. Cost-Effective Biosecurity How should we balance speculative risks of human extinction in a biosecurity portfolio? Here we turn to costeffectiveness analysis, which is one method of prioritizing public projects.29 Cost-effectiveness analysis is helpful if our goal is to maximize the effect of our resources to achieve a measurable aim (such as life-years saved or cases of disease averted). Here we compare the cost-effectiveness of reducing risks in the categories of incidents, events, disasters, and existential risks. Calculating Costs The US federal government was projected to spend almost $13 billion on health security–related programs in 2017.59 To our knowledge, there has not been a quantitative assessment of how this spending has reduced the chances of bioterrorism, biowarfare, or even naturally occurring pandemics. However, the World Bank estimates that it would cost $1.9 billion to $3.4 billion per year over 5 years to bring all human and animal health systems up to minimal international standards, and it suggests that these measures would prevent at least 20% of pandemics.60{{{{ Many countries do not currently have healthcare systems that meet international standards—for example, in 2014 only 33% of countries reported their national arrangements met those required under the International Health Regulations.61 These mitigation measures would be adopted to be effective regardless of whether a disease outbreak originates naturally, accidentally, or deliberately.{{{{ The ability to rapidly detect and characterize the agent involved helps fast-track public health and R&D responses. Acting promptly enables basic public health measures that might decrease the likelihood of spread (such as social distancing) and track its emerging epidemiology (providing critical input for tailoring the responses). Even if we lack existing or candidate vaccines or therapeutics, having the capacity to treat symptoms can have a dramatic impact on case fatality rates.xxxx We therefore assume that strengthening healthcare systems to meet international standards would have an impact on mitigating all types of disease risk, ranging from incidents and events to existential risks.\*\*\*\*\* [Footnote] \*Given the zoonotic nature of many emerging diseases and the recognized importance of adopting a One Health approach when addressing epidemic and pandemic risk, it will be important that both public health and animal health systems are strengthened to meet international standards. [End footnote] We extend the World Bank’s assumptions to include bioterrorism and biowarfare—that is, we assume that the healthcare infrastructure would reduce bioterrorism and biowarfare fatalities by 20%. We conservatively assume that existential risks will be reduced by only 1%, since any potential existential risk would likely be deliberately designed to overcome medical countermeasures. We calculate that purchasing 1 century’s worth of global protection in this form would cost on the order of $250 billion, assuming that subsequent maintenance costs are lower but that the entire system needs intermittent upgrading.{{{{{ To calculate the cost per life-year saved, we use the equation C/(N · L · R), where C is the cost of reducing risk, N is the number of biothreats we expect to occur in 1 century, L is the number of life-years lost in such an event, and R is the reduction in risk achieved by spending a given amount (specified by C). For nonextinction risks, we increase L 50 times over to denote 50 lifeyears saved per life. The denominator N · L · R denotes the total number of life-years saved. [Footnote] We evaluate the first order effects of these interventions and ignore second order spillover effects (such as any economic benefits of innovation that could come with the biosecurity spending). This could be an important oversight, as even short-term and small-scale biosecurity spending could have ramifications for humanity’s long-term future (eg, preventing a moderate bioterrorist attack could in turn prevent large wars that escalate or the erosion of norms in civil society, which in turn could evolve into existential risks). [End footnote] In a subsequent model we also apply a discount rate to represent policymakers concerned only about lives in the short term. Results Including future generations into our cost-effectiveness calculations demonstrates that reducing existential risks, even if they are improbable, can be incredibly cost-effective in expectation (Table 2). Depending on the model used, we estimate that we can purchase 1 quality adjusted life-year in expectation for 10s of dollars (with outliers suggested around 12 cents to $1,600). Even with the most conservative estimates of existential risk, reducing the risk of human extinction is at least 100 times more cost-effective than standard biosecurity interventions, and possibly up to 1 million times more cost-effective. It is important to note that this result does not depend on the $250 billion figure—if we found a cheaper intervention that reduced all risks by a similar amount, cost-effectiveness of all the interventions would increase, but the relative merits of reducing existential risk would remain the same.xxxxx There are certainly cheaper ways to reduce the low-level risks of biocrime and bioterrorism, and so our estimates of cost-effectiveness could be far too pessimistic. Examples of cheaper interventions might include dramatically increasing resources for specialized law enforcement prevention and interdiction, or increased surveillance on potential perpetrators. However, there are likely also far cheaper ways of reducing the more extreme risks that threaten extinction, and there is no reason to think similar efficiency gains could not be made in this area as well. Despite the vast resources spent on counterterrorism, governments may have neglected low-probability, high-impact risks.65,66 This therefore constitutes a critically underdeveloped area of research, for which there is likely low-hanging fruit. Even if the humanitarian case for reducing existential risk is clear, most policymakers will be responsible primarily for the interests of a more limited constituency comprising only the current generation and near future.\*\*\*\*\*\* It is therefore instructive to evaluate how well these cost-effectiveness results hold up when we largely ignore the benefits to future generations. We therefore repeat the cost-effectiveness estimates with a discount rate imposed on the benefits and costs borne in future years, and we find that the merits of reducing existential risk still hold. If we ignore distant future generations by discounting, the benefits of reducing existential risk fall by between 3 and 5 orders of magnitude (with a 1% to 5% discount rate), which is still far more cost-effective than measures to reduce small-scale casualty events. Under our survey model (Model 1), the cost per life-year varies between $1,300 and $52,000 for a 5% discount rate and between $770 and $30,000 for a 1% discount rate. These costs are even competitive with first-world healthcare spending, where typically anything less than $100,000 per quality adjusted life-year is considered a reasonable purchase.29 This suggests that even if we are concerned about welfare only in the near term, reducing existential risks from biotechnology is still a cost-effective means of saving expected life if the future chance of an existential risk is anything above 0.0001 per year. Our conservative models (with much lower risk) suggest that existential risk prevention is not cost-effective when compared to basic healthcare spending: Model 2 results in a cost per life-year between $330,000 and $16 million for a 5% discount rate and $190,000 and $9.7 million for a 1% discount rate, while Model 3 results in a cost per life-year of between $190,000 and $500,000 for a 5% discount rate and between $110,000 and $310,000 for a 1% discount rate. These conservative numbers would suggest that healthcare spending is a better purchase than marginal biosecurity funding, but even these numbers still support the notion that we are better off focusing on low-probability, high-impact risks rather than low-casualty biosecurity risks. For a biosecurity portfolio, even policy with limited time horizons is likely better off investing in measures that prevent the worst-case scenarios. Conclusions Although the probability of human extinction from bioweapons may be extremely low, the expected value of reducing the risk (even by a small amount) is still very large, since such risks jeopardize the existence of all future human lives. An initial attempt to estimate the cost-effectiveness of reducing these risks finds that it takes likely between 10 cents and 10s of dollars to save 1 life-year, assuming we value future human lives. Although this result is striking, it is not unprecedented. Similar analysis done by Matheny found that spending $1 billion on an asteroid deflection system would have a similar cost-effectiveness, at about $2.50 per life-year.29 Although preventing existential risks might be a far more cost-effective way to save lives than many existing biosecurity measures, this does not imply that we ought to devote all of our resources to protecting against existential risks. Many actions that fall under the rubric of standard health spending also likely reduce existential risk, and many of the resources spent reducing existential risk would in turn help address less extreme risks. Moreover, occasionally there are other opportunities that might be particularly cost-effective—for example, smallpox eradication cost less than $300 million (roughly $1.5 billion in 2017 dollars) and likely saved millions of lives.68 The conclusion is thus not that we should abandon all other health interventions for the sake of saving future lives, but rather that on balance we should increase investments that reduce these lowprobability, high-stakes risks. We propose several steps forward. Given the high uncertainty around our estimates, we can expect a high value of information for additional research, implying that resources should be allocated to further assessment of these risks before large sums are directly allocated on the basis of unreliable evidence. Areas for basic research could include examining existential risk using the tools of technological horizon scanning, red-teaming, ecosystem and epidemic modeling, analyzing historical epidemic death tolls, and examining past species that have gone extinct due to disease, among others. And if existential risk could be as important as we claim, more work should be done to assess possible existential risks and countermeasures. Many actions that would reduce existential risk are already being pursued by those in biosecurity and public health. But there are also measures that would be particularly important in the context of existential risk—including measures that may be unduly neglected without a special focus on existential risk. One particularly inexpensive measure would be to invest in contingency plans for worst-case scenarios. Countering a pandemic does not typically require a large fraction of worldwide economic output, so there is not a clear path forward for rapidly pivoting to a total war footing in which a large percentage of worldwide GDP is spent on countermeasures. Running small experiments with easily scalable interventions could be a cheap way to explore avenues for rapidly turning resources into protection (examples of such experiments might include paying bounties to individuals or companies to avoid flu infection for a year while conducting essential services, such as power and sanitation).{{{{{{ Countering existential risks could also result in reprioritizing current approaches—for example, favoring broadspectrum diagnostics and countermeasures, as opposed to those tailored to a single pathogen. The worst possible attacks could come from built-up arsenals of multiple pathogens, possibly designed with long incubation periods and traits to overcome vaccination or medical treatment. Platform technologies that allow customizable countermeasures (eg, phages for bacteria, generalized vaccine templates) or pathogen-blind diagnostics (eg, distributed sequencing and improved software to interpret novel pathogens before symptoms occur) will stand a better chance against such threats. An existential risk focus also would place extraordinary weight on avoiding arms races or the widespread weaponization of biotechnology. The near collapse of the 8th Review Conference of the Biological Weapons Convention in December 2016 demonstrates how fragile this regime is and how far current instruments are from the ideal. Strengthening the global norm against biological weapons might go a long way toward reducing the risks associated with state actors. The current 3-person Implementation Support Unit costs less than $1 million per year to support.71 In comparison, the 2017 budget for the work of the Organization for the Prohibition of Chemical Weapons is around $77 million (and provides for more than 450 fixed-term posts).72 Increasing the human capacity currently focusing on biological weapons risks by several orders of magnitude would be notably cheaper than the costs associated with building core capacities in public and animal health. More generally, any action that reduces the chance of arms races or great power conflict could substantially reduce the probability of existential risk from biotechnology in the century to come.

### 1NC – T – “Core Antitrust Laws”

#### Interp: The core antitrust laws are only the Sherman Act and the Clayton Act.

The Antitrust Division 07 – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

#### “Expand scope” excludes agency interpretation

Cook 95 – Judge, Illinois Appeals Court, Fourth District

Robert W. Cook, Springwood Assocs. v. Health Facilities Planning Bd., 269 Ill. App. 3d 944, Appellate Court of Illinois, Fourth District, March 1995, LexisNexis

With regard to the Board's position, we note that the regulations must control in the event of a conflict between the regulations and the application instructions. The regulations have the force and effect of law ( Union Electric, 136 Ill. 2d at 391, 556 N.E.2d at 239); the application and instructions do not. The application and instructions merely represent the Board's interpretation of the information which it needs in order to determine the need for a proposed project. While such an interpretation is entitled to some deference, it is not binding on a court. Further, an agency interpretation cannot expand or limit the scope of the relevant statute. ( Van's Material Co. v. Department of Revenue (1989), 131 Ill. 2d 196, 202-03, 545 N.E.2d 695, 699, 137 Ill. Dec. 42.) The regulation in question here required "market studies of the area indicating the characteristics of the population to be served." ( 77 Ill. Adm. Code § 1110.230(a)(1) (1992-93).) This is not the same as a memo of the facility's own internal experiences. Other interested parties cannot easily question the facility's own internal reports. The fact that many of a facility's present patients are from a given area does not necessarily predict the future population of the facility.

#### Expansion of scope requires an increase---that excludes alterations in terms of enforcement that keep the scope the same.

Clements 08 – Judge, Virginia Appeals Court

Jean Harrison Clements, Wise v. Velazquez, 2008 Va. App. LEXIS 489, Court of Appeals of Virginia, November 2008, LexisNexis

Discounting the terms of the award subject entirely to father's discretion, it is clear that the trial court awarded grandmother essentially the same visitation it had previously awarded her in the July 30, 2004 consent order--a minimum each month of two full days--except that father now had complete discretionary control over when the two days of visitation would occur since the visitation was no longer required to be on Saturdays. Thus, in light of the fact that the current visitation order provides the same amount of visitation that the original consent order did, and actually provides father more discretionary control over that visitation, we cannot say that the trial court's award of visitation to grandmother constitutes an expansion of the scope of visitation beyond what was originally agreed upon by the parties and ordered by the court in the July 30, 2004 consent visitation order.

#### Violation – the plan gives the FTC new rulemaking authority – it does not expand the scope of core antitrust laws – at best, they’re extra-topical

#### Vote neg – they justify AFFs about the FTC Act, amendments to state laws, and changes to future antitrust legislation. Skirts core link ground and moots the core topic counterplans.

### 1NC – Competition CP

#### The United States federal government should:

-restrict occupational licensing requirements

-repeal laws restricting dumping, export subsidies, and violation of U.S. companies’ intellectual property rights

-repeal all international tariffs imposed by the Trump administration

#### The Federal Trade Commission should increase cooperation with foreign antitrust agencies over the application of extraterritorial remedies.

#### Solves competition without relying on antitrust enforcement

Litan 18 – Nonresident senior fellow in the economic studies program at the Brookings Institution. Former senior fellow, director of the economic studies program, and vice president at Brookings.

Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation,” *Progressive Policy Institute*, September 2018, pp. 46-47, https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI\_AntitrustandDataLaws\_2018.pdf.

OTHER WAYS TO PROMOTE COMPETITION

Robust economic competition does not and should not rest entirely on effective antitrust enforcement. Other policies can also make the economy more competitive.

First, it is important that unnecessary occupational licensing requirements – which now cover almost 30 percent of the workforce, up from just 5 percent in the 1970s – be pruned and eliminated. As Professor Morris Kleiner of the University of Minnesota concludes, “There is little evidence to show that the licensing of many different occupations has improved the quality of services received by consumers; although, in many cases, it has increased prices and limited economic output.”96

A federal law preempting unnecessary state and local licensures, benefitting from a federal commission identifying which occupations no longer should have a license, would be the easiest solution to this problem, substantively. Politically, however, it is almost surely a nonstarter. Congress is unlikely to enact a statute that takes away protections benefitting almost one-third of the workforce, even if many of these protections hurt consumers.

An alternative, less sweeping federal solution would be to require reciprocity among the states; namely, if someone has a license to be a nurse, doctor, or hairdresser in one state, he or she would be able to have license to the same thing in any other state. This would greatly enhance worker mobility – a central problem affecting millions of Americans displaced or threatened with displacement in rural areas and smaller cities who would like to move to places offering greater opportunities, but currently can’t without going through retraining and recertification elsewhere.

Many states would be likely to object to a reciprocity mandate, however, fearing a “race to the bottom” in certification qualifications – even if those qualifications objectively are anti-competitive and unnecessary to protect health and safety. Furthermore, the Supreme Court’s recent decision in Murphy v. NCAA, allowing sports gambling, contains quite explicit language condemning as unconstitutional (in violation of the 10th Amendment) federal laws requiring states to act: “Congress cannot issue direct orders to state legislatures.” This language could be invoked to invalidate a federal law mandating reciprocal recognition of other states’ licensing regimes as an unconstitutional “direct order” to a state.

If reciprocity is ruled out – politically or constitutionally – then the only other way to eliminate unnecessary licenses is through state legislative action. This will be a painstaking process, requiring not only that each of the states mount a politically difficult effort, but also one that presents the substantively difficult challenge of going through all currently mandated licenses and removing the ones that aren’t required to protect the public. Nebraska has approached this problem by requiring its legislature to review 20 percent of its required licenses each year. An alternative approach is for each state to appoint a commission – modeled after the federal government’s base closing commission – and then for the commission’s list of suggested license eliminations to be given an up-or-down vote in a state’s legislature. Other states should experiment with either of these approaches, or perhaps others.

Second, foreign competition is not often thought of as part of the regime for protecting U.S. consumers and the competitive process; but, in an increasingly global economy, companies abroad – selling products and services here – are an essential part of the competitive ecosystem. Foreign competition can discipline any price-setting power dominant firms or firms in concentrated industries in the U.S. may otherwise have. It can also encourage domestic companies to be more innovative.

At the same time, however, U.S. law has special rules for foreign competitors, consistent with international rules of the World Trade Organization, which are designed to prohibit or offset the effects of three specific “unfair” trade practices (“dumping,” export subsidies, and violations of intellectual property rights of U.S. companies) but which also can insulate U.S. firms from foreign competition in ways that do not apply to domestic firms.98 In addition, upon a finding that certain imports from specific countries are harming U.S. industries, the President (under Section 201 of the Trade Law of 1974) can impose temporary “safeguard” tariffs on those goods. Also, under Section 232 of the same trade law, upon a finding by the Commerce Department that certain imports are threatening national security, the President can impose more lasting duties on those imports, as the Trump Administration has done for aluminum and steel imports from several countries and has threatened to do on foreign automobiles.

The price increases generated by the tariffs imposed by the Trump Administration on steel and aluminum, however, could easily swamp any increases due to collusion of domestic competitors, which the tariffs make more likely. Supporters of vigorous antitrust enforcement to benefit consumers must also, if they are to be philosophically consistent, oppose the turn toward protectionism of the current Administration, and instead support a return to pre-Trump era efforts of all other administrations since the end of the World War II at removing remaining trade barriers. At the same time, free trade advocates should also support a more generous and effective system for assisting workers displaced by trade, outsourcing, and automation to transition to other jobs and careers.99 As a society, we are paying the price for not doing a good job at this in years past. The result, at least in part, is the extreme political divisiveness we now see and lament.

#### FTC plank solves – their author – we read blue

Pachnou ’17 [Ms. Despina, Organization for Economic Co-operation and Development, “DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE” https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf]

5. The Agencies’ Cooperation with Foreign Jurisdictions on Remedies

18. Achieving effective remedies often entails cooperation with foreign jurisdictions. Such cooperation may allow the U.S. agencies to secure relief that sufficiently protects U.S. competition and consumers without applying the remedy to conduct or assets outside the United States. When an extraterritorial remedy is necessary to address harm or threatened harm to U.S. commerce and consumers, cooperation helps to minimize the risk of conflict with obligations of foreign laws or foreign remedial orders.35 Cooperation and coordination on remedies can be efficient for enforcers and the parties under investigation, especially given that over 130 jurisdictions have antitrust laws and over 80 require pre-merger notification. Cooperation may result in a remedies package that addresses competition concerns in multiple jurisdictions.36 The Agencies work closely with competition enforcers in other jurisdictions on cases under common review, including to help foster convergence and consistent remedy determinations.37

6. U.S. Case Examples

19. To the extent that the Agencies rely on extraterritorial remedies, they do so in both merger and conduct cases, although they arise most frequently in the merger context. In all cases, the Agencies seek remedies that are appropriately tailored and that do not apply extraterritorially unless necessary to address the harm or threatened harm to U.S. commerce or consumers.

6.1. Merger Cases

20. In most mergers, the Agencies can obtain an effective remedy for U.S. competition and consumers without extraterritorial divestitures or other relief. This is the case even when an Agency coordinates with other jurisdictions in investigating a transaction that raises concerns in both domestic markets and markets outside the U.S. Even in these instances, however, coordination between jurisdictions can be helpful. For example, the FTC benefited from coordinating with antitrust authorities in Canada, the EU, and Mexico during the investigation of Emerson Electric Co.’s acquisition of Pentair plc, even though the potential harm to U.S. markets was resolved exclusively through the divestiture of a U.S. switchbox facility.38 Similarly, in the General Electric-Alstom SA merger, effective relief for U.S. markets required divestiture of only U.S. based assets; however, coordination between the Department and the EC in connection with the Department’s investigation “facilitated [the Department’s] investigation and helped formulate remedies that [preserved] competition in the United States and internationally.”39 A coordinated remedy resulted in the Department and the EC announcing separate settlements that eliminated harm to consumers in their respective jurisdictions. 40 There are many more cases in which the Agencies have coordinated with their foreign counterparts on mergers that affect multiple jurisdictions.41

21. Although a merger may affect competition in several jurisdictions, the Agencies focus on preserving competition in the domestic markets that may be harmed by the proposed acquisition. On some occasions, relief secured by foreign jurisdictions means that no remedy, domestic or extraterritorial, is necessary to protect domestic competition. Though our experience in deferring to another authority’s remedy is limited, we have relied on informal deference and remain interested in doing so, under the right conditions. A notable example was in connection with Cisco’s acquisition of Tandberg in 2010. The Department declined to challenge the merger in part due to certain commitments that Cisco made to the European Commission (EC) to facilitate interoperability in products related to a type of videoconferencing called telepresence. Waivers of confidentiality by the parties and industry participants allowed the Department and the EC to cooperate closely in their parallel reviews of the transaction, resulting in an efficient outcome for the enforcers and the merging parties.42

22. Nevertheless, certain merger investigations resolved by consent decree have required the divestiture of assets located outside the United States to preserve competition within the United States. For example, the FTC consent decree resolving concerns regarding the merger of cement manufacturers Holcim Ltd. and Lafarge SA required, in part, divestiture of a Canadian cement plant and related U.S. terminals along with two Canadian terminals related to a U.S. cement plant. The FTC explained that the divested assets “remedy competitive concerns in northern U.S. markets [and are] part of a larger group of Holcim assets located in Canada that Holcim and Lafarge have agreed to divest to address competitive concerns raised by the [Canadian Competition Bureau (“CCB”)]. Commission staff worked closely with staff from the CCB to reach outcomes that benefit consumers in the United States.”

43 An extraterritorial remedy was also required to resolve Department’s investigation of the Anheuser-Busch InBev SA/NV & Grupo Modelo S.A.B. merger. The consent decree in that matter similarly required divestiture of a facility outside of the United States, the Grupo Modelo brewery in Mexico, and a perpetual and exclusive U.S. trademark license to the seven brands of beer that Modelo then offered in the United States, as well as three brands not yet offered in the United States, but currently sold by Modelo in Mexico. This remedy allowed the acquirer “to meet current and future demand for Modelo Brand Beer in the United States,” which resolved concerns that the merger would harm competition in twenty-six local U.S. markets.

### 1NC – States CP

#### Text: The fifty states and all relevant United States territories should prohibit platform conduct that fails under rule of reason without imposing heightened burdens on plaintiffs.

#### States have the right to enforce federal antitrust law and enact and enforce their own antitrust laws---those state-level laws are not inherently Congressionally preempted.

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

### 1NC – Agenda DA

#### CP: The United States Congress should pass the reconciliation infrastructure agreement.

#### Passage of big infrastructure bill is likely now but focus and Biden PC key to get Manchin and Sinema on board

Everett 9/16

Burgess Everett and Laura Barron-Lopez, Politico, 16 September 2021, <https://www.politico.com/news/2021/09/16/biden-influence-capitol-democrats-511952>

The next few months will push President Joe Biden to wield every drop of his influence over Congress. Democrats are plunging into messy internal debates over social programs from child care to drug pricing as they try to beat back GOP resistance on voting rights while steering the United States away from economic catastrophe. And in order to avert a government shutdown, avoid a debt default and fight ballot access restrictions passed in some GOP states, Democratic lawmakers are urging Biden to get more directly involved. Senate Majority Whip Dick Durbin said that Biden, “more than anyone,” maintains sway over his caucus’s 50 members: “There is no comparable political force to a president, and specifically Joe Biden at this moment.” Biden appears to be answering the call. The president is getting increasingly involved in Congress’ chaotic fall session as he battles sagging approval ratings, heightened concerns around the pandemic and some internal criticism over his withdrawal from Afghanistan. Rebounding as the midterms draw nearer will depend on whether his big social spending ambitions are realized and if his party can dodge a government shutdown and credit default. But even if he has success on those fronts, he still needs to maintain momentum on Democrats’ elections legislation, which Republicans look certain to torpedo. “I have full faith and confidence in Joe Biden in all of this,” said House Majority Whip Jim Clyburn, who's pressed Biden to endorse a filibuster carve out for voting rights legislation. “He is working this … and that’s how it should be.” Biden met with two key Democratic holdouts on his domestic spending agenda on Wednesday, part of a sustained push to keep Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) on board with his legislative program. Biden’s met with Sinema four times this year, in addition to telephone calls made between the two, and has spoken to Manchin a similar number of times. “Now is the time” for Biden to jump full-force into the reconciliation conversation, said Sen. Tim Kaine (D-Va.). And the White House made clear that Biden is diving into the series of tricky issues. Andrew Bates, a spokesperson for Biden, said that Biden and his administration "are in frequent touch with Congress about each key priority: protecting the sacred right to vote, ensuring our economy delivers for the middle class and not just those at the top, and preventing needless damage to the recovery from the second-worst economic downturn in American history.” To help corral all 50 Senate Democrats for the social spending bill, the president and his party need to create an “echo chamber” around its substance, said Celinda Lake, a pollster on Biden’s campaign. But that won't be easy. Manchin has told colleagues he’s worried about whether the bill’s safety net, climate action and tax reforms will be popular in his state, according to one Senate Democrat. He's also said he won't support a measure at the current spending level: $3.5 trillion. If Biden can hammer home the popular aspects of the spending plan, it may help assuage Manchin and improve his whip count in Congress. Underscoring the degree to which he's become the face of the multi-trillion dollar reconciliation bill, a Democratic aide said the party is increasingly seeking to frame it as Biden’s agenda, not that of Sen. Bernie Sanders (I-Vt.) or any single Democrat.

#### Plan uniquely wrecks it

Carstensen 21 – Professor & Chair, Wisconsin Law

Peter Carstensen, Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST, *Concurrences* No. 1 (2021), February 2021, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen>

14.Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Big infrastructure’s key to climate mitigation and adaptation---extinction

Reynard Loki 9-8, Senior Writing Fellow and Chief Correspondent for Earth | Food | Life, a Project of the Independent Media Institute, Former Environment, Food and Animal Rights Editor at AlterNet and Reporter for Justmeans/3BL Media, “Extreme Weather Devastating US Raises Calls to Pass Biden’s Infrastructure Bill”, Nation of Change, 9/8/2021, <https://www.nationofchange.org/2021/09/08/extreme-weather-devastating-us-raises-calls-to-pass-bidens-infrastructure-bill/>

In their latest climate report published in August, the United Nations’ Intergovernmental Panel on Climate Change (IPCC) found that human activity, particularly the combustion of fossil fuels, is the likely driver behind the increase in both the frequency and intensity of hurricanes over the past four decades. “The alarm bells are deafening, and the evidence is irrefutable: greenhouse gas emissions from fossil fuel burning and deforestation are choking our planet and putting billions of people at immediate risk,” UN Secretary-General António Guterres said in a statement on the report. “Global heating is affecting every region on Earth, with many of the changes becoming irreversible.” Linda Mearns, a senior climate scientist at the U.S. National Center for Atmospheric Research and one of the report’s co-authors, meanwhile, offered a stern warning: “It’s just guaranteed that it’s going to get worse,” she said, adding that there is “[n]owhere to run, nowhere to hide.”

Adding to the concern is the fact that the end of hurricane season is still far from over, as meteorologists at the U.S. National Oceanic and Atmospheric Administration (NOAA) monitor Hurricane Larry’s path across the Atlantic Ocean. Moreover, Hurricane Ida is just one of the several extreme weather events that have caused death and destruction across the nation. Massive wildfires, fueled by extreme heat and dry conditions, are ripping through California, where more than 1 million acres have been burned in 2021. These are unprecedented times: Only twice in the history of California have wildfires raged from one side of the Sierra Nevada mountain range to the other, and both of those wildfires took place in August.

The National Interagency Fire Center has reported that more than 5 million acres have been charred this year nationwide as of September 7. Nearly half of the land area of the lower 48 states is currently experiencing drought, with the NOAA warning in August that these extremely dry conditions—with precipitation at below-average levels and temperatures at above-average levels—are likely to “continue at least into late fall,” according to the New York Times. As a whole, the United States experienced its hottest June in the 127 years since temperature records have been maintained, while July was Earth’s hottest month on record.

“Climate scientists were predicting exactly these kinds of things, that there would be an enhanced threat of these types of extreme events brought on by increased warming,” said Jonathan Martin, an atmospheric scientist at the University of Wisconsin-Madison. “It’s very distressing. These are not encouraging signs for our immediate future.”

The increase in both the frequency and intensity of extreme weather events like hurricanes, wildfires, droughts and heat waves is providing a fitting backdrop for amplified calls to pass Biden’s infrastructure bill, which would help mitigate the impacts of the climate crisis by repairing 20,000 miles of aging roads and 10 of the country’s most economically crucial bridges to make them more resilient to extreme weather. The bill also seeks to accelerate the nation’s shift toward clean energy to achieve the Paris climate agreement’s goal of reducing global greenhouse gas emissions in order to limit the planet’s surface temperature increase in this century to 2 degrees Celsius above preindustrial levels. (The agreement’s hope to limit the increase to 1.5 degrees Celsius now seems unlikely, given the findings of the new IPCC climate report.) The bill seeks to utilize a combination of federal spending and tax credits to improve transportation, broadband internet, housing and the electric grid, as well as financial support to advance the nation’s manufacturing capabilities, specifically those industries that the administration believes will help the United States compete economically with China.

The White House issued a fact sheet describing the president’s infrastructure plan, saying that it would “create a generation of good-paying union jobs and economic growth, and position the United States to win the 21st century, including on many of the key technologies needed to combat the climate crisis.” The bill would be the first to earmark spending specifically for climate resilience, including $6.8 billion for the Army Corps of Engineers to address federal flood control and ecosystem restoration projects, with an eye toward environmental justice, and calling for 40 percent of all climate-related investments to happen in disadvantaged communities.

“Mr. Biden’s pledge to tackle climate change is embedded throughout the plan,” reports Jim Tankersley for the New York Times. “Roads, bridges and airports would be made more resilient to the effects of more extreme storms, floods and fires wrought by a warming planet. Spending on research and development could help spur breakthroughs in cutting-edge clean technology, while plans to retrofit and weatherize millions of buildings would make them more energy efficient.”

In August, Schumer said that the bipartisan infrastructure bill and Democrats’ reconciliation spending package would cut the United States’ carbon dioxide emission levels by 45 percent by 2030 compared to 2005 levels. He added, “When you add administrative actions being planned by the Biden administrative and many states—like New York, California, and Hawaii—we will hit our 50 percent target by 2030.” That is the goal that Biden set for the nation after he rejoined the Paris climate accord.

“In order to avoid the worst long-term consequences of the climate crisis, we need to put the U.S. on the path to 100 percent clean energy—otherwise, this summer may just be a preview of the disasters to come,” Brooke Still, senior director of digital strategy at the nonprofit League of Conservation Voters (LCV), told Earth | Food | Life recently in an email. “We know what a transition to clean energy will take: We need to stop using oil and coal and go big on clean energy. It’s clear the public agrees—71 percent of the public supports making the investments in climate, justice, and jobs that President Biden proposed. But climate deniers, fossil fuel interests, and obstructionist members of Congress are slowing things to a crawl.” LCV has launched a public petition urging Congress to “invest in clean energy and… in people and communities who too often have been left behind.”

## Competitiveness advantage

### 1NC – tech competition robust

#### The Big Four have increased innovation and *driven down* prices

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(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

Nonetheless, fears have been expressed from across the political spectrum about the growing power of the major tech platforms – especially The Four – for stifling innovation. It is important in assessing any such claims to distinguish between the factors that have led to tech platform successes, and subsequent activities of certain platforms once they have gained some measure of market power or influence.

As for their success, there is no evidence – nor do I detect any serious argument – for the proposition that any of the major tech platforms earned their positions through anti-competitive means. Even when the Department of Justice twice sued Microsoft in the 1990s – initially for abusive licensing practices in 1994, which was settled by a consent decree, and then again in 1998 for unlawfully maintaining its Windows operating systems (OS) monopoly for personal computers, ending in certain restrictions on Microsoft’s behavior – the Department never argued that the company achieved its OS monopoly unlawfully. Likewise, each of The Four has achieved its success through superior products or services that consumers or users clearly want (shortly, I address arguments that the success of Facebook and Google is attributable, at least in part, to mergers that should not have been approved).

Moreover, in each of these cases, the tech platforms have taken advantage of economies of scale given the high fixed costs (but low to zero marginal costs) of serving additional users/ customers, or “network effects” arising from the fact that the value of their networks or platforms increases with the number of users, or both. Put differently, tech platform markets (for perfectly legitimate and well-understood reasons) tend toward monopoly – “winner take all” – or at least a high degree of market concentration.8

Competition has not somehow been “lessened” when successful platforms invent a product or service that did not previously exist. Furthermore, despite their dominance in one market or sector (which may not constitute a “relevant market” for antitrust purposes) – social media (Facebook), online commerce (Amazon), Internet search (Google), premium smartphones (Apple) – the platforms are invading each other’s turf and, in turn, creating new kinds of competition against each other. Witness Facebook’s competition with Google for online ads, which Apple is just joining. Likewise, while Google may dominate general Internet searches, its chief competitor for product searches is Amazon.

Speaking of Amazon, though businesses in various parts of the economy are fearful of that company’s business model, recent research documents that online commerce, which Amazon has pioneered, has kept consumer product inflation in check – and, in many cases, helped drive prices downward. This clearly benefits consumers.9 The Chairman of the Federal Reserve Board, Jerome Powell, has pointed to the “Amazon effect” as potentially a major reason the overall inflation rate has not accelerated even as the unemployment rate has fallen to historic lows.10 It is hard to square these developments with claims that competition has weakened in consumer product markets. All of this is good for consumers and workers since, other things being equal, less inflation at any given level of unemployment enables the Fed to permit the economy to run “hotter,” with less unemployment, than might otherwise be the case.

Amazon, Apple and Alphabet also have entered the entertainment business, joining another tech platform, Netflix, and the traditional Hollywood studios – in the process, providing much stronger competition in the content generation market. Significantly, the tech companies’ entry into content is de novo, or from scratch, rather than through acquisition of existing firms, except for Alphabet’s acquisition of YouTube – a content site Google (later Alphabet) beefed up after it was acquired.11

Each of the tech platforms already has entered (or is looking to enter) other lines of business – either creating new markets or adding to competition in existing ones. Examples include Alphabet’s Waymo division that is working hard to commercialize driverless vehicles, and Amazon’s apparent intention to enter the transportation market – not only to make the company independent of third-party transporters such as FedEx, UPS and the U.S. Postal Service, but eventually to compete directly against them, potentially bringing down transportation costs as Amazon has done in other markets it has entered.

### 1NC -AT: Aff Solves Competition

#### No internal link to competition – Sitaraman says we shouldn’t be dependent on Chinese markets – that has nothing to do with whether the U.S. is leading in tech

### 1NC – AT: break up big tech – no solvency

#### Tech firms fail to meet the most basic legal standards for breakups, but doing so would only hurts consumers

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(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation,” Progressive Policy Institute, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

I recount my own personal history and involvement with different phases of the Microsoft investigations and litigation of the 1990s and early 2000s in the accompanying box to indicate my own sympathy, based on my professional experience, with breakup or structural remedies in monopolization cases for firms that have consistently abused their market power. So far, however, calls for the breakup of some of today’s large tech platform companies – Amazon, Facebook and Google, in particular53 – do not meet the antitrust standard required for breakup, nor is there any principled justification for breaking up the platform companies for nonantitrust reasons.

There are both economic and legal reasons for this conclusion. As a matter of economics, all three platform companies have benefited hugely from economies of scale and/or network externalities (the notion that a network tends to monopoly because the value to users rises as more join). Breaking up such enterprises into smaller pieces would bring only temporary change, because the markets in which they compete are subject to either or both these forces. Eventually, the market structure in each case would move back toward a single dominant firm (or, at most, two). As an economic matter, society gains from a breakup only if – during the transition back toward monopoly or oligopoly – reintroducing competition induces the ultimate winner(s) to provide even better and/or lower cost services to purchasers that outweigh the potentially higher costs that breakup very likely would entail during the transition (reduced benefits of network externalities and economies of scale). My own judgment is that cloning Microsoft Windows OS into three pieces, as discussed in the box, would have met this test. Breaking up any of the major tech platform companies would not. At the very least, I have seen no compelling evidence to the contrary.

While the economics of breakup are interesting, ultimately the law is what matters most. Under the antitrust laws – and the judicial decisions that have interpreted them through the years – we can’t even get to the breakup question unless it is established that a monopoly has somehow abused its dominant position through some bad conduct, and that the harm to the marketplace can be cured only by breaking up the monopolist rather than prohibiting its bad behavior (perhaps with some supplemental “fencing in” requirements to keep it from happening again). The antitrust laws do not – nor should they – punish a firm for acquiring dominance in a market because of a superior product or service and/or luck.

Let’s go through each of The Four and see, first, if there is any evidence of consistent abusive conduct of monopoly power of the kind evidenced by Microsoft in the 1990s, and second, if that conduct (assuming it is present) justifies an extreme breakup remedy. I haven’t seen a credible claim or evidence that either Apple or Facebook has abused any of their market power. Facebook’s mishandling of its users’ data, which I discuss later, can and should be addressed through other means, and is not an antitrust violation. In theory, an argument can be made that companies like Facebook and Google (to be considered shortly) benefited from approvals of various acquisitions along the way. But, at the time of these mergers, given the state of applicable merger law, it is difficult to claim that any court would have blocked such acquisitions.

Consider Amazon next. In a later section, I rebut claims that Amazon has abused its alleged monopoly power through alleged predatory pricing. I note here that, even if online retailing is its own distinct relevant market – and this is a subject for dispute – Amazon reportedly controls 44 percent of the spending in that “market.”54 This market share is well below the minimum 60-70 percent courts have required in a successful attempt-to-monopolize or monopolization cases brought under Section 2 of the Sherman Act.

To be sure, there are narrowly defined product markets, such as U.S. e-books, where Amazon’s market share likely exceeds 80 percent, and clearly is dominant. In such markets, the question then is whether the company is doing anything to abuse that dominant position. On the surface, it is hard to detect a problem. Amazon displays its own new books directly with offers for used books at much lower prices (even with shipping included) offered by a range of third-party sellers. There is not even a question of “search bias” in these displays.

Nonetheless, one complaint about Amazon in other product markets is that it is “destroying” the business of brand-name suppliers by offering Amazon’s own (expanding) private label goods.55 This is no different from practices by other retailers like Costco and Kroger. The article that raises this issue has a quote from Galloway essentially acknowledging – to the extent Amazon’s private labels are cutting into sales of branded products – that they are wringing out a price premium those brands have long enjoyed but which many economists have also long criticized for penalizing consumers. In other words, Amazon’s success in devaluing brands benefits rather than harms consumers.

Moreover, Amazon does not appear to exclude other name brands from its site. I tried entering several popular consumer products in Amazon’s search engine – such as televisions and even batteries (which are mentioned in the article) – and found nothing of the sort. It is true that Amazon may show its own private label brands first, but immediately below are brand names. This practice is analogous to the way Google displayed results from its own product comparison “vertical search engine,” until it changed its practice after the EU’s decision condemning it, as discussed next.

But Amazon’s landing pages are designed very differently from Google’s. Amazon shows products in order as one scrolls down the page; it doesn’t have the equivalent of a “righthand side” for the company’s own products or third-party ads, which don’t fit with Amazon’s business model – which is to sell products directly and earn the revenue therefrom, rather than from hosting ads as Google and Facebook do.

Yet how is Amazon’s showing of its brand names first in its page formats an antitrust violation? Amazon’s share of online sales for certain products in which it offers its own private label goods may be substantial enough to constitute dominance or even a monopoly, but it is far from clear whether a court would define the relevant antitrust market so narrowly, rather than taking account of offline sales as well – which certainly would bring down Amazon’s market share (name-brand batteries, like other brands, are sold in a wide number and variety of physical retail locations such as grocery stories and pharmacies).

Moreover, where else would a court have Amazon’s private label brands shown – third, fourth or fifth – and on what basis would a court engage in such micro-managing? The same goes for ordering the company to completely redesign its Web site pages to look like Google’s or Bing’s search engines and show results of third-party offerings on the left-hand of each landing page, and the company’s offerings only on the right, as Google now does. Would this fundamentally change things? And does it really make any difference if a customer – who is looking for an item such as batteries, and prefers a name brand like Duracell – is shown those options right below the cheaper Amazon private label brand? These are the kinds of questions a court would have to answer in determining whether Amazon’s private label displays somehow constitute abuse of any market power it would have in narrowly-defined online-only product markets.

But, if a court could somehow reach such a finding, would it merit breaking up Amazon? Into what? One company and Web site that offered only third-party items – in markets where the company’s online market share rose above some threshold level, which would require constant monitoring and readjustment – and another Web site offering only Amazon’s private label goods?

That separation would destroy a fundamental advantage to consumers of being able to browse a single site and comparison shop across all brands. To pose such hypotheticals almost self-evidently answers whether a court would seriously entertain breaking up the company in this or any other manner. I seriously doubt even the most pro-plaintiff judge – let alone the Supreme Court – would order a breakup of the company for this reason.

### 1NC – AT: big four hurt startups

#### Big tech is the single largest host for startups and sustains productivity growth

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But what about the market power of the tech platforms? Don’t they inhibit competitors – new and existing companies – from challenging them? A recent article in The Economist warns that the tech platforms have become so powerful and threatening that they have established “kill zones” around their markets – arenas where startups know they will be squashed if they try to compete with the existing platforms, and thus can only sell out to them. “Ninety percent of the startups I see are built for sale, not for scale,”12 one venture capitalist told the magazine. In addition, the article worries about the absence of new platforms to challenge (and ideally disrupt) the incumbents.

There are several responses to this critique. First, each of the major tech platform companies acts as a host for startups and smaller existing businesses – creating markets for their services or products where none may have existed before, or extending their reach far beyond where they may be physically located. As already noted, **Amazon hosts more than 1 million businesses** selling all kinds of goods on its platform, including used books and other items that compete with Amazon’s own offerings. Indeed, more than 50 percent of the non-food items sold on the Amazon platform are derived from independent merchants’ sales.13 Apple and Google collectively host millions of applications on their mobile platforms (iPhone and Android). Facebook’s advertising model, despite the criticism it has drawn, has spawned a whole industry of advisers on social media advertising and marketing to companies, large and small.

Second, the pattern of the decline in startups is also inconsistent with the rise of the tech platforms being the villain in the overall startup decline. As a recent Brookings study documents, the drop of startup activity is spread across all major industry categories14 and is not concentrated in tech, as one would expect to see if the tech platforms were principally to blame for the overall drop in startup activity.

Third, my own research with Ian Hathaway, which documents the decline in the startup rate (the percentage of the total number of firms that are less than five years old) in all but one of the roughly 350 metropolitan areas in the United States, identifies two other potential explanatory factors that are statistically related to startup trends. The decline in startup rates is steeper in metro areas where population has not been growing (suggesting both supply and demand factors at work), and where the concentration of firms at the local level regardless of industry is relatively high.15

In other work, we also found – as did the later Brookings study just noted – that firms are “aging” in America, with a greater percentage of firms being at least 15 years old.16 We did not find the age increase to be related to measures of local business consolidation, and we didn’t have the data to link it at that time to measures of industry concentration. Nonetheless, the aging of the firm structure in the economy could help explain some of the decline in productivity growth about which many economists have worried – and which I discuss in the next section – in at least two ways.

Firms may be like individuals, being less innovative as they grow older (past a certain point) – reflecting the stifling effects of growing bureaucracy, with multiple approvals and associated delays and second-guessing of anything new. In addition, the increasing share of businesses represented by older firms may reflect advantages of incumbency, which may have resulted from superior efficiency, but may also reflect the fact that the growing numbers and compliance costs of local, state and federal rules put a disproportionate burden on newer firms – historically the source of much disruptive innovation.

President Obama’s Council of Economic Advisers has pointed to similar factors in its attempt to explain the decline in startup activity:

“The reasons for declining firm entry rates are not well understood, but a partial explanation is that barriers to entry may have increased in many industries. These barriers could be in the form of federal, state, or local licenses or permits, including occupational licenses … While such regulations serve a valuable role in protecting public well-being, they can also add fixed costs to an entrepreneur wanting to open a new business. Barriers to entry may be related to various advantages that have accrued to incumbent firms over time. For example, economies of scale may mean that incumbent costs are far below those of new entrants, making it difficult for entrants to compete. Or demand-side network effects may tip the market to a single provider of the network good. But incumbent advantages could also be political in nature; for example, if existing firms successfully lobby for rules protecting them from new entrants.”17

Fourth, whatever impacts the tech platforms may be having in their markets, they do not appear to have adversely affected annual venture capital funding, which, by 2017, had almost tripled from levels before the dot-com crash (from $55 billion to $150 billion).18 It may be true that the power of tech platforms has diverted VC funding into spaces away from platforms and their surrounding markets (though the launch of companies for “sale” rather than “scale” is inconsistent with that claim), and toward other unrelated markets, such as electric vehicles, blockchain apps, e-sports, robotics, or synthetic biology. But this redirection of venture money is not necessarily a bad thing. It may portend breakthrough innovations in other markets of greater potential value to the economy and society that may never have occurred – at least, not as rapidly – had VC money continued to fund more Web-based platform companies.

Finally, even if the tech platforms are using their “kill zones” to deter or buy new competitors, that doesn’t warrant their breakup. It does, however, call for a change in merger law that will tilt the existing platforms to entering new markets on their own rather than through acquisition, which should encourage innovation by the platform companies

## Dependency advantage

### 1NC – AT: International

#### Doesn’t solve international commerce or it’s extra-T – plan doesn’t fiat the FTC engage in international enforcement measures

### 1NC – AT: Inequality

#### Alt causes to inequality – plan is a drop in the bucket of huge wealth and resource inequities

### 1NC – dominance inev or resilient

#### Tech giants inevitably circumvent enforcement and even the harshest DOJ penalties aren’t an effective deterrent

Jeffers citing **McCareins 19** – Mark McCareins, Clinical Professor of Business Law; Co-Director, JDMBA Program at NU Kellogg. Glenn Jeffers, freelance writer.

Mark McCareins, 8-19-2019, "Why Antitrust Regulators Don’t Scare Big Tech," Kellogg Insight, <https://insight.kellogg.northwestern.edu/article/why-antitrust-regulators-dont-scare-big-tech>

The Big Tech Firms Are Devoting Resources to Antitrust Compliance

Because their sheer size makes them highly attractive targets for antitrust investigation, big tech companies like Apple, Google, Amazon, and Facebook will have spent a lot of time, money, and energy on staying on the right side of antitrust laws.

“They should have devoted serious resources to what I would call ‘antitrust compliance,’” McCareins says. “Before they launch a new product or service, they’ve already probably run it through an antitrust filter and either said, ‘This is a solid idea,’ or ‘That may be crossing the line. Don’t do that.’”

This “antitrust filter” happens on a few levels. For one, these firms are educating their employees about compliance issues. Their business development and strategy teams are also consulting with antitrust compliance experts—both within their own companies and with outside firms they’ve retained—to evaluate whether existing programs and new products and services might run afoul of regulators.

“Walmart and Amazon are now bringing the benefits of their competition to the consumer. This is the exact result envisioned by the U.S. antitrust laws.”

In McCareins’s view, these large businesses have to date played within the antitrust rules to keep markets competitive. Large-scale government investigations like the ones the DOJ and FTC plan could not only prove costly and ineffective, but could also draw resources away from targeting actual abuses in other markets.

“It’s a trade-off,” he says. “If regulators bring a highly speculative case in one of these big-name markets because they think it will show America that they are tough on regulation, and they lose—and while they’ve been doing that, they let 20 other markets go unattended—I don’t know if that’s a good allocation of our prosecutorial resources. The Antitrust Division’s loss earlier this year in the ATT/Time Warner merger litigation is an example of the government rolling the dice with a speculative case and limited resources. One would think with respect to the current tech investigations that the government cannot afford a repeat of the ATT/Time Warner outcome.”

The Feds Don’t Have Time on Their Side

Even where there may be cause for concern, federal regulatory agencies are notoriously slow to investigate anticompetitive practices by tech companies. The investigations of any of these four firms will take years to unfold, and even longer to prosecute.

Take, for example, Microsoft. The FTC launched an investigation into the software firm’s bundling practices in 1990, with the DOJ following suit eight years later. At the time, the company’s Windows operating system accounted for 90 percent of the PC market. The DOJ eventually charged Microsoft, claiming that its Internet Explorer browser, which was built into Windows, had an unfair advantage over other web browsers like Netscape.

In 2000, a federal judge ordered the company to be split into separate entities, but an appeals court reversed the ruling. The DOJ and Microsoft finally settled the case in 2002—a full twelve years after a regulatory agency first launched an investigation. Microsoft was ultimately required to give computer manufacturers identical licensing contracts for Windows, which gave other companies more equal access to the browser market, as well as undergo nine years of court supervision into its business practices.

The punishment was, to say the least, much reduced from its original form. “The U.S. Department of Justice was not overly successful in that attack,” says McCareins, who was a partner in the firm that represented Microsoft, Winston & Strawn.

Any Penalties Are Likely to Be Insufficient

Which brings McCareins to his final argument: even if regulators are successful in proving anticompetitive behavior by one of the big four, the penalties will likely be civil judgements in the form of large fines, which may not serve as an effective deterrent for such huge, highly profitable companies. In addition, the antitrust division announced earlier that it is not a big fan of what it describes as “behavioral remedies.” So if the division does find grounds to sue, it will need to be sure that a structural remedy will be the ultimate result.

At worst, the FTC and DOJ could force a divestiture similar to the federal ruling in the Microsoft case. However, according to McCareins, divestitures do not always work to quell anticompetitive behavior in a timely manner, especially in markets where technological change is rampant.

In 1984, for example, the federal government broke AT&T into eight regional telecom providers, which became known as the “Baby Bells.” But those companies have since been reunited through a series of mergers and acquisitions. AT&T is now even bigger than it was in the 1980s thanks to its acquisitions of cellular and cable companies.

“You look at the telecom landscape today and you look at AT&T back in the day; you laugh and say, ‘I can’t believe we spent so much time and energy on that process,’” McCareins says.

### 1NC – AT: Dependency Trap

#### Alt causes to dependency – tech conglomeration is obviously not why Africa is poor – other development policies thump or outweigh

### 1NC – AT: killer acquisitions

#### Zero empirical evidence for killer acquisitions in tech markets

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(Geoffrey A. Manne, Samuel Bowman & Dirk Auer, “Technology Mergers and the Market for Corporate Control,” Draft edition released August 4, 2021, forthcoming in Missouri Law Review (Fall 2021), <https://laweconcenter.org/wp-content/uploads/2021/08/SSRN-id3899524.pdf>)

B. Killer Acquisitions in the Tech Sector

A natural extension of Cunningham et al.’s killer acquisitions work is to question whether mergers of this sort also take place in the tech industry. Interest in this question is driven by the prominent place that digital markets currently occupy in competition policy discussion, but also by the significant number of startup acquisitions that take place in the tech industry.

Existing studies provide scant evidence that killer acquisitions are a common occurrence in these markets, however. This is not surprising. Unlike the pharmaceutical industry, where drugs must go through a lengthy and visible regulatory pipeline before they can be sold, incumbents in digital industries will likely struggle to identify their closest rivals and prevents firms from rapidly pivoting to seize new commercial opportunities. As a result, the basic conditions for killer acquisitions to take place (i.e., firms being in a position to share monopoly profits) are less likely to be present—and it is also harder to design research methods that detect these mergers.

The empirical literature on killer acquisitions in the tech sector is still in its infancy. In fact, as things stand, no study directly examines whether killer acquisitions actually take place in digital industries (i.e., whether post-merger project discontinuations are more common in overlapping than non-overlapping tech mergers).

In one of the only empirical papers on this topic, Axel Gautier and Joe Lamesch look at 175 acquisitions by Amazon, Apple, Facebook, Google, and Microsoft.202 The authors observe that acquired firms’ products were discontinued in 60% of these mergers.203 On this basis the authors conclude that “the possibility of killing acquisitions cannot be leaved [sic] aside and it is important that competition authorities take into account the competitive potential of these young startups.” 204

As the authors themselves concede, however, their study sheds no light on the occurrence of killer acquisitions, as opposed to mere product discontinuations. 205 Indeed, the paper does not show that incumbents’ acquisitions are discontinued at a higher rate than the competitive baseline, or even that the discontinued mergers disproportionately concerned overlapping products that may threaten the acquirer’s market position. 206 Accordingly, the authors’ conclusion that authorities should pay closer attention to mergers that take place below existing notification thresholds appears premature. This is all the more true given that the paper says nothing about the relative benefits and costs of this policy change.

Similar issues also affect other empirical research on this topic. A recent paper by Elena Argentesi and her co-authors, for example, surmises that “merger control enforcement has not proved able so far to cope with several of the new challenges posed by digital markets,” and concludes that “[m]ore can and should be done. It might be that this will require a change in the legislation or the establishment of a new regulator.” 207

This conclusion rests mainly on two cases studies, and a more superficial analysis of almost 299 acquisitions by Google, Amazon, and Facebook.208 The authors collect several descriptive statistics about these transactions, and group these mergers by the target firm’s main business segment (however, as the authors observe, this is not a good proxy for actual overlaps between the acquirer and target firms’ businesses). 209

While this study sheds a fascinating light on the M&A activities of large tech firms, it says little about the potential occurrence of killer acquisitions. The authors find that a majority of the 299 scrutinized Big Tech acquisitions are spread between communication apps and tools (50), developer tools (40), physical goods and services (51) and AI & analytics (43).210 Moreover, the study shows that all three of Google, Amazon, and Facebook have, to varying degrees, invested in these sectors.211 This suggests these acquisitions might be better framed as “moligopoly” competition— where large platforms compete for control of markets outside of their core business areas—rather than killer acquisitions.212

Crucially, there is no sense that these acquisitions face higher termination rates than those made by other acquirers (such as venture capital firms), or that the activities of targets systematically overlap with those of incumbents. There is thus little reason to believe that they were “killer acquisitions,” and even less that they ultimately harmed consumers. In fact, the authors even observe that many of the target companies were likely complements, rather than substitutes:

However, most transactions do not have a clear horizontal element for each of Amazon, Facebook, and Google. Acquisitions target companies spanning a wide range of economic sectors and whose products and services are often complementary to those supplied by Amazon, Facebook, and Google. . . . Transactions that can be characterized as more horizontal in nature would seem to be the minority. 213

This tends to exclude the killer acquisition theory of harm. The authors supplement this empirical work with two case studies: one concerning Facebook’s purchase of Instagram; the other about Google’s acquisition of Waze.214 Crucially, in both cases, the authors fail to reach a conclusion as to whether the underlying merger ultimately harmed consumers, 215 and in the case of the Facebook/Instagram acquisition, the authors concede anecdotal evidence may even cut in the opposite direction.216

#### ‘Innovation decline’ from mergers is wrong

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(Geoffrey A. Manne, Samuel Bowman & Dirk Auer, “Technology Mergers and the Market for Corporate Control,” Draft edition released August 4, 2021, forthcoming in Missouri Law Review (Fall 2021), <https://laweconcenter.org/wp-content/uploads/2021/08/SSRN-id3899524.pdf>)

The bigger picture is that it is extremely difficult, even with hindsight, to determine whether these mergers might have been detrimental to competition and consumers. Perhaps more problematically, there are no obvious heuristics to identify mergers that are, on balance, more likely to harm competition.

Scholars have also published several theoretical papers concerning potential killer acquisitions in the tech sector. Mark Lemley and Andrew McCreary, for instance, argue that the acquisition of startup companies by large platforms leads to concentration in the tech industry and averts the Schumpeterian competition that would otherwise enable the acquired startups to compete with, and ultimately displace, incumbents.217 The authors substantiate this claim by citing evidence that acquisitions have gradually gained in importance, relative to IPOs.218 In other words, in a world without startup acquisitions, the authors believe thar far more companies would opt for IPOs and ultimately compete head-on with incumbents.

But the authors gloss over several critical counterarguments. For a start, it is not clear that VC funding would remain at its current levels if exit by acquisition were taken off the table. 219 Put simply, acquisitions may offer an exit to early investors in cases where IPOs are not a realistic prospect, thus increasing the incentive to invest in startups in the first place; barriers to market exit have been known to slow investments. 220

Likewise, it is far from clear that market concentration is a problem in and of itself. For example, economic analysis of the relationship between market structure an innovation suggests there is an ambiguous relationship between both variables, or at the very least a nonmonotonic one.221

Finally, the authors are dismissive of potential efficiency justifications that may underpin startup acquisitions. But the fact that startups routinely opt for acquisition instead of IPOs suggests the former is often more lucrative. While, in some cases, this could be due to market power reinforcing effects, in other cases superior efficiency of acquirers (or the inefficiency of targets) may play a larger role. This is almost by definition the case when the acquiring and target firms are not competitors or potential competitors.222 The managerial efficiency of incumbents223 , economies of scale224, and complementary dynamic capabilities225 are but a few potential explanations for these purchases. In short, the authors thus fail to adequately substantiate their claim that startup acquisitions reduce consumer welfare.

To summarize, while studies of this sort may indeed suggest that the clearance of certain mergers may not have been optimal, it is hardly a sufficient basis on which to argue that enforcement should be tightened. The reason for this is simple: As explained above, the fact that some anticompetitive mergers may have escaped scrutiny and/or condemnation is never a sufficient basis to tighten rules. For that it is also necessary to factor in the administrative costs of increased enforcement, as well as potential false convictions to which it might give rise. As things stand, economic research on killer acquisitions in the tech sector does not warrant tougher antitrust enforcement, though it does show the need for further empirical research on the topic.

### 1NC – AT: Other Countries

#### Gurumurthy says that developing countries need structural separation – no evidence that they will look to U.S. laws or that their legislatures will consider structural changes

### 1NC – AT: Coop

#### FTC won’t cooperate with other countries or the squo – Pachnou evidence is about the squo and is just about the FTC saying enforcement is good

### 1NC – enforcement fails

#### Predicting the competitive effects of a potential transaction is unworkably difficult

**Manne 21** – Geoffrey Manne, JD UChicago Law, fellow at Northwestern University Center on Law, Business, and Economics, founder of the International Center for Law and Economics. Samuel Bowman, Director of Competition Policy at the International Center for Law and Economics. Dirk Auer, LLM from UChicago.

(Geoffrey A. Manne, Samuel Bowman & Dirk Auer, “Technology Mergers and the Market for Corporate Control,” Draft edition released August 4, 2021, forthcoming in Missouri Law Review (Fall 2021), <https://laweconcenter.org/wp-content/uploads/2021/08/SSRN-id3899524.pdf>)

iii. Workability

There are also pragmatic objections to the above theories. The reforms proposed by these scholars would compel antitrust authorities and courts to make increasingly speculative assessments concerning the counterfactual setting of proposed acquisitions. Counterfactual analysis is the bedrock of antitrust merger enforcement. However, this exercise becomes exponentially more complicated as enforcers are asked (i) to look further into future, and (ii) to forecast the trajectories or firms that are more distantly related.

In simple terms, it is far easier to determine whether a merger between McDonalds and Burger King would lead to increased hamburger prices in the short run than it is to determine whether a gaming platform—like Steam or the Epic Games Store—might someday compete with video or music subscription platforms, such as Netflix or Spotify.

[I]t is inherently more difficult in future market cases to define properly the relevant product market, to identify likely buyers and sellers, to estimate crosselasticities of demand or understand on a more qualitative level potential product substitutability, and to ascertain the set of potential entrants and their likely incentives. Although all merger review necessarily is forward looking, it is an exceedingly difficult task to predict the competitive effects of a transaction where there is insufficient evidence to reliably answer these basic questions upon which proper merger analysis is based.108

Accordingly, it is not that the above models are necessarily wrong, but rather that applying them to practical cases would require antitrust enforcers to estimate mostly unknowable factors.

Unfortunately, these difficulties might ultimately prove insurmountable, especially if authorities are asked to operate below current merger filing thresholds, as many of the above papers suggest doing. For instance, many of the firms purchased by large tech companies have not yet brought a single product to market: indeed, this was the case when Google purchased Android.109 In turn, this makes it harder to predict whether the acquired firm might have grown into a competitor absent the merger.110

Proponents often attempt to mask these difficulties by citing the example of past mergers where the underlying products/services ultimately became competitors— Facebook’s acquisition of Instagram is routinely cited. However, using previous cases to argue that current enforcement leads to false negatives (i.e., authorities allow mergers between companies whose products became substitutes after the merger) is inherently prone to hindsight bias.

# Block

## T “core antitrust laws”

### 2NC – excludes FTC Act

#### The FTC Act is not an antitrust law---colloquial references are irrelevant.

Bonder 18 – Partner at Alston & Bird

Teresa T. Bonder, Defendants’ Opposition to Federal Trade Commission’s Motion for Permission to Serve Nine Trial Subpoenas, Federal Trade Commission v. Actavis Inc., et al., US District Court for the Northern District of Georgia, April 2009, LexisNexis

The statute the FTC cites, 15 U.S.C. § 23, authorizes nationwide service of process only for claims “arising under the antitrust laws.” Id. “[A]ntitrust laws” is a defined term for purposes of the statute. And, as the FTC admits (Mot. at 6), that definition in 15 U.S.C. § 12(a) does not list the FTC Act—the basis for all of the FTC’s claims in this case. Thus, the nationwide service of process statute does not, by its plain language, apply to this case. That is the end of the matter. None of the FTC’s arguments for ignoring the statutory definition is convincing.

First, the FTC notes this case has been colloquially referred to as an “antitrust case” by the parties and the courts in a variety of contexts. But such colloquial references cannot trump the express definition of the term “antitrust laws” in the statute. The Supreme Court has specifically instructed that whether a statute “may be colloquially described as an antitrust [law]” is “of no moment” when interpreting Section 12. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958). Instead, as the notes to 15 U.S.C. § 23 explain, “[t]he antitrust laws, referred to in text, are defined in section 12 of this title.” 15 U.S.C. § 23 note, attached as Ex. A. The Supreme Court has also said that the list in Section 12 “is exclusive.” Nashville Milk Co., 355 U.S. at 376. For this reason, courts maintain that “[t]he FTC Act is not an ‘antitrust law’ within the meaning of the Clayton Act, 15 U.S.C. § 12(a).” Fed. Trade Comm’n v. Onkyo U.S.A. Corp., 1995 WL 579811, at \*4 n.2 (D.D.C. Aug. 21, 1995).

#### A number of courts have determined the FTC Act is not an antitrust law.

Raphael 16 – Litigation partner in the San Francisco office of Munger, Tolles & Olson

Justin P. Raphael, Motion to Dismiss and Memorandum in Support filed by Defendant, Thompson, et al. v. 1-800 Contracts, Inc., et al., US District Court for the District of Utah, November 2016, LexisNexis

The FTC administrative action was not brought “to prevent, restrain, or punish violations of any of the antitrust laws.” Rather, it was brought under Section 5 of the FTC Act, 15 U.S.C. § 45. The term “antitrust laws” is defined in the Clayton Act to encompass a specific list of federal antitrust statutes, 15 U.S.C. § 12(a), which the Supreme Court has held is exclusive. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958) (“[T]he definition contained in § 1 of the Clayton Act is exclusive. Therefore it is of no moment that [a statute not listed therein] may be colloquially described as an ‘antitrust’ statute.”). That definition does not include Section 5 of the FTC Act, and multiple courts have acknowledged that the FTC Act is not an “antitrust law.” See Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1031 n.4 (9th Cir. 2001) (analyzing “prima facie” weight provision of Clayton Act, 15 U.S.C. § 16(a), and noting that “prima facie weight is given only to violations of the ‘antitrust laws’ as defined by the Clayton Act,” which “does not include violations of the FTC Act”); Yamaha Motor Co. v. FTC, 657 F.2d 971, 982 (8th Cir. 1981) (noting that Section 5 of the FTC Act is not “one of the ‘antitrust laws’ within the meaning of Sections [16(a) and 16(i)] of the Clayton Act”).

#### The phrase “antitrust laws” includes the Sherman Act and the Clayton Act, but is explicitly exclusive of Section 5 of the FTC Act.

Whyte 07 – Judge, United States District Court, California Northern

Ronald M. Whyte, Hynix Semiconductor Inc. v. Rambus Inc., 2008 U.S. Dist. LEXIS 53220, United States District Court for the Northern District of California, San Jose Division, January 2008, LexisNexis

Section 5(a) accords prima facie weight to a final judgment brought "under the antitrust laws." The Clayton Act specifically defines the phrase "antitrust laws." See 15 U.S.C. § 12(a). The definition includes the Sherman Act and the Clayton Act, but it does not list the Federal Trade Commission Act (15 U.S.C. §§ 41, et seq). This exclusion accords with the final sentence of section 5(a), which distinguishes "the antitrust laws" from "section 45." 2

The Federal Trade Commission brought its proceeding against Rambus pursuant to Section 45, which is also known as Section 5 of the FTC Act. See In re Rambus, Administrative Complaint, Docket No. 9302, at 1, 31-33 (FTC June 18, 2002). 3 The FTC's final order found that "Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies incorporated into the JEDEC standards in violation of Section 5 of the FTC Act." In re [\*12] Rambus, Opinion of the Commission, Docket No. 9302, at 3 (FTC August 2, 2006). HN4 Section 5 of the FTC Act incorporates various standards from the antitrust laws and also forbids practices the FTC deems against public policy for other reasons. FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). Although the FTC found that Rambus violated the Sherman Act, the FTC's order was in a proceeding under Section 5 of the FTC Act.

### 2NC – “Core laws”=Foundational

#### “Core” antitrust laws are foundational in nature and distinct from the enveloping parts.

Whyte 10 – Judge, United States District Court, California Northern

Ronald M. Whyte, Synthes USA, LLC v. Spinal Kinetics, Inc., 2010 U.S. Dist. LEXIS 70397, United States District Court for the Northern District of California, San Jose Division, June 2010, LexisNexis

According to Spinal Kinetics, since the specification refers to "an elastically deformable formed body . . . [ ] with an incompressible core, preferably a liquid core" (id. at 5:15-16), claiming a "flexible core" improperly attempts to claim new matter. Spinal Kinetics, however, is equating the word "core" with the composition of the core. The word "core" has an ordinary and customary meaning, namely "the central and often foundational part of a body, mass or construction usu. distinct from the enveloping part by a difference in nature or by being cut out or separated." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Merriam-Webster Inc. (1993), p. 506 ("core"). "Claim terms are 'generally given their ordinary and customary meaning,' the meaning that the term would have to 'a person of ordinary skill in the art . . . at the time of the invention.'" Power-One, Inc. v. Artesyn Technologies, Inc., 599 F.3d 1343, 1348 (Fed. Cir. 2010), quoting Phillips, 415 F.3d at 1312-13.

#### That is the common understanding of the word.

Robinson 07 – Judge, United States District Court, Delaware

Sue L. Robinson, Callaway Golf Co. v. Acushnet Co., 2007 U.S. Dist. LEXIS 85597, United States District Court for the District of Delaware, November 2007, LexisNexis

b. Although multi-component cores were known in the art at the time the patents in suit were filed,6 Mr. Sullivan referred to "conventional solid cores"7 without further description. Given the common understanding of the word "core,"8 [FOOTNOTE 8 STARTS] "The central and often foundational part of a body, mass or construction[.]" WEBSTER'S THIRD NEW INT'L DICTIONARY 506 (1993). [FOOTNOTE 8 ENDS] I conclude that the above construction is consistent with both the intrinsic and extrinsic evidence of record.

## Adv CP

### AT no bounded way

#### A scalpel is better than an axe – CP solves externalities caused by big tech without limiting innovation

Litan 18 – Nonresident senior fellow in the economic studies program at the Brookings Institution. Former senior fellow, director of the economic studies program, and vice president at Brookings.

Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation,” *Progressive Policy Institute*, September 2018, pp. 51, https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI\_AntitrustandDataLaws\_2018.pdf.

As in other sectors of the economy where firms have generated externalities, government has been called on to help curtail certain of those associated with the tech platforms: fake news, foreign political advertising, privacy and security. But, to preserve incentives for innovation – and the next platforms or other growth firms – any government action should be tailored to meet specific problems and ideally address them in a way that maximizes benefits to society at minimum cost to those regulated. Before I spell out ways to do this with respect to each of the data-related externalities identified in the previous section, several preliminary comments are in order.

#### Antitrust regs entrench monopoly power – only monopolies have the resources to navigate regs, and large firms will capture their regulators

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Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation,” *Progressive Policy Institute*, September 2018, pp. 51-52, https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI\_AntitrustandDataLaws\_2018.pdf.

Second, whatever regulation is imposed on the tech platforms (and other companies as well) may further entrench whatever market power each of them now has by making it costlier for other actual or potential competitors to do business. In general, many of these actual or would-be competitors do not have the economies of scale or resources to spread the fixed costs of complying with new regulations over their revenues with the same ease as the larger incumbents they challenge or may hope to disrupt. Moreover, there is a large academic literature documenting the ability of large regulated firms to “capture” the regulators who oversee them, through direct influence or the prospect of providing future employment for those regulators if they decide to leave public office. These outcomes were anticipated even before the EU’s stringent data privacy directive went into effect in late May.110 Policy makers and regulators in this country, therefore, must keep these potential unintended consequences in mind as they consider taking affirmative steps to address each of the externalities discussed in detail below.

### 2NC – Tech Competition Solvency – Startup Support

#### Providing non-antitrust support for new startups makes firms more innovative – patenting activity and follow-on financing both increase dramatically

Surana et al 20 – Assistant research professor at the Center for Global Sustainability, School of Public Policy at the University of Maryland College Park. She previously worked at the Harvard Kennedy School and the World Bank.

Kavita Surana, Claudia Doblinger, and Laura Diaz Anadon, “Collaboration Between Start-Ups and Federal Agencies: A Surprising Solution for Energy Innovation,” *Information Technology & Innovation Foundation*, August 2020, pp. 2, https://itif.org/sites/default/files/2020-clean-tech-start-ups.pdf.

Collaborations between climate-tech start-ups and federal agencies and laboratories work because both partners bring complementary resources to the relationship and can benefit from it. There are natural synergies between short-term competencies of start-ups for commercialization and long-term federal government technology resources. Start-ups need access to experts and mentors, and testing and experimentation facilities; federal agencies and labs can provide them. Start-ups need access to technology; agencies and labs offer licenses resulting from federal RD&D investment that has accrued for decades.

Agencies, for their part, want to see their investments in RD&D to turn into products that improve societal outcomes; start-ups can help them do that. The U.S. Department of Energy (DOE) and its 17 national laboratories are the largest and most visible partners for climate-tech start-ups. But they are not alone. Numerous other agencies also partner with climate-tech start-ups as a result of RD&D programs that simultaneously advance their missions along with clean energy innovation. 4

Our analysis reveals that the patenting activity of a climate-tech start-up increases by 74 percent on average every time it partners with a government agency or laboratory. Each technology license made by an agency to a start-up increases the start-up’s follow-on financing by over 155 percent on average. 5 While the ultimate goal is to commercialize products that reduce greenhouse gas emissions and allow the start-up to survive, intermediate successes such as these help that happen.

The impact of these collaborations is all the more surprising, as it is not the result of a systematic approach. The number of start-ups that collaborate with federal agencies or laboratories is dismally low. Lacking prior networks or targeted opportunities, start-ups often find it difficult to engage with federal partners. Although some agencies, including DOE, have set up mechanisms for technology transfer that can potentially foster collaboration, these mechanisms are scattered across different units and do not receive as much support as they should.

#### Governments are the best partners for firms and massively improve multiple performance metrics – best data

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Kavita Surana, Claudia Doblinger, and Laura Diaz Anadon, “Collaboration Between Start-Ups and Federal Agencies: A Surprising Solution for Energy Innovation,” *Information Technology & Innovation Foundation*, August 2020, pp. 4-7, https://itif.org/sites/default/files/2020-clean-tech-start-ups.pdf.

The Evidence for the Surprising Solution: Government Agencies Make Better Partners

Our study was designed to explore these trade-offs, finding that from a climate-tech start-up’s perspective, all collaborations are associated with better outcomes compared with no collaboration in a specific year. But every new collaboration with a government partner is better than a comparable collaboration with a private firm or university. We based this conclusion on a rigorous statistical analysis of 657 U.S. start-ups that were less than 5 years old (between 2008 and 2012).

Methods

Our statistical analysis uses a rich and detailed dataset that captures key facets of the climate-tech sector and its start-ups. Our approach is briefly described below. The full analysis is published in a peer-reviewed academic paper and is available from the authors on request. 18

The core of the data is information about collaborations between the 657 climate-tech start-ups and their partners during our study period. We used the i3 Cleantech Group dataset that reports climate-tech start-up activity, including collaborations, by tracking news, start-up, and investor websites, and through self-reported information from the start-ups. We selected companies that were less than 5 years old between 2008 and 2012 and were developing hardware or software across 17 reported climate-tech sectors. 19

We identified start-up partners within this frame. The partners included nearly 2,100 private-sector businesses, over 50 government agencies or laboratories (primarily federal agencies, but also some state agencies), nearly 80 universities, nearly 10 non-governmental organization (NGOs) or environmental groups, and over 40 other public partners (such as cities and schools). We focused on the outcomes from two types of collaborations, technology co-development, and licensing agreements. Our dataset contains 2,015 start-up collaborations, of which 659 were technology co-development and 41 were licensing across all partners. The start-ups, their partners, and the details on their collaborations were obtained from the i3 cleantech industry dataset and were verified by the authors. 20 We assumed that each reported collaboration in the dataset lasts for two years.

We analyzed two types of outcomes from each collaboration in each year of our analysis. The first was patenting activity of the start-up. We measured each start-up’s patent applications in each year of our analysis using the Derwent Innovations Index database. While patents are an imperfect measure of technological innovation, they do matter to start-ups as a way to demonstrate progress to their investors. 21 The second was follow-on private-sector financing. We estimated the number of financing deals start-ups brought in every year—as a measure of their performance, from the i3 dataset—coupled with information from multiple start-up investment databases. In our primary model, we used the number of financing deals rather than the total dollar investment because information on the magnitude of investment is not always publicly reported. Financing deals can be a proxy for the performance of start-ups given alternative measures such as employee or sales growth are often not available.

We also controlled for differences among the start-ups that might otherwise explain these outcomes. The control variables include prior patents, prior financing from private investors, prior grants or financing from public sources (including DOE), start-up experience as measured by the age and number of employees, technology domain (including hardware and software), and location at the metropolitan area level. We accounted as well for other types of collaborations start-ups may have (such as a start-up’s customer or procurement relationship with a partner).

Our primary analysis uses negative binomial regressions with fixed effects for year and climate-tech sector, such as wind, solar, and biofuels. In other words, we accounted for the unique characteristics of each year from 2008 to 2012, and of each sector. In addition, we carried out several robustness checks using different types of models and start-up outcomes to ensure the results were accurate. These checks include alternative outcome variables, such as the magnitude of investment and whether the start-ups were acquired or went public within six years of being founded. The findings reported here are valid and consistent across all of the models we ran.

Findings

MARK

Our topline finding is climate-tech start-ups experience an increase in patenting and financing when they partner with a government agency, even when all the previously discussed controls are included. Figure 1 displays the results, with each bar showing the percentage increase in the likelihood of patenting or follow-on financing as the result of a co-development or licensing collaboration. The blue bars represent collaborations with agencies, while the orange and gray bars represent the other partners. The lines show the standard errors in these estimates.

Start-up patenting activity soars by an average of 74 percent as a result of collaborating with a government agency or laboratory to co-develop a new technology. And each technology license given out by a government agency to a start-up more than doubles its financing deals—a startling 155 percent increase.

University partners only outperform government partners on 1 of these outcome measures: a 266 percent increase in new patenting activity by the average climate-tech start-up as a result of a licensing deal. But university co-development collaborations do not drive any statistically significant change in follow-on financing for the start-ups. Follow-on financing from university licensing deals produces less funding than those with government agencies and is not statistically different on average. Similarly, although we found positive outcomes for start-ups that collaborate with other private-sector firms—exhibiting an increase in patenting by 24 percent and follow-on financing by 20 percent from technology co-development—these results are well below those for government partners.

#### Solves resource constraints and allows risk-taking

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Kavita Surana, Claudia Doblinger, and Laura Diaz Anadon, “Collaboration Between Start-Ups and Federal Agencies: A Surprising Solution for Energy Innovation,” *Information Technology & Innovation Foundation*, August 2020, pp. 3, https://itif.org/sites/default/files/2020-clean-tech-start-ups.pdf.

But successes such as these are infrequent and need to be multiplied given the scale of the climate challenge. Doing so will require overcoming not only the general obstacles faced by startups, but also the more specific challenges of clean energy innovation.

The first of these is lack of resources. Start-ups typically have few employees, narrow technological expertise, and inadequate infrastructure to test or develop technologies. They possess limited financial resources to obtain these human and physical capabilities. VC helps tremendously, but start-ups that receive VC funding, regardless of sector, must demonstrate progress to their investors within one to two years to get new funding. 10

The VC model, built around short-term, quick returns, was designed primarily for information technology (IT) companies. For many climate-tech start-ups, one to two years is much too short a period to demonstrate technological or commercial prospects, as they have long timescales and capital-intensive infrastructures, making them incompatible with the model that works in IT. 11 Climate-tech start-ups usually face a deeper valley of death than IT start-ups. To demonstrate technological and commercial viability and successfully cross the valley, climate-tech start-ups may need to simultaneously scale up research to a working technology prototype, ensure the supply chains needed for product development are in place, and establish a pathway to profit generation, including a clear demand for the product from consumers or utilities for both hardware and software. 12

Some “patient” investors, such as Breakthrough Energy Ventures, recognize and accept the unique challenges of clean energy innovation. However, such investors are scattered, and overall investment in climate-tech remains inadequate, with many investors continuing to shun climate-tech start-ups as highly risky investments that are unlikely to yield quick returns.

Collaboration with external partners provides climate-tech start-ups with resources and intangible assets that help them navigate through the valley of death and get the investment they need. Collaborations can reduce some of the perceived risks inherent to clean energy innovation, improve the prospects of climate-tech start-up survival, and facilitate clean energy technology commercialization.

#### Best model – government collaboration provides expertise, infrastructure, and licensing advantages

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Kavita Surana, Claudia Doblinger, and Laura Diaz Anadon, “Collaboration Between Start-Ups and Federal Agencies: A Surprising Solution for Energy Innovation,” *Information Technology & Innovation Foundation*, August 2020, pp. 8, https://itif.org/sites/default/files/2020-clean-tech-start-ups.pdf.

1. Expertise: Federal agencies and laboratories have a critical mass of personnel working in a far broader range of relevant science and technology domains than the handful of employees within start-ups. These federal employees may provide their start-up colleagues with insights on technology development, complementary technologies in the energy system, or future developments. 28 Such access can potentially also be a precursor to more active engagement with the agency in the future, especially when it involves the start-ups’ business efforts.

2. Infrastructure: Climate-tech start-ups have limited physical infrastructures and experimental capabilities to test their technology and products. Partnering with federal agencies or laboratories can allow access to extensive experimentation, demonstration, and testing facilities that advance the start-ups’ technology and show its viability.

3. Inventions available for licensing: Federal RD&D carried out over decades with billions of dollars of investment has produced intellectual property the agency is encouraged to share. Although licensing technologies to start-ups is infrequent, our statistical analysis shows that when it does occur, it is usually impactful. Climate-tech start-ups have the opportunity to obtain licenses to these patents and put the inventions to use in commercial applications.

### 2NC –Enforcement Solvency

#### The issue is enforcement –

Moss 21 – President of the American Antitrust Institute. Adjunct faculty in the Department of Economics at the University of Colorado at Boulder.

Diana L. Moss, “Update on Digital Technology: The Failure of Merger Enforcement and Need for Reform,” *American Antitrust Institute*, 3 March 2021, pp. 4-6, https://poseidon01.ssrn.com/delivery.php?ID=265092002101088113007082096099122111032052061006004009102126091120089006099022071010048045127041107100023068076002115001112083117052036065085103089121003070010007049019046114127020092001123098105098073001024000113088027027066015104018090030028114115&EXT=pdf&INDEX=TRUE.

II. Merger Enforcement in Digital Technology Has Weakened Even Further

As discussed in the 2019 AAI White Paper, only a fraction of the total acquisitions made by Big Tech are reportable to the U.S. antitrust agencies under the Hart Scott Rodino Act (HSR) federal premerger reporting requirements.13 The White Paper presented data over the period 2001-2017, when the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) first presented HSR statistics for a major segment of the digital technology sector. 14 We updated enforcement data to include statistics through the most recently available, 2019 HSR report. 15 As in the 2019 AAI White Paper, we compared DOJ and FTC enforcement statistics for merger transactions across all sectors with those that fall in the category for internet service providers, web search portals, and data processing services.

A number of observations stand out from the updated enforcement data. First, just over 80% of transactions, as a percentage of those that were cleared to the DOJ and FTC for a closer look, received early termination (i.e., were closed after initial or early-stage review). This is about the average observed across all sectors. 16 The 2019 AAI White Paper revealed that the agencies subjected a much higher percentage of digital technology transactions, as a percentage of total clearances, to review through the second request process (and beyond) relative to all transactions. 17 But the 2019 analysis also found that the rate at which the agencies challenged mergers, as a percentage of total clearances, in a major segment of the digital technology sector was far lower than the average across all sectors. 18

The table below summarizes enforcement statistics for the 2001-2017 period covered in the 2019 AAI White Paper and the longer, 2001-2019 period in this update. It shows the percentage difference between the rates of second requests and challenges in digital technology versus all sectors between the two time periods. For example, the FTC’s rate of second requests in digital technology between 2001-2017 was almost 80% higher than all sectors. But for the 2001-2019 period it was only about 60% higher. The longer time period shows that the gap between the FTC’s rate of second requests in digital technology versus all sectors has decreased. Combined agency statistics for the longer, 2001-2019, time period show that the gap between the agencies’ higher rate of second requests in digital technology relative to all sectors has decreased.

DOJ’s rate of challenges between 2001-2017 in digital technology was 65% lower than all sectors. But for the 2001-2019 period, it was 75% lower. The longer time period therefore reveals that the gap between the DOJ’s rate of challenges in digital technology versus all sectors has increased with the updated data. Combined agency statistics show that the rate of merger challenges was 3% in digital technology versus 15% across all sectors based on 2001- 2017 data. 19 Updated statistics for 2001-2019 show that this rate fell to about 2.5%, while remaining at about 15% across all sectors. Combined agency statistics for the longer, 2001- 2019, time period show that the gap between the agencies’ relatively lower rate of challenges in digital technology has increased.

These statistics are trending in decidedly the wrong directions. The agencies’ higher rate of second requests in digital technology signal that enforcers have scrutinized digital technology acquisitions more closely. But merger enforcement has lost ground over the last two years. Likewise, the agencies’ rate of challenges in digital technology signaled that enforcers were not moving to force the abandonment or restructuring of, or seeking to block, potentially harmful acquisitions in digital technology. 20 Here again, merger enforcement has lost ground over the last two years.

The updated enforcement statistics reinforce the 2019 AAI White Paper’s observation that merger enforcement is essentially nonexistent in the digital technology sector, and has weakened even further since. With the exception of DOJ’s challenge to Google’s acquisition of ITA Software in 2009, the antitrust agencies still have not challenged more than one acquisition by the largest digital technology companies. 21 There are two possible explanations for the persistently low merger challenge rate in digital technology over the last two years.

One is that the FTC and DOJ have been busy with Section 2 investigations in digital technology. The agencies may, therefore, have learned everything they needed to know about acquisitions via those investigations. This could obviate the need for second requests. Another is that the Section 2 investigations could have had the effect of restraining moves by the largest firms to attempt anticompetitive acquisitions while in the enforcement spotlight, thus explaining the decline in challenges. While these are plausible explanations, they do not address the larger picture of relatively weak merger enforcement in the digital technology sector over a longer period of time. The effect of weak enforcement in contributing to past and potential future growth of Big Tech therefore remains troublesome.

### 2NC—coop plank solves

#### Sufficient—their card lists exmaples of the US doing it now, but makes clear that we ONLY enforce US law NOT foreign law. If cooperation is all that matters, this is enough

Pachnou ’17 [Ms. Despina, Organization for Economic Co-operation and Development, “DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE” https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf]

5. The Agencies’ Cooperation with Foreign Jurisdictions on Remedies

18. Achieving effective remedies often entails cooperation with foreign jurisdictions. Such cooperation may allow the U.S. agencies to secure relief that sufficiently protects U.S. competition and consumers without applying the remedy to conduct or assets outside the United States. When an extraterritorial remedy is necessary to address harm or threatened harm to U.S. commerce and consumers, cooperation helps to minimize the risk of conflict with obligations of foreign laws or foreign remedial orders.35 Cooperation and coordination on remedies can be efficient for enforcers and the parties under investigation, especially given that over 130 jurisdictions have antitrust laws and over 80 require pre-merger notification. Cooperation may result in a remedies package that addresses competition concerns in multiple jurisdictions.36 The Agencies work closely with competition enforcers in other jurisdictions on cases under common review, including to help foster convergence and consistent remedy determinations.37

6. U.S. Case Examples

19. To the extent that the Agencies rely on extraterritorial remedies, they do so in both merger and conduct cases, although they arise most frequently in the merger context. In all cases, the Agencies seek remedies that are appropriately tailored and that do not apply extraterritorially unless necessary to address the harm or threatened harm to U.S. commerce or consumers.

6.1. Merger Cases

20. In most mergers, the Agencies can obtain an effective remedy for U.S. competition and consumers without extraterritorial divestitures or other relief. This is the case even when an Agency coordinates with other jurisdictions in investigating a transaction that raises concerns in both domestic markets and markets outside the U.S. Even in these instances, however, coordination between jurisdictions can be helpful. For example, the FTC benefited from coordinating with antitrust authorities in Canada, the EU, and Mexico during the investigation of Emerson Electric Co.’s acquisition of Pentair plc, even though the potential harm to U.S. markets was resolved exclusively through the divestiture of a U.S. switchbox facility.38 Similarly, in the General Electric-Alstom SA merger, effective relief for U.S. markets required divestiture of only U.S. based assets; however, coordination between the Department and the EC in connection with the Department’s investigation “facilitated [the Department’s] investigation and helped formulate remedies that [preserved] competition in the United States and internationally.”39 A coordinated remedy resulted in the Department and the EC announcing separate settlements that eliminated harm to consumers in their respective jurisdictions. 40 There are many more cases in which the Agencies have coordinated with their foreign counterparts on mergers that affect multiple jurisdictions.41

21. Although a merger may affect competition in several jurisdictions, the Agencies focus on preserving competition in the domestic markets that may be harmed by the proposed acquisition. On some occasions, relief secured by foreign jurisdictions means that no remedy, domestic or extraterritorial, is necessary to protect domestic competition. Though our experience in deferring to another authority’s remedy is limited, we have relied on informal deference and remain interested in doing so, under the right conditions. A notable example was in connection with Cisco’s acquisition of Tandberg in 2010. The Department declined to challenge the merger in part due to certain commitments that Cisco made to the European Commission (EC) to facilitate interoperability in products related to a type of videoconferencing called telepresence. Waivers of confidentiality by the parties and industry participants allowed the Department and the EC to cooperate closely in their parallel reviews of the transaction, resulting in an efficient outcome for the enforcers and the merging parties.42

22. Nevertheless, certain merger investigations resolved by consent decree have required the divestiture of assets located outside the United States to preserve competition within the United States. For example, the FTC consent decree resolving concerns regarding the merger of cement manufacturers Holcim Ltd. and Lafarge SA required, in part, divestiture of a Canadian cement plant and related U.S. terminals along with two Canadian terminals related to a U.S. cement plant. The FTC explained that the divested assets “remedy competitive concerns in northern U.S. markets [and are] part of a larger group of Holcim assets located in Canada that Holcim and Lafarge have agreed to divest to address competitive concerns raised by the [Canadian Competition Bureau (“CCB”)]. Commission staff worked closely with staff from the CCB to reach outcomes that benefit consumers in the United States.”

43 An extraterritorial remedy was also required to resolve Department’s investigation of the Anheuser-Busch InBev SA/NV & Grupo Modelo S.A.B. merger. The consent decree in that matter similarly required divestiture of a facility outside of the United States, the Grupo Modelo brewery in Mexico, and a perpetual and exclusive U.S. trademark license to the seven brands of beer that Modelo then offered in the United States, as well as three brands not yet offered in the United States, but currently sold by Modelo in Mexico. This remedy allowed the acquirer “to meet current and future demand for Modelo Brand Beer in the United States,” which resolved concerns that the merger would harm competition in twenty-six local U.S. markets.

## Section 5 cp

### FTC

#### FTC enforcement undermines legal clarity

Pitofsky, 54th Chairman of the Federal Trade Commission, Professor of Law at the Georgetown University Law Center, ‘08

(Bob, FTC Workshop, Remarks of Robert Pitofsky, Official Transcript at 64-65, https://www.ftc.gov/sites/default/files/documents/public\_events/section-5-ftc-act-competition-statute/transcript.pdf)

Second, there are three Supreme Court cases that say unfairness means something besides beyond the Sherman and the Clayton Act -- Sperry, Indiana Federation, Brown Shoe -- and I don=t think that we ought to just ignore three Supreme Court cases.

On the other hand, I believe one must be very, very cautious about using Section 5. It is not a roving mandate to the Commission to go around doing good from an antitrust point of view. Why? Because the private sector has to have an idea of what the law is and it’s just not fair to interpret unfairness in unpredictable ways.

Second, it produces a situation in which behavior that’s illegal at the FTC is legal at the DoJ. I think that’s untenable. Especially if Congress has rejected the particular unfairness idea that the Commission is advocating, I think that’s untenable. And, most important, I think if the Commission gets very aggressive about unfairness it will lose its hard earned reputation of being careful, balanced, active. I think the Commission is in a better state today, in terms of Congress’s views of the agency and published views of the agency, than at almost any time -- and I think abusing unfairness is the way to lose that position.

#### Causes over-enforcement – FTC will prioritize competitors over competition

Alexander Paul Okuliar, Co-chair Global Antitrust Law Practice Group, Morrison Foster, July 12, 2021, FTC Meeting Signals Aggressive and Novel Enforcement to Come, <https://www.mofo.com/resources/insights/210712-ftc-meeting-signals-aggressive.html>

Rescinding the 2015 UMC Policy Statement has wide ranging and potentially dramatic implications for FTC enforcement under Chair Khan. As a threshold matter, it is consistent with an aggressive, populist neo-Brandeisian view of antitrust that is skeptical of the consumer welfare standard as the cornerstone of competition enforcement. It also shows hostility toward the antitrust laws as interpreted by the federal judiciary. Chair Khan criticized the 2015 UMC Policy Statement as binding the FTC to Sherman Act case law developed by “generalist judges.” Rescinding the policy statement also opens the door to FTC rulemakings for new substantive competition rules. (For a more in-depth discussion of a potential substantive competition rulemaking, see our previous Client Alert.) Finally, it could signal future Robinson-Patman Act enforcement by the FTC. The Robinson-Patman Act prohibits price discrimination, and has been widely criticized as protecting competitors and not competition.[17] While still on the books, neither the FTC nor the U.S. Department of Justice’s Antitrust Division have brought any Robinson-Patman Act enforcement actions in decades.[18] Some neo-Brandeisians have advocated a return to active Robinson-Patman Act enforcement by the federal government,[19] however, and rescinding the 2015 UMC Policy Statement would be consistent with such a return.

#### Agency infighting undermines enforcement

Crane, Professor of Law, University of Michigan Law School, ‘09

(Daniel A., “*linkLine*’s Institutional Suspicions,” <https://core.ac.uk/download/pdf/232690329.pdf>)

In recent times, the interventionist Commission has overtly clashed with the Chicago School-oriented Antitrust Division. The overt bickering began when the FTC asked the Supreme Court to reverse its defeat in the Eleventh Circuit Court of Appeals over the legality of pharmaceutical patent settlements while Justice Department recommended the denial of certiorari.82 Payback time came in linkLine, when the Justice Department filed a brief arguing against price squeeze liability. The FTC issued a press release explaining why it did not join the Justice Department brief and urged the Supreme Court to deny certiorari.83 The final straw came when the Justice Department issued its Section 2 report84 and three FTC Commissioners issued a shrill dissenting statement, disagreeing with almost everything in the report and warning that the FTC ‘‘stands ready to fill any Sherman Act enforcement void that might be created if the Justice Department actually implements the policy decisions expressed in its Report.’’85

This interagency hostility probably diminished the effectiveness of the two agencies in carrying on their antitrust missions, even when they were not directly squabbling. That is, it is hard to justify deference to the antitrust agencies’ decisions based on their expertise when the supposed experts perpetually contradict each other. And even though the hostility has abated considerably since Obama’s inauguration, the Chicago School courts are unlikely to give the FTC any quarter. *Rambus* is but the latest decision in which the full panoply of judicial suspicion of private antitrust litigation has led to the defeat of FTC enforcement actions as well.

## Dependency adv

### 2NC – global south alt causes

#### —alt causes—TONS OF OTHER DEVELOPMENT ISSUES IN THESE REGIONS—tech conglom is not reason Africa has econ problems

#### They say the aff results in extraterritorial remedies BUT THEIR CARDS DON’T SAY THIS—here’s the end of 1AC first card, it says “broader” remides are needed, which they obviously don’t do

1AC First ’21 [Harry; Professor of Trade Regulation @ NYU; “Digital Platforms and Competition Policy in Developing Countries”; <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864953>; AS]

This means that the first lesson for competition policy toward digital platforms is actually aimed at developed countries. If antitrust authorities in the U.S. are successful in their litigation against Facebook and Google, at least some thought should be given to how the remedies sought will affect developing countries.91 Although consideration of extraterritorial effects is not part of the case against these companies, remedy is broader. Positive spillovers should be part of the governments’ calculus.

#### THEY DON’T SOLVE—their ev says big tech is a problem in asia/Africa—NONE OF THOSE COUNTRIES ARE CONSIDERING THESE LAWS??

#### The end of 1AC gurumuth concludes theres a TON of others things inhibiting competition:

With respect to competition policy, there is mounting consensus that industrial era competition law frameworks need to be overhauled so that they are able to effectively address the anti-competitive risks of network-data effects in data value chains. In 2020, the European Commission for Competition announced an in-depth study aimed at the updation of its merger assessment rubrics to address the realities of asset light, data heavy platform business models of the digital age (Modrall, 2020). The United States House Judiciary Committee has just concluded an investigation into the structural separations to be effected in data value chains to ensure that corporations controlling essential platform infrastructures are not also competing with the businesses that transact goods and services on them, the urgently needed “separation of platforms and commerce” that legal scholar, Lina Khan, has flagged in her study of Amazon’s antitrust behavior (Khan, 2017; 2019). Such interventions to overhaul traditional competition laws are urgently needed in the Global South as well.12

### 2NC – dominance inev or resilient

#### Regulators would lose future court challenges and legislative efforts are futile

**Bhargava** et al. **19** – Hemant Bhargava, Professor at UC Davis School of Management, Ph.D. from The Wharton School.

(Hemant Bhargava, William Kovacic, Herbert Hovenkamp, 3-26-2019, “Why Breaking Up Big Tech Could Do More Harm Than Good,” https://knowledge.wharton.upenn.edu/article/why-breaking-up-big-tech-could-do-more-harm-than-good/)

Moreover, unwinding the transactions cited above would be “an extraordinarily difficult undertaking. Not impossible, but you are going to have to go into a federal court and explain a theory of competitive harm,” Kovacic said. The tech giants would sue, and it would be tough for regulators to win in court. “The U.S. jurisprudence allows you to provide evidence of consumer benefits, and to emphasize those benefits.”

Looked at another way, if regulators could unwind mergers, then it must also find a way to stop such “anti-competitive” deals from happening in the future. That means there would have to be rules prohibiting big companies from acquiring certain small firms, Kovacic said. That takes new legislation. “To make that truly effective, to have that complete barrier to acquisitions in place, requires going to the Congress and changing the law.”

The only way Warren’s two ideas would get through Congress is if there was “some cataclysm, some external shock that is a result of a corporate scandal, a further set of revelations that calls into question the legitimacy of the sector,” Kovacic said. One recent example is the Dodd Frank act that resulted from the severity of the financial crisis, he added. But barring such disasters, “it is a long, long way … to put all of these measures in place.”

#### Break ups bring temporary change at best

**Litan 18** – B.S. in Economics, the Wharton School; J.D., Yale Law School; Ph.D., Yale University. Non-Resident Senior Fellow at the Brookings Institution; previously Vice President and Director of Economic Studies

(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation,” Progressive Policy Institute, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

There are both economic and legal reasons for this conclusion. As a matter of economics, all three platform companies have benefited hugely from economies of scale and/or network externalities (the notion that a network tends to monopoly because the value to users rises as more join). Breaking up such enterprises into smaller pieces would bring only temporary change, because the markets in which they compete are subject to either or both these forces. Eventually, the market structure in each case would move back toward a single dominant firm (or, at most, two). As an economic matter, society gains from a breakup only if – during the transition back toward monopoly or oligopoly – reintroducing competition induces the ultimate winner(s) to provide even better and/or lower cost services to purchasers that outweigh the potentially higher costs that breakup very likely would entail during the transition (reduced benefits of network externalities and economies of scale). My own judgment is that cloning Microsoft Windows OS into three pieces, as discussed in the box, would have met this test. Breaking up any of the major tech platform companies would not. At the very least, I have seen no compelling evidence to the contrary.

While the economics of breakup are interesting, ultimately the law is what matters most. Under the antitrust laws – and the judicial decisions that have interpreted them through the years – we can’t even get to the breakup question unless it is established that a monopoly has somehow abused its dominant position through some bad conduct, and that the harm to the marketplace can be cured only by breaking up the monopolist rather than prohibiting its bad behavior (perhaps with some supplemental “fencing in” requirements to keep it from happening again). The antitrust laws do not – nor should they – punish a firm for acquiring dominance in a market because of a superior product or service and/or luck.

Let’s go through each of The Four and see, first, if there is any evidence of consistent abusive conduct of monopoly power of the kind evidenced by Microsoft in the 1990s, and second, if that conduct (assuming it is present) justifies an extreme breakup remedy. I haven’t seen a credible claim or evidence that either Apple or Facebook has abused any of their market power. Facebook’s mishandling of its users’ data, which I discuss later, can and should be addressed through other means, and is not an antitrust violation. In theory, an argument can be made that companies like Facebook and Google (to be considered shortly) benefited from approvals of various acquisitions along the way. But, at the time of these mergers, given the state of applicable merger law, it is difficult to claim that any court would have blocked such acquisitions.

Consider Amazon next. In a later section, I rebut claims that Amazon has abused its alleged monopoly power through alleged predatory pricing. I note here that, even if online retailing is its own distinct relevant market – and this is a subject for dispute – Amazon reportedly controls 44 percent of the spending in that “market.”54 This market share is well below the minimum 60-70 percent courts have required in a successful attempt-to-monopolize or monopolization cases brought under Section 2 of the Sherman Act.

To be sure, there are narrowly defined product markets, such as U.S. e-books, where Amazon’s market share likely exceeds 80 percent, and clearly is dominant. In such markets, the question then is whether the company is doing anything to abuse that dominant position. On the surface, it is hard to detect a problem. Amazon displays its own new books directly with offers for used books at much lower prices (even with shipping included) offered by a range of third-party sellers. There is not even a question of “search bias” in these displays.

Nonetheless, one complaint about Amazon in other product markets is that it is “destroying” the business of brand-name suppliers by offering Amazon’s own (expanding) private label goods.55 This is no different from practices by other retailers like Costco and Kroger. The article that raises this issue has a quote from Galloway essentially acknowledging – to the extent Amazon’s private labels are cutting into sales of branded products – that they are wringing out a price premium those brands have long enjoyed but which many economists have also long criticized for penalizing consumers. In other words, Amazon’s success in devaluing brands benefits rather than harms consumers.

Moreover, Amazon does not appear to exclude other name brands from its site. I tried entering several popular consumer products in Amazon’s search engine – such as televisions and even batteries (which are mentioned in the article) – and found nothing of the sort. It is true that Amazon may show its own private label brands first, but immediately below are brand names. This practice is analogous to the way Google displayed results from its own product comparison “vertical search engine,” until it changed its practice after the EU’s decision condemning it, as discussed next.

But Amazon’s landing pages are designed very differently from Google’s. Amazon shows products in order as one scrolls down the page; it doesn’t have the equivalent of a “righthand side” for the company’s own products or third-party ads, which don’t fit with Amazon’s business model – which is to sell products directly and earn the revenue therefrom, rather than from hosting ads as Google and Facebook do.

Yet how is Amazon’s showing of its brand names first in its page formats an antitrust violation? Amazon’s share of online sales for certain products in which it offers its own private label goods may be substantial enough to constitute dominance or even a monopoly, but it is far from clear whether a court would define the relevant antitrust market so narrowly, rather than taking account of offline sales as well – which certainly would bring down Amazon’s market share (name-brand batteries, like other brands, are sold in a wide number and variety of physical retail locations such as grocery stories and pharmacies).

Moreover, where else would a court have Amazon’s private label brands shown – third, fourth or fifth – and on what basis would a court engage in such micro-managing? The same goes for ordering the company to completely redesign its Web site pages to look like Google’s or Bing’s search engines and show results of third-party offerings on the left-hand of each landing page, and the company’s offerings only on the right, as Google now does. Would this fundamentally change things? And does it really make any difference if a customer – who is looking for an item such as batteries, and prefers a name brand like Duracell – is shown those options right below the cheaper Amazon private label brand? These are the kinds of questions a court would have to answer in determining whether Amazon’s private label displays somehow constitute abuse of any market power it would have in narrowly-defined online-only product markets.

But, if a court could somehow reach such a finding, would it merit breaking up Amazon? Into what? One company and Web site that offered only third-party items – in markets where the company’s online market share rose above some threshold level, which would require constant monitoring and readjustment – and another Web site offering only Amazon’s private label goods?

That separation would destroy a fundamental advantage to consumers of being able to browse a single site and comparison shop across all brands. To pose such hypotheticals almost self-evidently answers whether a court would seriously entertain breaking up the company in this or any other manner. I seriously doubt even the most pro-plaintiff judge – let alone the Supreme Court – would order a breakup of the company for this reason.

#### Increased enforcement empowers 30 new megacompanies, but fails to spur large-scale competition

**Karabell 20** – PhD from Harvard, Head of Global Strategies at Envestnet financial services firm.

Zachary Karabell, 1-23-20,"Don't Break Up Big Tech," Wired, https://www.wired.com/story/dont-break-up-big-tech/

Now imagine each of the Big Tech giants gets disassembled in this way. We might end up with a landscape of 30 companies instead of half a dozen. A quintupling of industry players would, by definition, create a more competitive field. But competition in the antitrust framework, stretching back to the original Sherman Anti-Trust Bill in 1890 and then subsequent legislation such as the Clayton Bill in 1914, is not a virtue or need in and of itself. It is the means to a set of ends—namely, “economic liberty,” unfettered trade, lower prices, and better services for consumers. By itself, competition does not guarantee anything.

Meanwhile, it’s hard to see how going from six companies to 30 would give consumers any more choice of services or more control over their data, or how it would help to nurture small businesses and lower costs to consumers and society. Perhaps there would be openings for companies with different business models, ones that brand themselves as valuing privacy and empowering individual ownership of data. This can’t be ruled out, but the nature of data selling and data mining is so embedded in the current models of most IT companies that it is very hard to see how such businesses could thrive unless they charged more to consumers than consumers have so far been willing to pay. In the meantime, the 30 new megacompanies would still have immense competitive advantages over smaller startups.

Would the market frictions and disruptions caused by a breakup be worth the possibility that such privacy-focused companies might succeed? Would cracking the current megacompanies into a set of slightly smaller ones effectively balance consumer needs and economic liberty? You may need to break eggs to make an omelet, but breaking eggs alone doesn’t make one.

## Competitiveness adv

### 2NC – AT: bad for startups

#### Big tech platforms are crucial to small businesses expanding their markets

**Jamison 21** – Mark Jamison is a nonresident senior fellow at the American Enterprise Institute. He is concurrently the director and Gunter Professor of the Public Utility Research Center at the University of Florida’s Warrington College of Business. PhD in Economics.

Mark Jamison, 4-26-2021, "Senator Hawley’s ‘trust-busting’ bill would actually bust consumers and small business," American Enterprise Institute - AEI, https://www.aei.org/technology-and-innovation/senator-hawleys-trust-busting-bill-would-actually-bust-consumers-and-small-business/

Small business would also suffer if the legislation succeeded in creating less innovative and less aggressive Big Tech companies. Big Tech benefits small businesses in at least two ways. One way is that entrepreneurs can build businesses on platforms built by Facebook, Google, Apple, and Amazon. These companies created the app economy, and — according to ACT | The App Association — 82 percent of app developers are small businesses, some of which reached over $1 billion in valuation in less than five years. And college graduates in the app economy earn more than twice what the average college grad makes.

Big Tech also helps small businesses expand their markets: In 2019, 95 percent of small businesses planned to increase their digital marketing. According to Deloitte, more of this is needed: Digitally advanced small businesses earn twice the revenue per employee and experience four times the annual revenue growth of their less digital counterparts. These benefits shrink if new laws hamper the effectiveness of Big Tech.

### 2NC – tech break up wrong

#### History proves firms recombine after breakups—a *20th century* framework can’t solve problems of *the 21st*

**Karabell 20** – PhD from Harvard, Head of Global Strategies at Envestnet financial services firm.

Zachary Karabell, 1-23-20,"Don't Break Up Big Tech," Wired, https://www.wired.com/story/dont-break-up-big-tech/

The escalating animus toward Amazon, Apple, Facebook, and Google—fueled by the conviction that these megacompanies imperil not just consumers and competition but privacy and democratic discourse—is one of the few areas of American life that can be considered truly bipartisan. It enjoys polling support not just among a majority of Democrats but in similar proportions of both Republicans and independents.

That makes it all the more regrettable that, should these forces coalesce after the presidential election of November 2020, the use of antitrust laws to break up Big Tech would almost certainly fail to satisfy their goals. “Break them up” is an easy slogan, and an appealing one; but like so many easy things, it will solve little. In the absence of a far more sweeping program to amend our laws and rethink the nature of information technology, such efforts will be worse than useless.

As I argued in WIRED last year, technology companies have been largely in denial of some very real concerns. The current landscape of technology has left consumers with little privacy even as their data is converted into vast corporate profit. The marketplace for online services is bereft of meaningful competition, and it is potentially corrosive of democracy. Faced with mounting criticism over these issues and the potential for bad regulations to address them, Big Tech might have taken matters into its own hands. The companies could have preemptively broken themselves up, and forestalled clumsy government interventions even as they made more aggressive efforts at reform. Instead they dithered while the regulatory wave grew larger. Now “break them up,” for all its faults, may soon become a tsunami.

The problems fueling “break them up” are valid; breaking them up is not the solution. To begin with, antitrust enforcement has been romanticized well in excess of its accomplishments. The breakup in 1984 of the monopolistic AT&T into eight companies unleashed competition for a time, lowering prices and improving services. Eventually, however, as landlines gave way to wireless, the industry reconsolidated and regulators relaxed. Today telecom is dominated by a reconstituted AT&T along with Verizon, with Sprint as a distant third (yet still immense) player. The court-mandated breakup of Standard Oil in 1911 was the culmination of the most significant antitrust action ever, but the company’s dozens of offshoots eventually recombined into massive oil companies that maintain tremendous power. (ExxonMobil and Chevron are the two most notable.) That breakup also made the wealthy Rockefeller family even wealthier, as their shares in one company became shares in many—almost all of which doubled quickly and then continued their upward trajectory from there.

It’s debatable whether antitrust enforcement has ever been particularly effective. Even a charitable reading of its legacy suggests that the first effect of disrupting Big Tech might be to enrich the oligopoly’s shareholders, which is certainly not what advocates would want. In fact, as I argued in that earlier WIRED column, industrial conglomerates often spin off businesses strategically. For instance, United Technologies is about to cut loose its multibillion-dollar divisions Otis Elevators and Carrier (one of the world’s largest HVAC companies) as a means of unlocking shareholder value. One wonders why Silicon Valley executives haven’t gone down this path; perhaps the mantras of integration and a hubristic belief that they will never actually be forced to break up has shut down consideration of those strategies.

Would a forced breakup at least be effective at dispersing power? Let’s say that Facebook were strong-armed into disassembling itself. Its logical components would be legacy Facebook (individual pages), Facebook for business, Instagram, WhatsApp, and Oculus. You might be able to slice it even thinner, but assume Facebook would become five companies. Facebook currently has a market capitalization of just over $600 billion. That total market cap wouldn’t be divided equally among the five new companies; WhatsApp might struggle given its lack of discernible income, while Instagram might soar. It’s likely, however, that the resulting businesses would have a combined valuation greater than $600 billion, assuming it follows past patterns and that the tech industry remains robust.

Now imagine each of the Big Tech giants gets disassembled in this way. We might end up with a landscape of 30 companies instead of half a dozen. A quintupling of industry players would, by definition, create a more competitive field. But competition in the antitrust framework, stretching back to the original Sherman Anti-Trust Bill in 1890 and then subsequent legislation such as the Clayton Bill in 1914, is not a virtue or need in and of itself. It is the means to a set of ends—namely, “economic liberty,” unfettered trade, lower prices, and better services for consumers. By itself, competition does not guarantee anything.

Meanwhile, it’s hard to see how going from six companies to 30 would give consumers any more choice of services or more control over their data,

or how it would help to nurture small businesses and lower costs to consumers and society. Perhaps there would be openings for companies with different business models, ones that brand themselves as valuing privacy and empowering individual ownership of data. This can’t be ruled out, but the nature of data selling and data mining is so embedded in the current models of most IT companies that it is very hard to see how such businesses could thrive unless they charged more to consumers than consumers have so far been willing to pay. In the meantime, the 30 new megacompanies would still have immense competitive advantages over smaller startups.

Would the market frictions and disruptions caused by a breakup be worth the possibility that such privacy-focused companies might succeed? Would cracking the current megacompanies into a set of slightly smaller ones effectively balance consumer needs and economic liberty? You may need to break eggs to make an omelet, but breaking eggs alone doesn’t make one.

Warren has also floated a plan to limit the number and scale of acquisitions that Big Tech companies can make in any given year. There is now an entire venture capital ecosystem that funds and incubates companies not so they can go public but so they can be acquired by Alphabet, Facebook, Amazon, Apple, or Microsoft (as well as Oracle, Salesforce, Intel, and a handful of others). These acquisitions are arguably part of the innovation structure, with Big Tech providing the same exit capital as public markets, but with less regulatory hassle. Limiting acquisitions, as Warren suggests, could have the unintended consequence of depressing spending on innovation rather than unlocking it, and making it harder for smaller companies to raise money. More problematic is how the cap would be determined, or enforced fairly and consistently. If Facebook can only make X acquisitions per year at Y price, then why shouldn’t ancillary companies like Visa be subject to the same rules? Visa may be seen as a financial services company, but it is really in tech, having announced the acquisition, just last week, of financial tech company Plaid for $5 billion.

The idea that breaking up Big Tech would strengthen democracy simply by decreasing the immense power of a few companies may be just as appealing, but it’s false too. There is no past evidence that large, dominant companies imperil democracy; AT&T and IBM had de facto monopolies in the 1960s and 1970s over telephony and computers when democracy in the United States was becoming ever more inclusive. Perhaps it’s not size per se but, rather, the nature of today’s companies—not the “big,” just the “tech”—that is at the heart of such problems.

Whether or not Big Tech represents an unhealthy concentration of power, we need to consider that the antitrust framework of the 20th century, which was meant to address industrial companies, may not fit the technological oligopolies of the 21st century. Antitrust was invented during the Progressive Era as a means to address issues of price, access, and competition.

What we need now is a new regulatory framework based on today’s issues: privacy, who owns and profits from data, competition, and innovation. Those should be the starting points for developing policy, in place of a focus on the size or number of tech companies. We need to ask what rules would protect consumers, ensure continued innovation, and allow for competition, without creating additional, unintended problems. The answer isn’t likely to look like the ones that were developed more than 100 years ago; and shoehorning today’s challenges into that 20th-century mold may only make things worse. “Break them up” has the virtue of sounding simple, and all the vices of being simplistic. We have real issues that need creative thinking; the regulations of the past, which didn’t work so well even then, are not an answer.

### 2NC – tech competition robust

#### There’s unprecedented productivity growth, innovation, and new firm entry in the tech industry

**Petit 21** – Nicolas Petit European University Institute, Florence. David J. Teece, Institute for Business Innovation U.C. Berkeley and Berkeley Research Group Institute

Nicolas Petit and David Teece, “INNOVATING BIG TECH FIRMS AND COMPETITION POLICY: FAVORING DYNAMIC OVER STATIC COMPETITION,” July 2021, https://ssrn.com/abstract=3229180

The rise of Big Tech firms is having the welcome effect of causing a resurgence of interest in industrial organization. The emerging scholarship is mixed. On the one hand, there is a tendency to treat big tech firms as different because innovation in general (both technological and business model), and technical inputs in particular (big data, intelligent algorithms, and skilled engineers), clearly impact market structure and economic performance. On the other hand, industrial age explanations like monopoly power, anticompetitive leveraging, and predatory mergers are often used to supply theories for the durability and diversification of big tech firms. There is little or no mention of the role of entrepreneurship and management or of new operating models which deliver value in new and better ways.

We are skeptical about the power of these narratives to account for the totality of the competitive circumstances at hand. Our skepticism is aroused by the record of the big tech firms.2 There are many indicators suggesting that dynamism, not a base of monopoly power, is what is at work. The digital economy shows unprecedented productivity growth, rapid innovation, and new firm entry. In consumer digital goods and services in telecommunications and broadcasting, output has risen, quality has increased and prices have declined (Byrne and Corrado, 2020). This state of affairs could not reasonably exist if big tech firms were dominant players that suppressed competition by using scale, supposedly like the large iron, oil and steel trusts of the industrial age. Admittedly, it is theoretically possible that absent big tech firms, the development and growth of the digital sector would be even higher, and welfare benefits greater. However, proponents of the monopoly argument are yet to articulate the “but for” ideal world that they imply would otherwise exist.3 Our intuition thus, strays, from the monopoly explanation. Instead, we might be observing a group of diversified big tech firms coexisting and competing in oligopoly with each other vigorously, and with new and adjacent firms entering the fray from time to time. One of us referred to this broad-spectrum competition as the “moligopoly” hypothesis (Petit, 2020). A similar interpretation was given in 2021 by The Economist, which noted that monopoly explanations were “getting harder to sustain” as digital markets in the US are “shifting towards oligopolies in which second and third firms compete vigorously against the incumbent” (The Economist, 2021).

#### Tech firms face constant pressure to do R&D and release new features

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(Maurits Dolmans and Tobias Pesch, “Should we disrupt antitrust law?” 2018, https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf)

Indeed, so-called “digital monopolists” do not enjoy a “quiet life” like classical monopolists. The constant innovation suggests there is plenty competitive pressure.29 This suggests that there could in fact be both strong competition (between online firms, and between online and offline firms) and increased concentration. If so, intensified competition enforcement based on an assumption of inadequate competition may not be the answer. Breaking up online firms may not increase competition either.30

First, large platforms engage heavily in R&D and release new features constantly.31 If we (threaten to) break them up, we reduce incentives to keep innovating.

Second, under the modern consumer welfare standard, competition law is primarily concerned with controlling abusive conduct. “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices–at least for a short period–is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.” 32 A concentrated market structure alone does not warrant intervention.

Third, it is by no means clear how a break-up could be achieved without undermining two-sided business models (for instance, when separating advertising from a service) or even undermining the benefits of vertical integration; or whether breaking up would have any effect (where there are no causal links between market power in one area and activities in another). A split could in fact reduce competition, for instance, if a market platform provider like Amazon were prohibited from itself selling products online.

Fourth, international law and comity stand in the way: could a US authority break up Baidu or the EU break up Facebook? This extraterritorial exercise of jurisdiction would create legal issues and international tension.33 Breaking up Western IT firms while leaving Chinese or Indian firms untouched is not a solution either, since it could skew online competition in the long term.

Finally, and most importantly, it is unclear whether breaking up digital companies would be a solution at all. If it is true that they benefit from network, scale, and scope effects, and “winner takes all” or “tipping” dynamics, one of the successor entities would simply regain the market share of their former parent company.34 That process of eliminating efficiencies is at best inefficient with little social and political benefits, and at worst leads to capital destruction and undermines trust in Government.

#### Tech outcompetes other sectors in competitiveness – all metrics run counter to monopolistic behavior

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Matthew Lane, 7-29-2019, "How Competitive Is the Tech Industry?," https://www.project-disco.org/competition/072919-how-competitive-is-the-tech-industry/

How competitive is the tech industry?

These traits of the tech industry make measuring competition challenging. By some metrics, competition is poor. By others, competition is robust. Some tech companies tend to be very different from each other as a whole but can compete vigorously in different product or service categories. For example, Android has by far the biggest overall install base, but Apple seems to own the high income market. This could be why average app revenue has been much higher on iOS. This nuance means that there is much stronger competition for app developers than one would expect from looking purely at shares of mobile operating system installs.

New companies have also been able to carve out successful markets and challenge established tech firms in specific categories. The Atlantic called TikTok the biggest star of YouTube’s VidCon, and perhaps for good reason. It’s the third most installed app worldwide. Indeed, it was TikTok that gave us the summer’s biggest hit – Lil Nas X’s Old Town Road. The song was originally released independently and gained its popularity on TikTok. That led to a deal with Columbia Records, and now the single is dominating worldwide.

Other young companies are bringing fierce competition to narrow products that may generally be seen as features in other companies’ offerings. Dropbox, for example, is a successful cloud backup and file sharing company. There are cloud storage services provided by Apple, Google, and Microsoft as part of other products, and yet Dropbox still managed to double its revenue to $1.2 billion from 2015 to 2018. Slack is also doing well providing what is essentially just a messaging platform, something that has been offered as part of other services since AOL Instant Messenger. But Slack focused on a new experience, providing the simplest and easiest way for teams to collaborate and engage in high volume chat. Microsoft has made a strong push to compete by bundling its messaging service with Office 365, but Slack CEO Stewart Butterfield said he wasn’t worried and compared the effort to Bing or Google+.

Tech doesn’t display the typical symptoms of monopolies

There is one other problem with writing big tech off as simple monopolists. Monopolists are generally known for their laziness, it’s one of the key consumer harms antitrust laws seek to protect against. Their quality drops, their prices rise, and they innovate less. There is very little motivation for a company to develop and release a new product when consumers have no choice but to buy their current product.

However, the biggest R&D spenders worldwide are fairly consistently large tech companies. Amazon and Alphabet top the list with Apple, Microsoft and Facebook not far behind. What’s more, many of these companies greatly increased their R&D spend from 2017 to 2018. Amazon’s R&D spend jumped from $16.1 billion to $22.6 billion, and Facebook’s from $5.9 billion to $7.8 billion. So if these companies face no competition, what are they spending to get ahead of? Amazon and Google are also the most loved brands of 2019, which doesn’t seem to indicate that they are skimping on quality or charging outrageous prices. Michael Mandel of the Progressive Policy Institute found that tech seemed to outperform the rest of the private sector on certain competitive factors.

What does this data tell us? One answer could be that big tech is afraid of being replaced by the next big thing. New technologies can claim markets in ways that are hard to predict and the innovation process usually brings disruptive new products and services to the markets. Voice assistants, for example, could replace many searches that consumers would ordinarily do through the search bar. [1] [2] Or maybe they won’t, and it will be a different technology that incumbents have to worry about. It could even be something that seems straight out of science fiction, like Elon Musk’s company that promises to build direct computer-brain interfaces.

BBC writes about another rising competitor – applications. Many companies are creating apps with new ways of interacting with data, like Tinder’s swipe function or Netflix’s recommendation engine. Companies like Uber and Lyft use their own algorithms to match drivers and riders. These applications allow access to information directly and used without any assistance from other internet onramps like Google Search, meaning less search bar searches are needed.

Maybe the main reason big tech seems so unbeatable is that they continue to compete based on the fear that they will get replaced in the same way they unseated other companies to get where they are now. Whether real or imagined, having companies compete to stay where they are isn’t a bad thing for consumers as long as they aren’t blocking new companies from getting their chance to try to win the market.

#### Their stats underestimate the *inherent instability* of tech dominance

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Iain Murray and Ryan Khurana, 2-21-2018, "Competition In Technology Is More Vibrant Than It Looks," Investor's Business Daily, <https://www.investors.com/politics/commentary/competition-in-technology-is-more-vibrant-than-it-looks/>

At first glance, digital markets do seem fairly concentrated in just a few companies. Facebook owns the top three social media apps: Facebook, WhatsApp, and Messenger, all of which exceed 1 billion unique monthly active users. The company captures 20.9% of total U.S. digital ad revenue, putting it only behind Alphabet's 42.2%. And given the fast growth rate of Amazon, this looks like it is only a matter of time before the three control the entire market.

Viewing these numbers in perspective, however, makes the picture a lot more complicated.

Apple's native iMessage service, which does not show up in social media download statistics, shows much higher user engagement than Facebook Messenger, especially among younger demographics. Facebook is actually competing in messaging with a company whose interface it depends upon to gain access — and Facebook is losing.

This reveals one of the difficulties in seeing who is competing against whom online. Facebook competes not only against other social media sites like Snap, but also against the likes of Google, Apple, and Microsoft in various domains. Online competition requires the firm to provide for a variety of user demands — or cede ground to rival startups. Unless a firm like Apple can provide a messaging service that its users enjoy, it would allow Facebook to gain ground, which weakens the long-term prospects of Apple's business.

These "platform wars" mean that competition between tech giants takes place over many different products and services, at various tiers. To understand the level of concentration properly, one cannot specify the market too narrowly. While Snapchat has less than one third of Instagram's users, those under the age of 25 use Snapchat much more heavily.

Taking a snapshot of one moment does not tell you about how demographics will affect market position in the next.The competition is fierce. Today's startups are tomorrow's giants, just like Facebook and Amazon once were — and not very long ago.

That means the current market positions of Big Tech firms are inherently unstable, despite the best efforts of these firms to prepare for the future. Facebook's attempt to kill off Snapchat with its Camera app is now regarded as a failure, as is Google's attempt to kill Facebook with Google Plus, and Amazon's attempt to branch into mobile with the Fire phone.

Having lots of data and users is not enough for these companies to branch out into new territories. If platforms fail to develop ecosystems that adapt to user demands, they can fall from seemingly dominant positions rapidly — as recent history amply demonstrates.

When the competitive pressure on these firms is put into perspective, they look less dominant. Amazon currently makes 2.5% of U.S. digital ad revenue compared to Alphabet and Facebook's near 70%, but looking at total U.S. ad revenue shows these firms together make only 20%.

Just consider that if tech giants are increasing their revenues to the detriment of newspapers, it still exaggerates the concentration to neglect newspapers' print ads entirely. It is also possible that some recent decisions, such as Facebook's news feed changes, will drive away users in the long-term. This is a dynamic market.

## Innovation DA

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#### Timeframe—Immediate implementation is bad—it undermines the economic recovery—turns case

Jan Rybnicek is Counsel in the antitrust practice of Freshfields Bruckhaus Deringer and a Senior Fellow at the Global Antitrust Institute at Antonin Scalia Law School at George Mason University, February 12, 2021, Op-ed: Recent antitrust proposals could ‘throw sand in the gears’ of economic recovery by stalling M&A, https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html

Last year, some in Congress called for a merger moratorium banning all M&A during the pandemic. Then, in a surprise announcement, the FTC — over the objection of two commissioners — said it would no longer quickly approve the vast majority of transactions notified to the government that cannot plausibly reduce competition. Most recently, Senator Amy Klobuchar, D-Minn., introduced antitrust reform legislation that would give the government even greater power to block M&A it deems problematic.

While these proposals are well-intentioned, they threaten to throw sand in the gears of the economy and to do far more harm than good. Adding friction to M&A activity has the potential to stall capital markets, reduce innovation and investment, and frustrate economic growth. And it does so at precisely the wrong time — when the nation is attempting an economic recovery during an ongoing global pandemic that has upended how we work.

Antitrust has seized lawmakers’ interest like no other time in modern memory. Senator Klobuchar’s legislation is the most ambitious attempt to reform the antitrust laws in nearly half a century. A key focus of the bill is to make it even easier for the federal antitrust authorities — the Federal Trade Commission (FTC) and the Department of Justice (DOJ) — to intervene in private parties’ dealings by blocking M&A that they decide will harm competition.

Under existing law, the antitrust agencies must convince a judge that a deal is likely to substantially lessen competition in order to obtain an injunction preventing the transaction. The agencies bear the burden in proving their case. That typically has not been too tall an order. While reviewing a government challenge to a small grocery store merger and lamenting the internal contradictions in antitrust law, Supreme Court Justice Potter Stewart once observed that the only thing consistent about merger litigation is that the government always wins.

Over the last several decades, antitrust has become a more principled body of law through the incorporation of economics and a focus on promoting consumer welfare, but one thing has not changed: the government still nearly always wins.

Reform advocates would have you believe that the FTC and DOJ show up in court on a wing and a prayer and rarely are able to convert the power and credibility of the federal government into merger litigation victories. But reality is far different. The government has no problem blocking mergers it believes are problematic. Over the last 20 years the DOJ and FTC have prevailed in nearly 85% of merger challenges. That is a record any litigator would envy. And the government’s win-rate only improves when looking at more recent cases. In fact, after the DOJ or FTC challenge a merger, companies more often than not abandon their deal before trial because the legal standard is so favorable to the government. This even includes successful challenges against deals involving the acquisition of a nascent firm that does not compete against the acquirer today but, in the government’s view, could in the future, such as the DOJ’s recent success in blocking Visa’s purchase of fintech upstart Plaid.

Senator Klobuchar’s legislation would put the thumb on the scale even more in favor of the government. It would lower the legal standard and allow the government to stop any deal that raises even an “appreciable risk of materially lessening competition.” It also would create presumptions against large deals that do not even involve competitors. Most significantly, the legislation flips the traditional burdens of proof on their head and requires defendants to prove that their deal should be allowed to close. In light of the disadvantages companies already face when confronted with government opposition, such changes are unwarranted, unless you believe the government is infallible and should win 100% of its cases.

Giving the government greater discretion to intervene in deals would add unnecessary friction to the M&A market and reduce the types of investments that have fueled U.S. economic growth, including in the many startups whose founders and investors develop new and innovative products in part due to the prospect of exit through M&A.

#### Magnitude—Unbridled tech competition erodes firebreaks with China and Russia--leads to nuclear escalation

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(Michael, :A Strategy for Reducing the Escalatory Dangers of Emerging Technologies,” December, <https://www.armscontrol.org/act/2020-12/features/strategy-reducing-escalatory-dangers-emerging-technologies>)

The level of risk associated with the military exploitation of cutting-edge technologies cannot be separated from the geopolitical context in which this process is occurring, given that the principal enablers of such weaponization—China, Russia, and the United States—perceive themselves to be engaged in a competitive struggle for military advantage at a time when war among them is deemed entirely possible. Under these conditions, all three countries are enhancing their capacity for what the Pentagon calls “high end” warfare, or all-out combat among the modern, well-equipped forces of their adversaries—combat that is expected to make use of every advance in military technology.

The U.S. military leadership first described this evolving environment in its National Defense Strategy of February 2018. “We face an ever more lethal and disruptive battlefield, combined across domains, and conducted at increasing speed and reach,” it stated. “The security environment is also affected by rapid technological advancements and the changing character of war. The drive to develop new technologies is relentless…and moving at accelerating speed.”1

If the United States is to retain its technological edge and prevail in future wars, the leadership asserted, it must master these new technologies and incorporate them into its major military systems.

A very similar outlook regarding the strategic environment is embedded in Chinese and Russian military doctrines. In language strikingly similar to that of the U.S. strategy, but in mirror image, China’s July 2019 white paper on national defense asserts that the United States “has provoked and intensified competition among major countries, significantly increased its defense expenditure, pushed for additional capacity in nuclear, outer space, cyber, and missile defense, and undermined global strategic stability.” If Chinese forces are to prevail in this environment, it states, “greater efforts have to be invested in military modernization to meet national security demands.”2 Russian doctrine makes similar claims and places equal emphasis on the utilization of emerging technologies to ensure success on the battlefield.3

The modernization and enhancement of front-line conventional forces are common themes in the military doctrines of all three countries, but so also is the modernization of strategic nuclear forces. All three are engaged in costly upgrades to their nuclear delivery systems, in some cases involving the replacement of older ICBMs, bombers, and missile-carrying nuclear submarines with newer, more capable versions. More worrisome still, all three are developing nuclear warheads for use in nonstrategic scenarios, for example, to defeat an overpowering conventional assault by an adversary. This is an explicit goal of the Nuclear Posture Review adopted by the Trump administration in February 20184 and is believed to figure in Russian military doctrine. China is less transparent about its nuclear weapons policies, but is known to have developed nuclear warheads for its medium- and intermediate-range ballistic missiles designed for use against U.S. and allied forces in the Asia-Pacific region.

The Eroding Nuclear Firebreak

In light of these developments, many analysts believe that the barriers to nuclear weapons use have been substantially eroded in recent years. Most of these obstacles were erected during the Cold War era, when leaders of the United States and the Soviet Union came to realize that any nuclear conflict between them would result in their mutual annihilation, impelling them to devise a variety of measures intended to prevent a conventional war from escalating across the “firebreak” separating non-nuclear from nuclear combat. These measures included the “hotline” agreement of 1963; successive limitations on the size of each other’s nuclear arsenals, beginning with Strategic Arms Limitation Talks agreement in 1972; and the Intermediate-Range Nuclear Forces Treaty of 1987. In the language of the time, these measures were designed to preserve “strategic stability” by eliminating the risk of accidental, inadvertent, or unintended escalation across the nuclear firebreak.

In today’s strategic environment, however, analysts fear that strategic stability is being undermined by changes in the nuclear doctrines of the major powers and by the introduction of increasingly capable non-nuclear weapons. These developments include, on one hand, the adoption of policies envisioning the use of “tactical” or “nonstrategic” nuclear arms in response to overwhelming non-nuclear attack by an adversary, and, on the other, the deployment of sophisticated cyber and conventional weapons thought capable of locating and destroying an adversary's nuclear combat capabilities, especially its nuclear command, control, communications, and intelligence (C3I) systems. Also contributing to this environment of instability, analysts warn, is the dissolution of the arms control regime established by the two superpowers during the Cold War era and the emergence of India and Pakistan as major nuclear weapons powers.5

None of these countries would deliberately choose to initiate a nuclear exchange, recognizing that the costs of doing so in terms of homeland devastation would be so high. Yet, they have adopted military doctrines that emphasize non-nuclear attacks on their adversary’s critical military assets—radars, missile batteries, command centers, and so on—at the very onset of a conflict. In most cases, these assets are primarily intended for conventional operations, but some also house nuclear C3I facilities or perform dual-use functions, both conventional and nuclear—a situation described by James M. Acton as “entanglement.” If these dual-use or co-located facilities come under attack, the target state might conclude this was the prelude to a nuclear strike and decide to launch its own nuclear munitions before they could be destroyed by its adversary’s incoming weapons. “Entanglement,” says Acton, “could lead to escalation because both sides in a U.S.-Chinese or U.S.-Russian conflict could have strong incentives to attack the adversaries dual-use C3I capabilities to undermine its non-nuclear operations.”6

With all these countries fielding ever more capable conventional weapons and embracing nuclear policies that authorize the use of nuclear weapons in response to severe non-nuclear threats, the risk of such scenarios is bound to increase under any circumstances. Worse still, these dangers are being further amplified by the utilization of emerging technologies for military use. Such technologies pose an added threat to the durability of the nuclear firebreak by multiplying the types of non-nuclear attacks that can be launched on critical enemy assets and by increasing the vulnerability of nuclear C3I systems to non-nuclear attack.

The Risk of Nuclear Escalation

The pathways in which militarized emerging technologies could increase the risk of nuclear escalation can be summarized in four areas.

First, increasingly capable air and naval autonomous weapons systems equipped with advanced sensors and AI processors could be deployed in self-directed “swarms” to find and destroy key enemy assets, such as surface ships and submarines, air defense radars, anti-air and anti-ship missiles, and major C3I facilities. To an adversary, such attacks could be interpreted as the prelude to a nuclear first strike, especially if they result in the destruction of nuclear C3I systems co-located with non-nuclear C3I facilities, prompting it to launch its own nuclear weapons for fear of losing them to enemy weapons.7

Second, multiple strikes by hypersonic missiles could be used early in a conflict to destroy key enemy assets like those described above, again causing the target state to fear that a nuclear strike is imminent and cause it to launch its own nuclear arms. This danger is multiplied by the fact that the flight time of hypersonic missiles is extremely brief and that many of these weapons now being developed by the major powers are designed to carry a nuclear or a conventional warhead, leaving a target country in doubt as to an attacker’s ultimate intentions, especially if key C3I facilities are degraded, preventing senior leaders from knowing the nature of the attack and inclining them to assume the worst.8

Third, just before or at the very onset of a conflict, a belligerent could launch a cyberattack on its adversary’s early-warning and C3I systems, hoping thereby to degrade that country’s ability to resist a full-scale assault by conventional forces. Because many of these systems are also used to warn of a nuclear attack and to communicate with nuclear as well as conventional forces, the target country’s leaders might conclude they are facing an imminent nuclear attack and order the immediate launch of their own nuclear weapons.9

Fourth, as the speed and complexity of warfare increases, the major powers are coming to rely ever more heavily on AI-empowered machines to sort through sensor data on enemy movements, calculate enemy intentions, and select optimal responses. This increases the danger that humans will cede key combat decision-making tasks to machines that lack a capacity to gauge social and political context in their calculations and are vulnerable to hacking, spoofing, and other failures, possibly leading them to propose extreme military responses to ambiguous signals and thereby cause inadvertent escalation. With machines controlling the action on both sides, this danger can only grow worse.10

These are some of the major pathways to escalation that are being created by the weaponization of emerging technologies, but other pathways of a similar nature have been identified in the academic literature and are likely to arise as these technologies are pressed into military service.11

#### Our impx is bigger--Chinese AI dominance is the death knell of global peace – triggers great power wars

Allison 20 **–** Professor of Government, Harvard Kennedy School

Graham Allison, August 2020, "Is China Beating the U.S. to AI Supremacy?," Belfer Center for Science and International Affairs, <https://www.belfercenter.org/publication/china-beating-us-ai-supremacy>

An AI Arms Race?

During the Cold War, the stakes in the nuclear arms race with the Soviet Union were obvious. In today’s Thucydidean rivalry between a meteorically rising China and a colossal ruling United States, what are the risks of an escalating AI arms race?

Like it or not, future war will be AI-driven. As Secretary of Defense Mark Esper recently noted at the conference of the National Security Commission on AI, “Advances in AI have the potential to change the character of warfare for generations to come. Whichever nation harnesses AI first will have a decisive advantage on the battlefield for many, many years.” AI’s ability to accelerate decision cycles in conflict will compel militaries to adopt it. In air-to-air combat, pilots begin with an ooda loop: observe, orient, decide, act. If A can “get inside B’s OODA loop,” A wins—since he can maneuver to escape A’s fire and attack where he calculates B’s path will leave him when A’s missile arrives. Because AI can observe, orient, decide and act at multiples of a human pilot, it will become irresponsible to send a human pilot into battle with an AI piloted aircraft.51 As former Chairman of the Joint Chiefs of Staff Joeseph Dunford put it: “Whoever has the competitive advantage in artificial intelligence and can field systems informed by artificial intelligence, could very well have an overall competitive advantage.”52

The demonstrated success of AlphaGo, and more recently, AlphaStar, in defeating all competitors in one of the world’s most complex real-time strategy video games suggests that in any structured contest between offense and defense, AI will dominate humans. The company, country or team with the best AI will win. As an example, consider American football. In what commentators often discuss as a “chess match,” the offense and defense coordinators know that if the defense guesses correctly whether the next play will be a pass or a run, most nfl teams’ defenses can successfully stop most opponents’ offense. Reading all the variables in a situation, AI should be able to tilt the scales on the field—or in analogous military competitions on land, sea, and in the air and space.

The domain’s leader will also be the first to know which of today’s military mainstays AI will upend. Germany discovered the power of submarines before World War I because it led in their development. British admirals did not wake up to their deadly efficiency until a lone German U-boat in 1914 sank three armored cruisers on a single morning. By then, it was too late—the British had already invested their treasure in building battle fleet that had become largely obsolete. The coordination of drones and cruise missiles that successfully attacked Saudi Arabia’s most valuable target and cut its oil exports by half is suggestive. Will AI-empowered drone swarms make aircraft carriers equally obsolete, all for one one-thousandth of the cost? Will AI analysis of data from all sources pierce the invisibility of stealthy systems like the F-35 in which the United States has invested so substantially? The first country to know will be the one driving the research and development frontier.

#### Link alone turns case – big companies will use the aff’s expanded liability to screw over competitors—

Dorsey et al., Associate at Wilson Sonsini Goodrich, ‘18

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.39 Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys’ fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant’s ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival’s resources for years — thereby crippling a rival and diminishing the amount of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.41 The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

#### Tech giants will expand into the finance—regulatory is determining factor

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Ryan Jones and Pinar Ozcan, "Rise of BigTech platforms in banking," Saïd Business School at the University of Oxford, Industry Paper 1, 2021, <https://www.sbs.ox.ac.uk/sites/default/files/2021-02/Rise%20of%20BigTech%20Platforms%20in%20Banking%20-%20Oxford%20White%20Paper%20Final%20%28002%29.pdf>

Banks, and in particular current accounts, can be viewed in many ways as a platform model of the 20th century. Incumbents, who provide free current account services to consumers, have long boasted of their number of products per customer (PPC) – quoted as high as 6 for premier account customers of leading UK banks. This has been fostered by a relationship built around the current account platform from which additional services are bundled to create both economies of scale and scope. This in turn has **become the expectation** of consumers who want a **one-stopshop** for financial needs, creating a barrier for new entrants. This barrier has proven hard to navigate for FinTechs whose innovation focuses in one area of the banking ecosystem.

While all informants agree that the traditional disruptive path is significantly constrained and reshaped by the regulatory context, it is also clear that a platform business model is particularly suitable for financial services.

Having seen the impact of BigTech in other industries, the banking industry is understandably keeping an eye on the **potential for BigTech** to deploy their platforms in banking. Amongst our informants, some saw this as a matter of time, whilst others doubted it would happen at all, with the cost of regulation commonly cited as the largest barrier. Interestingly, even among those who saw entry as a certainty, **none considered that it was already happening** – this is supported by the fact that no BigTech company has yet acquired a full banking license in the UK. However, **this should not fool anyone**. Over recent years there has been **significant activity** from BigTech players in **banking-related services**, resurfacing and reiterating the question of where banking **starts and ends.**

As shown in the table above, BigTech are **actively broadening** their platforms into a **number of areas** of the financial ecosystem, in particular payments. This may partly be due to the lower regulatory burden of payments; as one insider put it – e-money license holders can ‘zip around like bugs’ compared with more heavily regulated deposit-takers. Another potential reason is datafication. Access to the payments network provides a vast amount of new data on consumer preferences and buying habits, which can be coupled with existing platform data to enrich BigTech’s understanding of its customers and create new opportunities for monetisation and lock-in.

As well as acquiring new sources of data, activity in financial services to date is also offering BigTech the opportunity to **further monetise** their existing data stacks. Amazon’s extension of credit to businesses on the platform via Amazon Lending, launched in the US in 2012 and in the UK in 2015, is a prime example. Amazon already has **unrivalled access to data** on its seller community. As the sole source distributor for many of its merchants, Amazon already knows product type, quantity and, importantly, revenue generation of each seller per month. This information can be used to profile sellers’ ability to pay and extend credit on a targeted basis, **far better** than a bank could without access to similar data. From this advantage, Amazon can begin to use this data to learn more about risk modelling and other core areas of banking. The same dynamics are true of Facebook and the social media platforms, who capture **swathes of data** on individuals that can be collated with payments and other financial data to create new and innovative bankingproducts.

Entry into these, perhaps peripheral, areas of the banking bundle could be the extent of BigTech’s ambitions in banking. However, they appear to be the start of a **broader envelopment**. While troubled in its execution, Facebook’s closed libra ecosystem has the mission to ‘enable a simple global payment system and financial infrastructure that empowers billions of people’3 . It has since attracted a significant amount of debate and regulatory attention from both the Federal Reserve Bank and the Bank of England, among others. Similarly, Google has announced it ambitions to enter the US ‘checking account’ market with an anticipated consumer launch during 2021. This **gradual participation** in banking services in many ways **mirrors the classic disruptive path** described by the innovator’s dilemma (Christensen, 2003). BigTech’s acquisition of elements of the banks’ bundle could represent a **similar path to market domination**. Ceding markets that they previously dominated may leave incumbents open to a fuller platform envelopment by BigTech in their most profitable services, such as mortgages and consumer credit. This trend is also evident in the table above by the number of lending and credit services already offered by BigTech.

#### Antitrust scrutiny deters investment in finance---wards away big tech

Pedersen 20 – Brendan Pedersen covers federal bank regulation and fintech policy for American Banker

Brendan Pedersen, "Congress's scrutiny of tech giants could be blessing and curse for banks," American Banker, 10-13-2020, https://www.americanbanker.com/news/congresss-scrutiny-of-amazon-google-could-be-blessing-curse-for-banks

WASHINGTON — A Democratic proposal to reform antitrust law to limit the reach of the largest technology firms may hearten banks, but analysts say the financial services sector is not immune from a revived focus on breaking up megacompanies.

In the sweeping 400-page report by the House Judiciary Committee’s antitrust law subcommittee, lawmakers laid out a sweeping case for reforming laws that allow the colossal growth of just a handful of tech giants: Amazon, Apple, Facebook and Google.

“To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons,” the report said, adding later that “the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform.”

The U.S. banking industry has long worried about the financial ambitions of leading tech firms and even the possibility that one of the four Big Tech giants could charter or acquire a bank with significant competitive advantages at the expense of traditional financial services firms. While none of the four companies have applied for banking powers, past reports have circulated of Google and Amazon being among those having engaged with bank regulators.

The report authored by subcommittee staff did not specifically focus on the tech giants' financial services aims, but rather on how their global reach and impact on sectors like the news media could threaten democratic norms.

But observers said tighter restrictions on acquisitions by tech leaders could put them on more equal footing with banks and even discourage their potential interest in acquiring financial technology startups. The report also appears to validate the regulatory regime for bank parents as a potential model for reining in growth of the tech sector.

“A more aggressive antitrust stance would reduce the likelihood that those companies get even deeper into financial services, so it protects some turf for banks that don't have to compete with a Bank of Amazon or an Apple Bank,” said Jeremy Kress, an associate professor of business law at the University of Michigan.

#### Blockchain key to prevent snap financial collapse

Furber 19 – Sophia Furber is a journalist with S&P Global Market Intelligence, where she leads EMEA fintech and banking tech reporting, citing Brian Behlendorf, executive director of Hyperledger

Sophia Furber, "Blockchain could prevent rerun of 2008 banking meltdown, says tech veteran," S&P Global Market Intelligence, 6-28-2019, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/blockchain-could-prevent-rerun-of-2008-banking-meltdown-says-tech-veteran-52534233

The aftermath of the 2008 global financial crisis would have been considerably less chaotic if banks had used blockchain to keep track of complex derivative trades, according to technologist Brian Behlendorf, executive director of Hyperledger.

Hyperledger, a global cross-industry group that aims to advance the use of blockchain technologies, is an initiative of the The Linux Foundation and counts major global banks including Deutsche Bank AG, JPMorgan Chase & Co. and Citigroup Inc. among its members.

More than the crash in the U.S. housing market, it was what happened next with the vastquantity of credit derivatives that really tipped the financial system into crisis, Behlendorf said.

At the height of the global financial crisis in October 2008, the collapse of Lehman Brothers Holdings Inc. triggered hundreds of billions in credit default swap, or CDS, protection payouts, but because the derivative instruments had been bought and sold **so many times**, it was **difficult to** know who was liable to pay out.

'A crisis of paperwork'

"This was not a crisis of over-exuberance. It was a crisis of paperwork," Behlendorf said in an interview. "It showed the fallibility of [banks'] digital systems. There was not an automated systematic record of who owned what, and banks were slow to respond."

Using blockchain would have meant that banks had a common system of record for instruments such as swaps, which could have resulted in a more "orderly unwinding" of contracts, he said.

There is a strong case for using blockchain in the parts of a bank that deal with settlements, clearing and trading, as this could help to prevent a re-runof the events of 2008, he said.

Until February this year, Hyperledger had been chaired by Blythe Masters, the JP Morgan banker widely credited with inventing the credit default swap in the 1990s. Following her career in banking, Masters has emerged in recent years one of the most vocal advocates for the use of blockchain in the world of finance and spent four years as CEO of blockchain services firm Digital Asset Holdings, LLC before stepping down in February this year, citing personal reasons.

Masters has taken a step back from Hyperledger for the time being for health reasons, according to Behlendorf.

The global CDS market has shrunk considerably since the days of the global financial crisis: outstanding notional amounts of CDS contracts stood at $8 trillion at the end of the first half of 2018, compared with $61.2 trillion at the end of 2007, according to the Bank for International Settlements.

But beyond the infamous CDSs, the global derivatives market is still vast — and growing. The notional outstanding value of over-the-counter derivatives stood at $595 trillion as of end-June 2018, up from $532 trillion at end-2017, according to the BIS.

#### Sustained economic depression triggers world war

Walt 20 – Stephen M. Walt is a columnist at Foreign Policy and the Robert and Renée Belfer professor of international relations at Harvard University.

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

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

#### Antitrust liability is uniquely chilling to firms—treble damages increase the potential cost of all conduct and undermines industry dealmaking

Delrahim, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, ‘20

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is “exclusionary” or “predatory” in nature. I will focus on so-called “exclusionary” conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term exclusionary conduct in antitrust law is potentially misleading because there is a difference under the Sherman Act between “lawful” and “unlawful” conduct that results in exclusion of a competitive alternative. In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn “exclusionary” conduct that is driven by competition on the merits such as innovation. Most obviously, legitimate competition on the merits can be “exclusionary” in the sense that consumers choose a superior product or service. That conduct does not violate Section 2. By comparison, conduct that “excludes” a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.

When courts police the line between lawful and unlawful “exclusionary” conduct, a few themes emerge.

First, courts have recognized that not every type of conduct that may enhance a business’s market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position. The Supreme Court held that the claim did not satisfy Section 2 as a matter of law. That is because the claim would condemn a monopolist’s refusal to share its resources and effectively would create an antitrust duty to help a competitor. Such a duty, the Court explained, is in “tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” The Court applied a legal rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of “false positives” or condemnations of lawful pro-competitive conduct. As the Court has explained, “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” Judge Robert Bork, in his famous Antitrust Paradox, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that “[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed.”

This backdrop helps frame the question whether a unilateral refusal to license a lawful patent on “FRAND” terms after committing to do so constitutes a form of unlawful exclusionary conduct. A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct.

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the “exclusion” of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey. By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the “winning” technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.

This form of lawful and pro-competitive exclusionary conduct should not be condemned as unlawful under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on “FRAND” terms and engaged in so-called “hold-up.” That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are “FRAND.” I will explain why.

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on “fair,” “reasonable,” and “non-discriminatory” terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down “FRAND” by its component terms makes clear why this is so.

First, the Sherman Act does not police “fair” prices or competition; it protects the competitive process. Judge Easterbrook once asked, “Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When economic pressure must give way to fair conduct . . . rivals will trim their sails”; introducing conceptions of “fairness” into the Sherman Act “is to turn antitrust law on its head.”

Second, having undertaken a contractual duty to charge “nondiscriminatory” rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination; indeed, in some circumstances price discrimination may be pro-competitive.

Third, the Sherman Act does not authorize courts to determine “reasonable” licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would “require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. Transforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and the patent laws themselves, both of which serve the same goal of increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in Trinko, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in Novell v. Microsoft, following Trinko, a monopolist’s refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a “presumably profitable course of dealing between the monopolist and the rival” and that termination is “irrational but for its anticompetitive effect.”

I would note that then-Judge Gorsuch’s standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the Trinko case. The brief stated:

Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival, the inquiry into whether conduct is “exclusionary” or “predatory” requires a sharper focus. In that context, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms. An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme. It logically follows that there is no antitrust liability for proposing to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly “deceives” an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder’s profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of “FRAND” and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of “FRAND.” Because both patent-holders and licensees participating in a standard-setting process recognize that the proper “FRAND” rate will be determined after the fact—in court, if necessary—there is therefore no meaningful ex ante “deception” that should give rise to an antitrust claim.

To be sure, having one’s technology incorporated into a standard, in some circumstances, may increase a patent-holder’s market power. The same could be said, of course, about a monopolist’s refusal to deal with a rival who might gain market share if it had access to the monopolist’s inputs. Even if this occurs as a result of a patent holder’s so-called “deception” about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would “require[] the court to assume the day-to-day controls characteristic of a regulatory agency.”

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

#### Plan is the first and only statutory change in over 50 years—even minor changes signal to courts that they have to favor plaintiffs

Tracy 21– Ryan Tracy and Brent Kendall, tech and legal reporters, respectively, in WSJ’s Washington Bureau

(Ryan Tracy and Brent Kendall, 3-12-2021, "Antitrust Law: What Is It and Why Does Congress Want to Change It? ," WSJ, <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>)

U.S. antitrust laws date back more than 130 years and affect every part of the economy. Democrats and Republicans are now considering the most significant changes in decades. Here's what you need to know about what might be coming:

What is antitrust law?

Antitrust laws are designed to protect and promote competition, guided by the principle that consumers are better off when companies battle for their business by offering better services and prices.

The laws date to the 1890 Sherman Antitrust Act, when powerful monopolies (then known as "trusts") in industries such as oil and railroads exercised huge influence over American trade. These laws bar price-fixing, market-rigging, monopolistic practices and mergers that pose a substantial threat to competition.

Why does Congress want to update the laws now?

Both political parties have been galvanized by concern that the nation's giant tech companies -- including Alphabet Inc.'s Google, Amazon.com Inc., Apple Inc. and Facebook Inc. -- hold unchecked power over the economy and American society, and don't have any true rivals in the sectors they dominate.

Are Democrats and Republicans in agreement?

To a degree, but they have different perspectives.

Democrats say the tech giants are a symptom of a broader disease, pointing to studies showing many U.S. industries have grown more concentrated. With fewer competitors, they say, big companies are tilting the scales in favor of the rich and powerful by, for example, paying their workers less or shutting off a path to startups that could offer better products.

Republicans generally aren't convinced concentration is a problem in and of itself, pointing out that operating at a large scale can allow big companies to cut prices. But they do worry about it in some industries. In social media, many in the GOP say, a lack of competition for Facebook, Google's YouTube and Twitter Inc. empowers those platforms to treat conservatives unfairly. (The companies deny political bias.) Republicans also see increased antitrust enforcement as a better approach than direct government regulation of the marketplace.

What changes are they considering?

Some of the proposals are relatively modest, including bigger budgets and new civil penalty power for antitrust enforcers at the Federal Trade Commission and the Justice Department.

Lawmakers have also proposed changes to legal standards to make it easier for enforcers to halt proposed mergers and business practices that threaten competition. And some have called for moving some of the FTC's enforcement authority into the Justice Department, rather than having the agencies share power.

There is also a bipartisan proposal to allow local news outlets to join to negotiate with dominant platforms such as Google and Facebook.

What are some of the tougher proposals?

Some lawmakers are calling for measures that would force technology companies to break apart widely used digital platforms from other business lines. This could force Amazon to separate its online marketplace, or Google to split off its search engine. Both companies operate many other businesses.

Existing lawsuits by the FTC, Justice Department and states could result in similar consequences for Google, and could force Facebook to shed its Instagram and WhatsApp units, but those remedies are years away at a minimum.

I've read about something called self-preferencing. What is that?

That is a practice in which companies such as Amazon and Google use proprietary platforms to promote their own products and services over those offered by competitors.

While Republicans generally aren’t in favor of breaking up big companies, a handful of GOP lawmakers say they are so concerned about the conduct of big tech platforms that they would be open to restricting self-preferencing.

That could mean a mandatory separation of certain business lines, such as Amazon dividing its e-marketplace from Amazon-made retail products or Google splitting its search engine from maps or travel.

Are the tech companies fighting back?

Yes. The tech giants and other big businesses are poised to fight many of the measures, which they see as threats to their bottom lines. Facebook and Amazon spent more on lobbying in 2020 than any other U.S. corporations, seeking to influence legislation on antitrust and other matters. The tech giants say that they face vigorous competition forcing them to constantly innovate, and that they have acquired large market shares because consumers love their products—arguments that they are now making in court.

Supporters of existing antitrust law say the current rules are sufficiently flexible for addressing the challenges presented by evolving technologies and other developments in the modern marketplace. They also say the current approach strikes a fair balance between policing markets and giving companies significant room to maneuver in the rough-and-tumble business world.

So what might happen?

Members of both parties support larger enforcement budgets and the news-industry proposal. In concept, both sides agree there might be a need for so-called interoperability and data portability rules to create more competition in the tech sector. These would allow consumers to move more easily between competing online platforms by, for instance, posting on multiple social-media sites at once or moving their shopping histories from one marketplace to another.

Some Republicans have also said they would join Democrats in supporting changes to legal standards—especially if they are targeted at the tech sector. In addition to self-preferencing, one potential area for compromise between the parties is a proposal to raise the legal burden for mergers by companies with 50% or greater market share.

Republicans would support a consolidation of enforcement agencies, but Democrats don’t appear interested.

What would the changes mean?

Even if Congress acts on only a couple of middle-of-the-road proposals, it could mark the biggest substantive changes in decades, as courts have been reading current antitrust laws more narrowly. Very large companies could have trouble getting deals approved. Tech giants could have to divest themselves of certain business lines.

If lawmakers, for example, make slight changes to reinforce broad government authority to successfully challenge mergers that threaten consumers, “that would signal to the courts that merger enforcement is important and that doubts should not always be resolved in favor of defendants,” said Wayne State University law professor Stephen Calkins.

#### Any change has ripple effects throughout antitrust doctrine

Pearlstein 20 – former business and economics columnist for The Washington Post and the Robinson professor of public affairs at George Mason University

Steven Pearlstein, "Facebook and Google cases are our last chance to save the economy from monopolization," The Washington Post, 12-18-2020, <https://www.washingtonpost.com/business/2020/12/18/google-facebook-antitrust-lawsuit/>

Keeping a close eye on both the antitrust cases and the legislative debate will be the members of the Supreme Court, including six conservative justices who have a well-documented hostility to government regulation of business. The century-old Sherman and Clayton acts are remarkably spare and concise statutes, which has meant that most antitrust law has been judge-made, based on the precedents laid down in individual cases. Any antitrust reform that might come out of Congress, however, is certain to be much more detailed and prescriptive than those earlier laws. Not only would such legislation erode the power and discretion of the court, but it would also likely overturn a number of recent precedents that have made it much more difficult for regulators to limit the size and business practices of dominant firms.

All that could well be playing out in Congress just as the court considers the inevitable appeals in the cases of U.S. v. Google and FTC v. Facebook. And it would hardly be unprecedented if some members of the Supreme Court were to consider the political and legislative consequences as they decide the fate of two companies with whom most Americans interact on a daily basis.

A similar dilemma faced Judge Learned Hand of the U.S. Court of Appeals in 1945 as he considered U.S. v. Alcoa. After the longest federal trial in history — two years — a district court judge had ruled against the government’s request to break up Alcoa, declaring that the company had legally obtained its 90 percent share of the aluminum market. Hand himself was an antitrust skeptic. But in a memo to his fellow appeals court judges, Hand recognized that the public would not accept a highly technical ruling that any such monopoly was benign.

“If we hold that [Alcoa] is not a monopoly, deliberately planned and maintained,” Hand wrote, “everyone who does not get entangled in the legal niceties … will quite rightly, I think, write us down as asses.”

In the end, the appeals court ruled that Alcoa had illegally monopolized the market for aluminum, and Hand’s opinion became one of the most influential, and controversial, in the history of antitrust. The cases against Google and Facebook will be no less consequential or contentious.

#### Vertical merger restrictions are unnecessary and limit innovative capacity of firms

Hazlett 21 – H.H. Macaulay endowed professor of economics at Clemson University, and previously served as chief economist of the Federal Communications Commission

Thomas W. Hazlett, "Antitrust Activists Want to Go Full Throttle. Here's a Lesson They Should Consider First. ," Barron's, 7-29-2021, https://www.barrons.com/articles/antitrust-activists-want-to-go-full-throttle-heres-a-lesson-they-should-consider-first-51627509048?mod=hp\_LATEST

Big Tech is in the **antitrust hot seat**. But before the Department of Justice tries to break up companies like Google or Apple, it should **recall the history**, and eventual outcome, of the **AT&T -Time Warner merger.**

The DOJ expended **extensive time and resources** to stop AT&T’s acquisition of Time Warner, marking the department’s first challenge to a major vertical merger in over 40 years. The government was **unsuccessful** despite its best efforts, which included an appeal to the D.C. Circuit, and time reveals that its concerns were evidently misplaced all along. The merger **did not** result in **higher prices**, **program blackouts**, or even **any appreciable advantage** for the companies.

In October 2016 AT&T announced its plan to buy Time Warner. Donald Trump’s presidential campaign trashed the merger in a statement: “AT&T … is now trying to buy Time Warner and thus the wildly anti-Trump CNN. Donald Trump would never approve such a deal.” With Trump in office, the DOJ moved to block it.

In 2017, the DOJ went to court to complain that the merger would “substantially lessen competition in video” by allowing AT&T to “use Time Warner’s ‘must have’” networks like CNN, TNT, TBS, and HBO to raise fees charged to rival cable TV distributors like Comcast or DISH. AT&T, which had acquired national satellite operator DirecTV, could threaten “blackouts” depriving rival distributors of key programs—their subscribers would then quit and flock to DirecTV (AT&T) so as to keep watching CNN or the NBA Playoffs on TNT. Not only would major TV and cable systems be hurt, but emerging online streaming services would be crushed.

The government’s case focused on “**vertical leveraging**,” where a company uses two complementary products to make it more difficult for rivals to compete in the individual markets. Here, AT&T was combining video content creation with video program distribution; the allegation was that competitors in either segment might be hurt. Yet there are clear efficiencies to be had, as widely found in studies of vertically integrated firms, with joint operations boosting consumer happiness. Buyers at Costco eagerly snap up Costco-supplied Kirkland products—which the retailer stocks in place of those of some independent producers—if they improve price or quality. So facts, not just a story, are needed. District Court Judge Richard J. Leon found that the DOJ case “falls far short of establishing the validity of its… theory.”

Aside from the political overtones of the case, there was good historical reason **to doubt** the official complaint. A cable TV programmer combined with (or split from) a video distributor several times in recent years. Vertical integration **did not cause higher prices**, as shown by econometric analysis. Nor did vertical integration lead to “blackouts,” as the DOJ conceded. A three-judge panel of the D.C. Circuit confirmed Judge Leon’s opinion, finding that “the industry **had become dynamic** in recent years with the emergence, for example, of Netflix and Hulu.”

Owning DirecTV and Time Warner together turned out to be **not much advantage**, let alone a monopoly. Despite a huge boost in pandemic demand for video content, rivals soon **dined on AT&T-Time Warner’s lunch**. When AT&T bought DirecTV in 2015, it paid $67 billion. In February 2021, with DirecTV’s satellite subscriber base collapsing, the spun-off operation was valued at $16.3 billion.

And AT&T then unloaded the video assets of Time Warner. A new enterprise—Warner Bros. Discovery—is being spun off and merged with Discovery (Discovery Channel, Animal Planet, TLC, HGTV, the Food Network and more). The content-only firm voluntarily severs the link the DOJ critiqued as easy monopoly money. With the allegations of anticompetitive bundling, it has been cast off as not worth the trouble. AT&T shareholders receive $43 billion, less than half the $100 billion AT&T expended (in debt and equity) for Time Warner three years ago. The government’s scenario of anti-competitive vertical integration **proved a fantasy**.

AT&T’s maneuvers deserve whatever scorn billions in shareholder losses can buy. A cynic might offer that antitrust laws be beefed up to protect against such corporate errors, ignoring that **economic penalties**—**more reliable and harsher than whatever** antitrust enforcers might deal—**are visibly in place**. But little note has been made of the ironic political saga. Policymakers are moving full throttle to enact statutes to beef up antitrust prosecution in tech for exactly what AT&T so **spectacularly failed to do** in video. Rep. Pramila Jayapal (D-Wash.) and Rep. Lance Gooden (R-Texas) introduced the “Ending Monopoly Platforms Act” that would restrict vertical mergers in online services, for example. At least five other bills for new antitrust rules have been introduced.

Not only can such policies be **expensive legal diversions**, they can **block the innovations** igniting exciting new choices for customers. Netflix has integrated from streaming into movie production, after launching Roku. Hulu was created by News Corp. (Fox) and NBC-Universal (Comcast). Amazon Prime Video, Sling, YouTube TV, Apple TV, Disney Plus, HBO Max and Paramount Plus—each has extended a large media or e-commerce platform. Each evolved from **a quest for better products**. Treating entrepreneurship as suspect puts the **screws to just the disruptions** now roiling online entertainment markets. AT&T learned the hard way that owning complementary products is **no guarantee of success**. That instructional video needs more downloads in D.C.

#### Breakups disadvantage competitors and consumers by eviscerating the competitive edge of industry leaders—they falsely assume unleashed innovations can come from innovative, competitive companies, but the opposite is true

Portuese 20– Aurelien Portuese, Director, Antitrust and Innovation Policy @ Information Technology and Innovation Foundation

(Aurelien Portuese, 10-28-2020, "A Search for Sanity in Antitrust: Move (Too) Fast, Break (Innovative) Things?," ITIF, <https://itif.org/publications/2020/10/28/search-sanity-antitrust-move-too-fast-break-innovative-things>)

A 1978 article titled “A Search for Sanity in Antitrust” published in Fortune argued that antitrust enforcement was fraught with “an oligopoly of opposites” where the regulators welcomed economic efficiency of business but enforced populist decisions that preserved an atomized market structure at the expense of economic efficiency and against scale economies of companies. More than 40 years later, antitrust enforcement is yet again in search of sanity in antitrust where enforcement diverges between, on one hand, an atomized market structure protective of small competitors irrespective of their efficiencies, and on other hand, a tolerance for corporate bigness as long as it can be justified based on superior efficiency. This debate has noisily resuscitated in recent weeks.

Rarely has a week in U.S. antitrust been as historical as the one we have just been through. In choreographed moves, the House Judiciary Committee and the Department of Justice (DOJ) have initiated forceful attacks on big tech companies. The Judiciary Committee published a 450-page report on big tech in which it has recommended breaking up of companies such as Google, Apple, Amazon, and Facebook. A few days later, Attorney General William Barr initiated a lawsuit against Google, the alleged “gatekeeper of the Internet,” in what resembles the historical lawsuit against Microsoft 20 years ago. Inspired by Europe’s first moves against big tech, where reports, legislative proposals, and fines have already been issued, American antitrust appears to be undergoing a massive transformation with momentum for “platform busting” in the digital economy. This platform-busting outbreak has its origins with an influential group of scholars and policy advocates—the so-called “Neo-Brandeisians”—who wish to resurrect the anti-monopoly / anti-bigness sentiments that spurred the populist momentum of the late 19th century when the antitrust laws were adopted. Obviously, big is not always bad (in fact it is usually good), and corporate champions may generate social benefits and collective pride, but the current antitrust moment reneges on decades of improvement in economic knowledge in favor of the originalist antimonopoly, over-interventionist stance, which embodies a substantially different approach to the optimal level of interventionism in the market and innovation processes.

The breakups of big tech companies are explicitly called for in the House Judiciary report and suggested again Google in the DOJ’s lawsuit. Aimed at generating a “forceful antitrust enforcement” (p. 20), the report recommends “structural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business” (p. 20). Structural remedies mean breakups of companies by divestitures of assets with an associated prohibition to subsequently buy out or merge these assets. Structural remedies as regulatory tools impose blatant limitations on fundamental liberties such as property rights, entrepreneurship, and freedom to contract. Thus, antitrust enforcement has wisely been reluctant to hastily resort to such intrusive administration tools, unless an unexceptionally strong case can be made. The first breakup took place in 1911 when the Supreme Court decided, in Standard Oil v United States (221 US 1, 1911), to break up John D. Rockefeller’s Standard Oil Trust into spinoff companies after having being accused of having secretly conspired against consumers and rivals. Such conspiracies are prohibited under Section 1 of the Sherman Act of 1890—the main statute of antitrust laws. The other major breakup took place in 1982 with the Supreme Court’s decision in United States v. AT&T (552 F. Supp. 131, 1982), wherein the telecom company, which enjoyed regulated monopoly status, went through judicially imposed asset divestitures to create seven regional companies. Subsequently, spinoff companies merged back to “baby Bells” as well as “baby Standards,” which emerged after the breakup of Standard Oil. Competition was spurred in long-distance telephony, but only to a limited extent and for a short time, because innovation costs and economic disintegration cannot be underestimated: In particular, the coming of the Internet, cable broadband, and mobile telecommunications as outside innovations created more competition than the breakup could have ever expected and realized.

The breakups of companies, beyond the legal obstacles inherent to the consequences they generate, represent the regulators’ desire to reorganize the market to structure it more optimally, irrespective of the fundamental synergies and network effects that are crucial for these firms’ innovativeness and competitiveness. It may perhaps be the acknowledgment of the detrimental effects of breakups which led the DOJ to settle with Microsoft in 2001 so that no structural remedy was imposed on Microsoft. To ditch the accusations of violation of Section 1 of the Sherman Act against Microsoft, which was alleged to have tied-in its browser with its operating system, the DOJ only imposed a less intrusive behavioral remedy: Microsoft had to remove the default installation in PCs of Microsoft’s browser (Internet Explorer) and Microsoft’s media application (Windows Media Player). These regulatory requirements implicitly acknowledged the unreasonableness of a breakup, and correspondingly, recognized the appropriateness of the behavioral remedies over structural remedies, especially when it comes to the removal of default settings.

Default settings are precisely, again, at the heart of the DOJ’s lawsuit against Google. The accusations indeed echo those formulated 20 years ago against Microsoft, and that formulated a couple of years ago against Google by the European Commission. Be that as it may, default settings are incredibly complicated business common practices when it comes to assessing them from an antitrust perspective. On their anticompetitive effects, one can arguably say that they are established only by dominant players and self-reinforced their very dominance without giving other competitors a chance to compete given the alleged status quo bias of consumers. The DOJ lawsuit takes the controversial view that for Google to require preinstalled default status of its search engine on Android-based mobile devices grants Google “de facto exclusivity,” since consumers do not switch to alternative search engines despite none of the traditional switching costs being present with the search engine.

Of course, consumers’ status quo bias exists as first documented in 1988 by Samuelson and Zeckhauser. Under uncertainty, the rational choice model indeed suggests that risk-averse consumers may reveal some inevitable path-dependency. This rationally minded decision does nevertheless not suggest that it is welfare-increasing or welfare-decreasing if consumers both are satisfied with the current quality of services provided and are reluctant to engage in search-and-find costs for alternatives that may not use marketing strategies to appeal to consumers. Also, contrary to Microsoft’s former practice which created obstacles to exit, the costs and obstacles to leaving Google search engines are almost null since alternative search engines are just “one click away.” Indeed, how could consumers be worse off if they are satisfied with the product, if switching costs for alternative search engines are close to zero, and if rivals do not engage in reaching out to consumers via alternative media? It appears thus rational for consumers to stick to the status quo, especially so when there are minimal learning costs involved. Furthermore, the status quo bias is somehow overcome when one looks at the trends: Only 57 percent of consumers use search engines for online product research. Also, digital apps are increasingly used for accessing the Internet: Google may very well be one of the Internet gateways but not its gatekeeper.

Neither the Standard Oil breakup nor the AT&T breakup can serve as inspirations for a breakup of Google. First, the two historical breakups are precedents Google cannot be compared with. The breakup of Standard Oil Trust took place mainly under Section 1 of the Sherman Act, which is designed to prohibit and prevent price-fixing conspiracies by cartels. Of course, Google is not a cartel and does not conspire with competitors against consumers. If a case can be made against Google, it can only be under Section 2 of the Sherman Act, which prevents monopolization attempts by a single firm—here, Alphabet Inc. the mother company of Google. Thus, one cannot apply the rationale behind Standard Oil to Google as the former organized a “trust” while the latter is a vertically integrated single company. Antitrust law may legitimately bust trusts; it can hardly disintegrate vertically integrated companies. The AT&T breakup equally is an inadequate source of inspiration for the DOJ, since AT&T benefited from a government-enticed monopoly that included regulated prices which had to be abandoned in order to foster competition.

Second, Google has emerged neither out of a trust-organizing business model (à la Standard Oil) nor out of a government enticed monopoly business model (à la AT&T). Google has emerged out of massive investments and innovation to compete with many incumbents (i.e., Yahoo! for search engine, Nokia and Blackberry for mobile OS, etc.). While it may no longer be the “scrappy start-up” as colloquially referred to in the DOJ’s lawsuit, Google has invested massively in its search algorithm to best suit consumer preferences and in its business model so that its success enabled it to enter, not always successfully, adjacent markets to compete with incumbents or to create new markets of its own.

Finally, it appears that breaking up Google would immediately benefit both Apple and Microsoft. Apple would gain because its business model of iPhone’s iOS based on a closed, priceable digital ecosystem will prevail over Google’s ad-funded free-of-charge business model enforced through contractual arrangements. Apple may eventually suffer or benefit as payments from Google will end. Should Apple choose to discontinue its use of Google’s search engine subject to the fact that the financial incentives were truly decisive, then either an inferior quality search engine alternative will be chosen for iPhones, and the price-quality ratio of iPhones will worsen at the expense of Apple’s end-consumers, or Apple could launch its own search engine incurring massive costs of replication of Google at the expense of Apple’s other investments and overall profitability. Should Apple choose to continue to use Google’s search engine despite the lack of financial incentives, then the profitability of each iPhone, iPad, and iWatch would decrease so that either consumers may be charged higher prices or the company’ investments in innovation may decrease, or a mixture of these two detrimental implications will occur. Also, breaking up Google would immediately benefit Microsoft’s Bing search engine. Awkwardly left unaddressed by the House Judiciary report, Microsoft’s strengths and capabilities appear ignored, but the Bing search engine (as well as Microsoft Edge’s browser) and associated ad revenue will correspondingly increase with the regulatory fall of Google should a breakup ever occur. The current competition for Bing to tackle the incumbent Google would be artificially bent so that it favors one competitor over another irrespective of consumer benefits or harms. Moreover, if it is not Bing that will win from Google’s breakup, it may very well be the Chinese Baidu or the other Chinese entrant, Huawei.

The breakup of Google will unleash some innovations as argued by those suggesting it, but it will prevent Google from being the engine of innovation we currently have to “escape” competition by a superior efficiency. Google’s trading partners writ large will be harmed (from Apple to device manufacturers through online advertisers) as well as Google’s consumers. Unleashed innovations might be expected from breakups, but only if the targeted company is neither innovative nor competitive. With billions of dollars spent annually on R&D for innovation, and with hundreds of innovations made reality, the breakup of Google can hardly unleash any sort of innovation from the market, except some rents undeservedly earned by rivals thanks to rent-seeking through strategic lawsuits as we have seen in Europe.

Breakups of companies are provided for by antitrust laws, especially for busting trusts—these inefficient cartels which conspire to harm consumers and stifle innovation. Breakups of companies are extremely unfair for dominant players that earned their success through innovative products, competitive offers, and a long-term vision that discounted short-term benefits in favor of long-term corporate strategy. Breakups may eventually yield much greater costs to consumers and to overall innovation than the expected rivals’ benefits to be generated with short-lived spinoff companies. For sure, breakups of these companies may always generate massive media coverage, popular support—especially when announced two weeks before a historical presidential election. Political tactics force decisions to be rushed out with little gains for consumers or democracy but with great self-inflicted pains imposed on innovation and the quality of regulatory decision-making processes. Searching for sanity in electoral politics may prove as complicated as searching for sanity in modern antitrust enforcement.

#### Perception—companies do not expect immediate statutory/legal changes—enforcement only affects a small slice of deals

Zero 21 – Senior Reporter for Mergers & Acquisitions

Brandon Zero, "Antitrust Deal Scrutiny More Storm Than Fury," Mergers & Acquisitions, 8-4-2021, <https://www.themiddlemarket.com/news-analysis/threat-of-antitrust-deal-scrutiny-seen-more-storm-than-fury>

What’s the forecast for regulatory scrutiny of deals so far this year? There may be more cloud cover than storms on the M&A horizon. New antitrust scrutiny and a longer review time are potential looming threats, but they lack the lightning needed to actually block deals.

Let’s look at these twin threats and the risks they pose to dealmaking. President Biden’s executive order has spurred the Department of Justice and Federal Trade Commission to increase scrutiny of deals in a move that, “if implemented by regulators and upheld by the courts…could lead to the most robust antitrust enforcement in decades,” writes Debevoise & Plimpton lawyers in a recent note. But that’s a big ‘if.’ The attorneys write that actually intensifying competition review standards would require acts of Congress and/or litigation. Both regulatory agencies have mixed records in courts. And it’s unclear if Democrats will defy the political gravity that has historically weighed down incumbent presidents’ party performance in midterm elections to win a mandate to rewrite antitrust laws.

What about the other lingering storm cloud on the periphery? A frenetic M&A pace has overwhelmed oversight body the Federal Trade Commission to the extent that it’s warned companies the expiration of the standard 30-day waiting period is no longer an implicit approval of a deal, Bloomberg reports. That creates a threat of enforcement even after deals have closed.

Amidst the merger deluge, a few high-profile deals have been challenged, but context is king: the handful of challenged deals represent a small slice of the year’s record value of announced transactions.

For starters, some of the highest profile deals challenged by the new administration’s antitrust regime represent merger dynamics that have always drawn intense scrutiny. Aon Plc’s proposed $30 billion takeover of Willis Towers Watson (Nasdaq: WLTW), announced only five years after Willis Group’s $18 billion merger with Towers Watson, was challenged by the DOJ as taking the industry from three competitors to two. So called “3 to 2” mergers have always been a bright line for regulators. And the insurance investment bankers I’ve spoken to for a decade about industry consolidation have long steered clear of attempts to marry those players or Marsh & McLennan (NYSE: MMC) out of fear of this precise outcome.

There are wild cards that could skew my forecast. It’s true that zealous enforcement of vertical merger review guidelines has created unexpected scrutiny of some sectors, and that agencies’ evolving theories of harm could disproportionately put tech deals at risk. But on the whole, the latest policy announcements may well be more thunder than lightning**.**

#### No lasting change even if administrative stuff implemented

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(Joshua D., “Lina Khan Is Icarus at the FTC,” July 13, WSJ)

All that has been overshadowed by an executive order aimed at competition and loaded with goodies, good intentions, new regulatory regimes and a blissful ignorance of unintended consequences (“Joe Biden, 20th Century Trustbuster,” Review & Outlook, July 10). Some of its pronouncements, like occupational-licensing reform, are to the good. But the FTC’s competition authority is about to become a free-for-all for the Biden administration to reshape the economy. One wonders how the Republicans going along with all this to “get Big Tech” are feeling right now; I’m guessing “played.” If not, they’ll catch up soon enough.

Imagining the FTC as Icarus flying without the constraints of history, economics or law is a fun thought experiment, but we’ve been here before. Ms. Khan’s initial steps are indicative of a regulatory overreach that will end with the FTC’s wings melting in the courts. This path does not lead to incremental, much less radical, change. I predict early headlines that appease a rabid base, frustration for FTC staff and a new, volatile partisanship at the agency, but actual results that leave unsatisfied the progressives aching for radical change.

#### Great performing stock market and low interest rates mean M&A activity will only increase over next year

Sraders 21 – Finance Reporter at Fortune Magazine

Anne Sraders, "M&A activity has already blown past the $2 trillion mark in a record-breaking 2021," Fortune, 6-2-2021, https://fortune.com/2021/06/02/mergers-acquisitions-2021-m-and-a-record-year-spacs/

Dealmakers are having a **record-breaking** year.

So far in 2021, global **mergers and acquisitions** have totaled a record $2.4 trillion, **up 158%** from the same period last year, according to a Refinitiv Deals Intelligence report out Wednesday. That marks the highest year-to-date total going back to 1980 when Refinitiv’s records began (the first quarter was also a banner few months for M&A).

“As the **surging stock market** continues to **drive confidence**, and **interest rates** remain at **record lows** making borrowing for acquisitions cheap, dealmaking **continues at pace**,” Lucille Jones, a Deals Intelligence analyst at Refinitiv, wrote alongside the report.

Though deals in May totaled slightly less than those in April, they still topped $500 billion globally (at nearly $533 billion) for the third consecutive month (see Refinitiv’s chart below), and notched the highest-ever May total. Deals involving at least one U.S. company (worth together some $274.2 billion for May) slumped 3% from the month prior.

[[figure omitted]]

Notably, the much-beloved tech sector wasn’t the hottest area to find deals last month. According to Refinitiv, media and entertainment deals accounted for 29% of “M&A announcements by value during May 2021,” knocking tech off the top spot for the first time in 10 months. That media and entertainment deal spurt was boosted by megadeals like the $43 billion WarnerMedia and Discovery merger and Amazon’s $8.5 billion purchase of famed studio MGM.

At some firms, there has been “anecdotal evidence to suggest this forward calendar [year] is **out of control**” for M&A, Marc Cooper, CEO of boutique investment bank PJ Solomon, told Fortune back in April. Indeed, Cooper added, if the backlog of deals the firm was working on “means anything, it’s going to be a **big back half**.”

#### Predicted biden tax increases mean firms are rushing to do deals now

McNeely 21 – Partner at Reagan Consulting

Brian McNeely, "Capital Gains Tax Increases Will Accelerate M&A Activity in 2021," Independent Agent Magazine, 5-26-2021, https://www.iamagazine.com/news/capital-gains-tax-increases-will-accelerate-m-a-activity-in-2021

2020 was another record year for insurance agent and broker merger & acquisition activity. In total, 728 transactions were completed and the prices related to those transactions were also at record-high levels. Imagine telling someone just five years ago that even a premier asset would be trading at guaranteed multiples of more than 14 times earnings before interest, taxes, depreciation and amortization (EBITDA)—you would have been accused of being under the influence of a narcotic.

However, the robust activity of 2020, specifically in the fourth quarter, appears to have created a hangover in early 2021. In the first quarter of 2021, 152 transactions were completed, versus 177 in the same period in 2020, a 14% decrease. This slowdown is largely the result of transactions that would have otherwise closed in the first quarter of 2021 being accelerated into the fourth quarter of 2020 to protect against a retroactive capital gains tax rate increase.

That **slowdown** is **about to end**, and we will see an **acceleration** in the remainder of **2021**. The reason: Uncle Sam.

The Biden administration has put forth a **widely publicized plan** to increase **capital gains rates** from 20% to 39.6% for the highest wage earners, which likely includes agents and brokers selling their business. And these increases could be made retroactive to a date in 2021. Both January and October are possible options. However, the recent job report and inflation concerns have presented additional challenges to already ambitious plans. As a result, many experts believe capital gains rates will only **increase** to 28%-30%, which is still a **massive jump**, and go into effect on **Jan. 1, 2022**.

Nevertheless, a capital gains increase remains **almost certain** and may cause agency owners interested in selling their business in the next three to five years to **accelerate their timeline** to 2021. By doing so, sellers can **take advantage** of the **current market** where transaction multiples are at **all-time highs** and capital gains rates are still at 20%. The chart below illustrates how the change in capital gains tax rates affects the sellers' net proceeds.

#### Internal link is net neg—some enforcement increases innovation—but expanding liability for conduct decreases it—prefer recent statistical ev.

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(Gregory, “How Antitrust Affects Innovation,” October 17, https://clsbluesky.law.columbia.edu/2017/10/17/how-antitrust-affects-innovation/)

My research responds to this state of affairs by empirically testing antitrust enforcement’s relationship with innovation. The history of antitrust law is an ideal natural laboratory for empirical study since its rate of enforcement has fluctuated, creating variations that generate strong statistical results. For example, each category of antitrust action initiated by the government has changed in a unique pattern. The rate of Section 1 investigations has steadily declined, but merger enforcement—which has traditionally been less common than sections 1 and 2 investigations—peaked in the 1990s and has since become more prominent than Sherman Act investigations. As a result, it can be statistically determined with a high level of confidence whether the rate of innovation has changed in accordance with increases and decreases of antitrust activity, controlling for mitigating factors.

I constructed a new dataset of publicly available information as well as data received from Freedom of Information Act (“FOIA”) requests. The dataset spans from 1963 to 2015 with a unique entry each year. The results of the models are consistent, strong, and quite unexpected, demonstrating the effects of antitrust enforcement on society’s ability to produce patents and R&D.

First, a greater number of antitrust lawsuits filed by private parties—which are the most common type of antitrust action—impedes innovation. Second, the different types of antitrust actions initiated by the government tend to affect innovation in profoundly different ways. Merger challenges (under the Clayton Act) promote innovation while restraint of trade and monopolization claims (under sections 1 and 2 of the Sherman Act) suppress innovative markets. Even more interesting, these effects become stronger after the antitrust agencies explicitly made promoting innovation a part of their joint policies.

My results suggest that the arguments for and against antitrust have merit. On one hand, antitrust enforcement fosters the incentives to innovate when it preserves the number of firms competing within a market. Yet enforcement reduces innovation when it scrutinizes *how* firms compete. This makes sense. Commentators have noted that the Sherman Act is designed to raise suspicions about many activities in which innovative firms typically engage. An inventor may, for instance, exclude competitors from using her invention or enter into contracts and agreements with competitors to license or develop technology— either scenario can draw an antitrust challenge. Enforcing the Sherman Act can thus curb innovation by creating liability for inventors who would like to comply with the law. In short, antitrust appears to promote innovation when it maintains competition by preserving the number of firms competing within a market, but it ~~retards~~limits innovation when it limits how exactly those firms compete against each other.

#### The vast majority of innovation comes from firm improvement, not competitors

Garcia-Macia et al. 19 – Garcia-Macia, International Monetary Fund; Hsieh, Booth School of Business, University of Chicago and National Bureau of Economic Research; Klenew, Department of Economics, Stanford University and National Bureau of Economic Research

Daniel Garcia-Macia, Chang-Tai Hsieh, and Peter J. Klenew, "How Destructive Is Innovation?," Econometrica, Vol. 87, No. 5 (September, 2019), 1507–1541, September 2019, <http://klenow.com/DestructiveInnovation_GHK.pdf>

Likewise, when a new product replaces an existing product, one would like to identify whether the new product is owned by another firm (“creative destruction”) or the same firm (“own innovation”). Based on case studies, Christensen (1997) argued that innovation largely takes the form of creative destruction, and almost always from new firms. Akcigit and Kerr (2018) looked at whether patents cite earlier patents by the same firm or by other firms. The case studies and the sample of patenting firms, however, may not be representative of firms in the broader economy. Many innovative firms, particularly outside of manufacturing, do not patent.

In the absence of more direct evidence, we try to infer the sources of growth indirectly from the patterns of job creation and job destruction among all private sector firms in the U.S. nonfarm economy. We use data from the U.S. Longitudinal Business Database (LBD) from 1983 to 2013. The seminal work of Davis, Haltiwanger, and Schuh (1996) documents the magnitude of job flows within U.S. manufacturing, and these flows are commonly used as proxies for the intensity of creative destruction. For example, Decker, Haltiwanger, Jarmin, and Miranda (2014) pointed to the decline in U.S. job reallocation since the 1970s as evidence of a decline in the rate of creative destruction.

We view the LBD data through the lens of an exogenous growth model featuring creative destruction, own innovation, and new varieties. For industries such as manufacturing, the object of innovation may be products. For services and retail, which make up the bulk of the LBD data, innovation may take the form of new and improved establishments. For example, Walmart opening a new store may be akin to adding a new product. A new Walmart store arguably gains market share by offering a distinct variety (the store format, including all the items for sale within it) and/or by offering low prices (due to high process efficiency) relative to existing stores in the local market.

We reach four conclusions from our indirect inference based on LBD data. First, most growth appears to come from incumbents rather than entrants. This is because the employment share of entrants is modest. Second, most growth seems to occur through quality improvements rather than brand new varieties. Third, own-variety improvements by incumbents loom larger than creative destruction (by entrants and incumbents). The contribution of creative destruction is around 25 percent of growth, with the remainder mostly due to own innovation by incumbent firms. Fourth, the contribution of entrants and creative destruction declined from 1983–1993 to 2003–2013, while the contribution of incumbent firms, particularly through own innovation, increased.

#### The costs of over enforcement are comparatively more dangerous than non-intervention—*False convictions are worse than false acquittals*

Lambert 20

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(Thomas A. Lambert, "The Limits of Antitrust in the 21st Century," Summer 2020, Cato Institute, https://www.cato.org/regulation/summer-2020/limits-antitrust-21st-century)

Regulating these sorts of competitive mixed bags inevitably entails costs. First, there are the costs that result from mistaken judgments. If the law wrongly allows conduct that is, on net, anticompetitive, consumers will face higher prices and/​or reduced quality, and a deadweight loss will occur. But if the law wrongly forbids conduct that is, on balance, procompetitive, market output will be lower than it otherwise would be and, again, consumers will suffer. In addition to these so‐​called “error costs,” regulating competitive mixed bags entails significant “decision costs”—i.e., costs to business planners and courts from deciding whether contemplated or actual conduct is forbidden or permitted.

False conviction error costs, false acquittal error costs, and decision costs are intertwined. If policymakers try to reduce the risk of false conviction by making it harder for a plaintiff to establish liability or easier for a defendant to make out a defense, they will raise the risk of false acquittal. If they ease a plaintiff’s burden or cut back on available defenses to reduce false acquittals, they will increase false convictions. And if they make the rule more nuanced in an effort to condemn the bad without chilling the good, thereby reducing error costs overall, they enhance decision costs. As in a game of whack‐​a‐​mole, driving down costs in one area will cause them to rise elsewhere.

Given this unhappy situation, Easterbrook proposed an overarching goal for antitrust policies: they should be crafted so as to minimize the sum of error and decision costs. Pursuing such an objective, policymakers would not try to prevent every anticompetitive act, allow every procompetitive one, or keep antitrust rules as simple as possible. They would eschew perfection along any single dimension in favor of overall optimization.

The second key component of Easterbrook’s approach was his instruction about how antitrust tribunals should weigh the harms from false convictions versus false acquittals. If a procompetitive behavior is wrongly condemned, the adverse effect—squandered efficiencies—will persist until a subsequent judicial decision overrules the erroneous precedent. By contrast, if anticompetitive conduct is wrongly allowed to persist, the result will be the sort of monopoly pricing that invites market entry and thereby self‐​corrects. Accordingly, Easterbrook reasoned, false convictions are worse than false acquittals, which suggests that liability rules on questionable practices should be calibrated so as to err in the direction of allowing anticompetitive acts rather than banning or discouraging procompetitive ones.

#### Our internal link is systemic—theirs is easily corrected

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(Joshua D., and Murat C., “The Easterbrook Theorem: An Application to Digital Markets,” The Yale Law Journal Forum, Vol. 130, pp. 622-646)

The best critics can muster is to argue that such conduct “may be rare because antitrust rules have deterred firms from using vertical restraints to harm competition,” and, without ruling out deterrence, the conclusion cannot be supported;42 or that many studies simply “cannot determine the net effect of the vertical integration on welfare.”43 But to put it simply, evidence of prevalent and systemic anticompetitive vertical behavior throughout the economy just does not exist. Methodological defects in any individual study aside, when one struggles to find evidence of anticompetitive effect in the work product of a nation’s worth of economists, Bayesian updating suggests it is pretty safe to conclude vertical conduct is predominantly procompetitive or competitively neutral. So too with the data on predation; while possible, it is also very rare.44 While outside of our current scope, the data on modern horizontal mergers tell the same story.45

So how costly are these errors when they happen? Reliable estimates of the magnitudes of errors are even more difficult to come by than estimates of their frequency.46 Economic theory guides the Easterbrook assumption. It tells us that Type II error costs are bounded by eventual entry or greater competition in the pursuit of monopoly profits, but Type I costs are bounded only by legal correction.47 Type I error costs are also systemic: they apply across markets within the jurisdiction that made the error. Legal precedent condemning procompetitive behavior is likely to chill the same procompetitive behavior across product markets. Type II error is more likely limited to a single firm or market. For example, an ultimately unsuccessful challenge of an anticompetitive merger is not likely to result in a wave of anticompetitive mergers. Further, because rule-of-reason analysis requires case-by-case adjudication, erroneously permitting anticompetitive conduct does not prohibit future plaintiffs—whether federal or state enforcement agencies or private plaintiffs—from bringing suits against others to challenge their conduct.