# 1NC

## OFF

### 1NC – T – Increase

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

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

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

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

#### Increase means to make greater.

Merriam-Webster ND

“increase,” Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/increase

transitive verb

1: to make greater : AUGMENT

2obsolete : ENRICH

#### Violation – the plan at best does not change the standard for violating section 2. At worst, it is anti-topical because it makes it harder to prove something is anticompetitive because it must “significantly” reduce competition

#### Vote neg—

#### A] Limits—they make the topic bidirectional by allowing affs that REDUCE prohibitions

#### B] Ground—All core disad links and CP competition is based on INCREASES on prohibitions

### 1NC – States CP

#### Text: The fifty states and all relevant United States territories should **substantially increase prohibitions on anticompetitive business practices by the private sector by at least expanding the scope of the Sherman Act to prohibit unilateral exclusion that reduces competition significantly.**

#### 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 – FTC Tradeoff DA

#### The plan forces tradeoffs in FTC enforcement efforts – they’re in a merger tsunami and barely staying afloat, but the plan drowns them

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Despite short resources, FTC is effectively regulating hospital mergers – the plan halts that progress

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Long term per-person healthcare costs will collapse the economy from a bubble burst or terminal budget overstretch – no alt causes – restoring competition in hospital markets is key to reduce costs

Evan Horowitz, Fivethirtyeight, January 11, 2018, The GOP Plan To Overhaul Entitlements Misses The Real Problem, <https://fivethirtyeight.com/features/to-cut-the-debt-the-gop-should-focus-on-health-care-costs/>

There is no wide-reaching entitlement funding crisis, no deep-rooted connection between runaway debts and the broad suite of pension and social welfare programs that usually get called entitlements. The problem is linked to entitlements, but it’s much narrower: If the U.S. budget collapses after hemorrhaging too much red ink, the main culprit will be rising health care costs.

Aside from health care, entitlement spending actually looks relatively manageable. Social Security will get a little more expensive over the next 30 years; welfare and anti-poverty programs will get a little cheaper. But costs for programs like Medicare and Medicaid are expected to climb from the merely unaffordable to truly catastrophic.

Part of that has to do with our aging population, but age isn’t the biggest issue. In a hypothetical world where the population of seniors citizens didn’t increase, entitlement-related health spending would still soar to unprecedented heights — thanks to the relentlessly accelerating cost of medical treatments for people of all ages.1

What’s needed, then, is something far more focused than entitlement reform: an aggressive effort to slow the growth of per-person health care costs. Or — if that’s not possible — some way to ensure that the economy grows at least as fast as the cost of health care does.

Diagnosing the debt: It’s not about demographics

America’s long-term budget problem is very real. Already, the federal government has a pile of publicly held debts amounting to around $15 trillion, or about 75 percent of the country’s entire gross domestic product. That’s the highest level since the 1940s, yet the debt burden is expected to double by 2047 and reach 150 percent of the GDP, according to the Congressional Budget Office.2

It makes sense to list entitlement spending among the culprits for the growing national debt, given that these programs have grown from costing less than 10 percent of the GDP in 2000 to a projected 18 percent in 2047. Part of this is simple demographics: As America ages, more of us become eligible for Social Security and Medicare, thus driving up expenses.3

But there’s a crack in this demographic explanation: It only makes sense for the next 10 to 15 years. That’s the period of rapid transition when graying baby boomers will boost the population of seniors from around 50 million to more than 70 million. A change like that should indeed produce a surge in entitlement spending as those millions submit their enrollment forms.

By 2030, however, this wave will start to ebb, leaving the elderly share of the population at a roughly stable 20 to 21 percent all the way through 2060, based on the size of the population following the boomers and slower-moving forces like lengthening lifespans.

But think what this should mean for entitlement spending. As the population of seniors levels out in those later years, costs should naturally stabilize — at least, if demographics were really the driving factor.

This is exactly what you see for Social Security. The CBO expects total Social Security spending to leap up over the next decade but then settle at just over 6 percent of the GDP, at which point it will cease to be a major contributor to rising entitlement spending or growing debts. Social Security is thus a minor player in our long-term budget drama; if you cut the program to the bone, shrinking future payouts so that they won’t add a penny to the deficit, the federal debt would still reach 111 percent of the GDP in 2047.4

Likewise, cuts to welfare and poverty-related entitlements like food stamps and unemployment insurance are unlikely to improve the debt forecast. In fact, spending on these entitlements has been dropping since the high-need years around the Great Recession and is expected to shrink further in the decades ahead — partly because payouts aren’t adjusted to keep up with economic growth, and partly because the birth rate has been falling and several programs are geared to families with children.5

But the scale of the problem is totally different when you turn to health care. Spending on entitlement-related health programs — including Medicare, Medicaid and subsidies required by the Affordable Care Act — will never shrink or stabilize, according to projections. The CBO predicts these costs will grow over 65 percent between now and 2047 — and then go right on growing after that, heedless of the fact that the percentage of the population that’s over 65 should no longer be increasing.

Why is health care eating the budget? Per-person costs

Demographics aren’t responsible for the projected explosion in health care costs. More important than the growing number of elderly Americans is the growing cost per patient — the rising expense of treating each individual

The CBO found that the lion’s share — 60 percent — of the projected increase in health spending comes from costs that would continue to increase even if our population weren’t getting older.

The reasons for this are many, including the rising cost of prescription drugs and the fact that hospital mergers have reduced competition. But since 2000, per capita health costs in the U.S. have, on average, grown faster than the GDP. And while these costs rose more slowly after the Great Recession and the implementation of the Affordable Care Act, analysis from the Centers for Medicare and Medicaid Services suggests this slower growth rate won’t last.

Which is bad news for these programs, because if the problem were demographic, it’d be easier to solve. By mixing the kind of program cuts Republicans generally support with targeted tax increases favored by some Democrats, you could meet the short-term challenge posed by retiring baby boomers and raise enough money to cover the larger — but stabilizing — population of eligible seniors. But with ever-rising costs, there is no stable future to prepare for. To keep these programs funded, you’d need a wholly different approach — indeed a whole new perspective on mounting federal debt and the role of entitlements.

The future is a race between rising health care costs and economic growth, a race that the economy is losing. Each time health costs outpace the GDP, it creates what the CBO calls “excess cost growth,” which feeds the federal debt. If the government could close this gap, the long-term budget outlook would be a lot rosier.

There are two ways to solve this issue: Either contain health care costs — say through price regulation or more competitive markets — or boost economic growth enough to pay for this expensive health care. Success on either front would make health care spending look more manageable over future decades and lighten the debt load.

Entitlement reform needs health care reform to work

Few of the proposals that commonly fall under the heading of entitlement reform target the health care cost problem, which limits their ability to reduce the long-term debt.

Even when they do address health care, often the result is to shift — rather than solve — the problem. Say lawmakers decide to dramatically cut Medicare. That would indeed ease the government’s debt problem. But the underlying dynamic — the race between health costs and the GDP — wouldn’t really change. Seniors would still need health care, and per-person costs would likely still grow (maybe even faster, since Medicare is a relatively efficient program).

On top of all this, there’s also a deep-seated political barrier: It’s no good if one party picks its favored solution only to watch the other party dismantle it when they next take over. You need political consensus to make changes stick, and America is notably short on consensus right now.

In the end, though, it won’t do to just throw up our hands. Absent some workable solution, spending on health care will sink the federal budget, generating levels of debt that would hold back the economy and potentially spark a global crisis of confidence in the United States’ ability to borrow.

#### 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.

### 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.

#### Turns the aff – 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.

**Independently, merger frenzy is key for regional banks to gain sufficient resources to invest in cyber-defenses**

**Mendelson 18** – U.S. president and CEO of Bank Leumi

Avner Mendelson, "Survival strategy: Cut the number of banks in half," American Banker, 1-30-2018, https://www.americanbanker.com/opinion/survival-strategy-cut-the-number-of-banks-in-half#:~:text=Consolidation%20can%20actually%20help%20smaller,regulatory%20burden%20that%20accompanies%20growth.&text=Thus%2C%20as%20banks%20expand%2C%20there,for%20profitable%20growth%20over%20time.

It’s no secret that the banking industry has been consolidating for the last 30 years — the number of bank charters has fallen from 14,000 in 1985, to close to 8,500 in 2000, to 4,938 at the end of 2017 — a remarkable 64% drop, most of which happened during the '90s and after the financial crisis. New bank formation also virtually stopped, from a rate of nearly 100 per year up until 2008 to fewer than two per year now.

But while that reduction is remarkable, it’s not necessarily a bad thing.

Some of the post-crisis decline can be attributed to bank failure and the lack of de novo banks, but a significant amount is due to an uptick in M&A activity — particularly among smaller banks — driven by increased regulatory and technology standards that incentivize scale.

Over the past few years, there have been well over 200 M&A deals per year among community banks, those with less than $10 billion in assets, almost double the amount of such activity in the crisis years of 2008 and 2009, according to the S&P Global Market Intelligence.

Going forward, the trend of consolidation is likely to continue, and it’s possible that a healthy 2,000 to 3,000 institutions would serve the U.S. even better than the current number. The goal should be to maintain competition without creating concentration.

Further consolidation makes sense because the bar at which a bank can remain profitable has risen. The fixed costs of running a bank, both opening it for business and maintaining it for the long haul, continue to grow: These costs run the gamut from keeping up with compliance, anti-money-laundering and other standards to having a program and resources in place to attract talent. Now more than ever, technology is a major cost center. Banks must invest in their tech infrastructure to meet customer expectations, keep up with competitors and steel themselves against cyberattacks.

Consolidation can actually help smaller banks stay profitable, while managing the increased regulatory burden that accompanies growth. The regulatory requirements for banks vary by asset size, and the vast majority of U.S. banks have less than $10 billion in assets, the first major regulatory threshold. What often happens is that smaller players — those under the $10 billion mark— join together to surpass that first threshold by a wide margin. Once these banks reach $20 billion or $30 billion in assets, they can become attractive acquisition targets for banks in the $100 to $250 billion range, well above the $50 billion threshold that triggers even greater oversight from regulators. Thus, as banks expand, there is even more incentive for consolidation and mergers to reach scale to allow for profitable growth over time.

This is not to say that small banks don’t have their place in the ecosystem. In rural areas, regional and community banks fill an important social and economic role by bringing banking services to otherwise underbanked communities. These institutions deliver a product offering that is relevant to their customers and beneficial to the entire local community. As long as these smaller banks have a business proposition that truly justifies their size, there will always be room for them. I would even advocate that the industry, as a whole, should ensure these banks are properly incentivized and encouraged to exist. But in large urban markets like New York, Chicago and Los Angeles — where bigger players abound and where there is no shortage of competition — consolidation is the most logical path forward.

At the same time, there is still room for new entrants — but these select few newcomers will need to innovate and fill gaps, not just replicate the status quo. A handful of new banking charters will likely come from fintech startups with banking capabilities. Yet these, too, will eventually be ripe for acquisition by larger banks that need to build out their technology. Thus, the trend toward further consolidation will continue.

Community bank executives, especially those heading the very smallest banks, must continue to explore ways to be more competitive and more resilient. In doing so, they can’t ignore the fact that selling to or merging with another bank may benefit shareholders and customers alike.

**Cyberattacks against small banks collapse the US financial system---they’re uniquely vulnerable**

**Harner et al. 20** – Chris Harner is managing director of the cyber risk solutions practice at Milliman, an actuarial and consulting firm; Chris Beck is an executive risk consultant within the practice; Blake Fleisher is a senior cyber risk analyst in the practice

Chris Harner, Chris Beck, and Blake Fleisher, "Cyberattacks Could Cripple Major U.S. Banks," CFO, 3-11-2020, https://www.cfo.com/cyber-security-technology/2020/03/cyberattacks-could-cripple-u-s-banking-system/

In the 21st century, first-order, single-point failures with profound second- and third-order effects are especially common in cyberattacks against complex systems. For one, the U.S. financial system is complex and highly interconnected, making it very vulnerable to a cyberattack.

The Federal Reserve Bank of New York (FRBNY) recently epitomized this interconnectivity in a report, arguing that a cyberattack could impair a bank’s ability to service creditors. More specifically, impairment of any of the five most active U.S. banks could result in significant spillovers to other banks, with 38% of the network affected on average.

Perhaps even more concerning, the FRBNY identified a subset of smaller banks that, if impaired, could threaten the solvency of a top-five institution. In particular, the FRBNY estimated it would take the financial distress of six small banks, each below $10 billion in assets, or just one institution with between $10 billion and $50 billion in assets.

More than 80 U.S. banks fall into the midsize bank category, with aggregate assets of approximately $1.8 trillion, while there are about 4,440 small banks, with cumulative assets of around $4.7 trillion. Combined, the midsize and small banks account for about 36% of all commercial banking assets. This indicates that the complexity of the U.S. banking system may not be driven solely by the “megabanks.”

A cyberattack on these banks, which appear benign in isolation and have simpler balance sheets, could ultimately cause a cascading failure of interbank funding, leading to a tipping point for a broader systemic liquidity crisis.

At a glance, when viewed with typical “first-order thinking,” this is deeply troubling, because larger banks tend to have more resources and invest more in building robust cybersecurity than smaller banks. Even if a large bank puts in place a proper cybersecurity policy with the right controls for its own protection, which it absolutely needs to do, it may not be enough.

The issue is not just building a bigger cybersecurity “moat and castle.” Instead, financial institutions need to understand the interconnectedness of their entire ecosystem, integrating cyber risk, vendors, liquidity sources, off-balance-sheet exposures, etc.

More thoughtful analysis, using second- and third-order thinking, indicates that cyberattacks by their very nature know no physical boundaries and can spread rapidly across the globe. We know this from the infamous NotPetya attack in 2017, when a worm planted in Ukrainian tax software managed to infect not just Ukrainian critical infrastructure, but also the largest global shipper, A.P. Moller-Maersk, and the big pharmaceutical company Merck as well as a chocolate factory in Australia.

In a system like banking that is already highly interconnected in its own right, one would expect the overall impact on the U.S. financial system to be even greater. The FRBNY’s paper is a very important illustration of how an operational risk can rapidly lead to grave financial risk.

#### That causes nuclear war

Tønnesson 15 - Stein Tønnesson 15, Research Professor, Peace Research Institute Oslo; Leader of East Asia Peace program, Uppsala University, 2015, “Deterrence, interdependence and Sino–US peace,” International Area Studies Review, Vol. 18, No. 3, p. 297-311

Several recent works on China and Sino–US relations have made substantial contributions to the current understanding of how and under what circumstances a combination of nuclear deterrence and economic interdependence may reduce the risk of war between major powers. At least four conclusions can be drawn from the review above: first, those who say that interdependence may **both inhibit and drive conflict** are right. Interdependence raises the cost of conflict for all sides but asymmetrical or unbalanced dependencies and **negative trade expectations** may generate tensions leading to trade wars among inter-dependent states that in turn increase the risk of military conflict (Copeland, 2015: 1, 14, 437; Roach, 2014). The risk may increase if one of the interdependent countries is governed by an inward-looking socio-economic coalition (Solingen, 2015); second, the risk of war between China and the US should not just be analysed bilaterally but include their allies and partners. Third party countries could drag China or the US into confrontation; third, in this context it is of some comfort that the three main economic powers in Northeast Asia (China, Japan and South Korea) are all deeply integrated economically through production networks within a global system of trade and finance (Ravenhill, 2014; Yoshimatsu, 2014: 576); and fourth, decisions for war and peace are taken by very few people, who act on the basis of their future expectations. International relations theory must be supplemented by foreign policy analysis in order to assess the value attributed by national decision-makers to economic development and their assessments of risks and opportunities. If leaders on either side of the Atlantic begin to seriously **fear or anticipate their own nation’s decline** then they may blame this on external dependence, appeal to anti-foreign sentiments, contemplate the use of force to gain respect or credibility, adopt protectionist policies, and ultimately **refuse to be deterred by** either **nuclear arms** or prospects of socioeconomic calamities. Such a dangerous shift could happen **abruptly**, i.e. under the instigation of actions by a third party – or against a third party. Yet as long as there is both nuclear deterrence and interdependence, the tensions in East Asia are unlikely to escalate to war. As Chan (2013) says, all states in the region are aware that they cannot count on support from either China or the US if they make provocative moves. The greatest risk is **not** that **a territorial dispute** leads to war under present circumstances but that **changes in the world economy** alter those circumstances in ways that render inter-state peace more precarious. If China and the US fail to rebalance their financial and trading relations (Roach, 2014) then a trade war could result, interrupting transnational production networks, provoking social distress, and exacerbating nationalist emotions. This could have unforeseen consequences in the field of security, with nuclear deterrence remaining the only factor to **protect the world from Armageddon**, and **unreliably so**. Deterrence could **lose its credibility**: one of the two great powers might gamble that the other yield in a cyber-war or conventional limited war, or third party countries might engage in conflict with each other, with a view to obliging Washington or Beijing to intervene.

### 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

-require tech platforms to identify and remove bot accounts using their platforms

-require digital advertising platforms to maintain a complete record of advertisers who have spent more than $500 on ads on the platform

-require platforms to take reasonable measures to prevent foreign nationals from sponsoring political ads

-reform Section 230 of the Communications Decency Act to create liability standards for algorithmically-promoted misinformation on social media platforms

#### Solves competition without relying on antitrust enforcement

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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. 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.

#### Removing bots solves democracy

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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. 58-59, https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI\_AntitrustandDataLaws\_2018.pdf.

Senator Warner’s proposal to require tech platforms to identify “bots” using their platforms – enabling users to distinguish between them and real (even if anonymized) people – seems like a minimum step that should be taken to address part of the fake news problems. Some platform companies are not waiting for legislation, however. Facebook and Twitter are removing, not just disclosing, bots that they can identify. Not surprisingly, these efforts, too, have elicited charges of censorship. Warner’s white paper also correctly points to the practical and privacy concerns raised by further steps, such as requiring tech platforms to verify the origins of posts on their networks or identifying inauthentic accounts.118

#### Advertising reform solves democracy

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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. 59, https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI\_AntitrustandDataLaws\_2018.pdf.

Making Political Ads Transparent

The fake news problem, which contributes to social divisions, is compounded by political ads run by organizations or sponsors whose identities are not known, in contrast to the publication of such information for media ads. Shortly before the Facebook’s CEO, Mark Zuckerberg, testified before committees in both congressional chambers in April, the company announced it was going to investigate the identity and location of the sources of political ads. In addition, the company has announced it will keep a publicly-accessible archive of all political ads that are posted on its network.

Facebook and Twitter have also publicly supported The Honest Ads Act, proposed by Senators Mark Warner, Amy Klobuchar, and the late John McCain, which would institutionalize some of these steps and adopt others as a matter of law. Specifically, the bill would require digital advertising platforms to maintain a “complete record” of advertisers who have spent more than $500 on ads on the platform during the previous year, which would enable all users (including the media) to see a list of all advertisers, the ads themselves, the name of the candidate an ad is supporting, and the audiences targeted by the ads – not just the ads that are shown now to targeted users. Although logging and disclosing ads is easier and cheaper in an online environment, the Honest Ads requirements would be more extensive than the requirements for other media platforms, on which political ads are subject to the Federal Election Campaign Act’s disclosure requirements (which currently do not apply to online ads). The proposed bill also would require online platforms to take all “reasonable” measures to prevent foreign nationals from sponsoring political ads.

#### Section 230 liability solves democracy

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Bill Baer and Caitlin Chin, “Addressing Big Tech’s power over speech,” *The Brookings Institution*, 1 June 2021, https://www.brookings.edu/blog/techtank/2021/06/01/addressing-big-techs-power-over-speech/.

Although current antitrust laws fall short in addressing social media’s power to affect democratic processes, members of Congress have demonstrated interest in reassessing or updating them. U.S. Senator Amy Klobuchar (D-Minn.) recently proposed legislation to amend the Clayton and Sherman Acts. In addition, the House Antitrust Subcommittee released a majority staff report last year, and U.S. Representative Ken Buck (R-Colo.) released a separate report. Both called for reform, suggesting a bipartisan interest in reducing the raw power of a few dominant firms and thereby helping new social media platforms compete.

There are alternate paths as well: Congress could address the potential for platforms to misuse their power over information and hate speech by updating Section 230 of the Communications Act of 1934, which sets certain liability standards for social media platforms and user-generated content.

### 1NC – Section 5 CP

#### The Federal Trade Commission should:

**PLANK 1**

--determine that “unfair methods of competition” pursuant to section 5 of the FTC act to prohibit [unilateral exclusion that reduces competition significantly] and bring associative enforcement actions

**PLANK 2**

--issue cease and desist letters to companies engaging in conduct that [reduces competition significantly] stating that their practice violates the core antitrust laws

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

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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.

**Section 5 expansion and clarification is critical to preventing international protectionism**

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1. Interpretive Latitude in the FTC Act

A dearth of clarity on standards and criteria has been part and parcel of the FTC Act’s considerable normative influence abroad,66 especially with respect to areas of regulator discretion in enforcement. Within two years of the statute’s enactment, President Wilson would confess candidly of the new FTC: “It is hard to describe the functions of [the] [C]ommission. All I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business.”67 While Wilson may have been referring to the FTC as a shield for business owners against monopolies and dominant competitors, his inability to easily condense the mandate of the Commission spoke to its versatility and breadth. The FTC Act’s purview over any “unfair methods of competition”68 per its Section 5 granted the agency wide berth in pursuing both ongoing and incipient antitrust violations beyond the Sherman Act’s reach, instead of limiting the FTC to codified standards and prescriptions for a generally defined set of antitrust violations. According to Winerman, “then, as now, the agency combined formal powers to investigate [and] formal powers to prosecute,” while permitting dialogues “with business to facilitate compliance with the law (those emphasized by Wilson).”69 As discussed, there existed a strong predilection in the FTC Act’s originators towards favoring cooperation with big business over heavy-handed policing and resultant debilitation of the national economy. The inferred use of discretion prevalent throughout the statute proved conducive to this aim.

Section 5 proceeds to state that a person, partnership, or corporation believed culpable of antitrust violations by the FTC will be issued a complaint and a notice of a hearing if “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.”70 This invocation of the public interest without further elaboration has left open a sizable margin for interpretive license,71 not the least a presumption that the public referenced is the domestic public. Certainly the public interest varies from country to country and is not a fixed concept. Even within a single domestic polity, different interest groups may be at odds regarding its intuitive definition. Former FTC Chairman William Kovacic noted that “in the 1950s and the 1970s, Commission efforts to use Section 5 litigation elicited strong political backlash from the Congress. The very breadth of Section 5 creates political risks in its application.”72 Whether manifestations of checks and balances or politicized affairs, such historical developments contributed to extralegal U.S. regulatory norms in antitrust enforcement that foreign competition regimes could not transplant and adapt in the same manner that they did American competition laws.

Section 5 also states “in determining whether an act or practice is unfair, the Commission may consider established public policies as evidence,” with the qualifier that “[s]uch public policy considerations may not serve as a primary basis for such determination.”73 Befitting the FTC Act’s elastic mandate, no specific examples of any such public policies are offered. Furthermore, the FTC may find unlawful only the unfair method of competition that “causes or is likely to cause substantial injury to consumers not outweighed by countervailing benefits to consumers or to competition.”74 Without further elaboration on countervailing benefits, the statute cedes to the Commission the leeway to finesse its responses to complex antitrust violations. While guidance to fill these descriptive gaps has been supplied domestically by over a century of successive judicial decisions, alongside evolving conventions accounting for legislative as well as private sector interests, most foreign competition regimes lack a comparable array of participant actors beyond the executive branch.75 When acting in a relative vacuum of precedent and checks, protectionist administrations abroad encounter less resistance to their justifications for selective antitrust enforcement in the name of public policy and/or countervailing national economic benefits.

Section 5 is not explicit regarding openness to presidential control, but Section 6 includes direct mention of presidential prerogative: “The Commission shall also have power. . . [u]pon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.”76 Wilson was quick to rely on Section 6,77 and even as the notion of FTC autonomy later became entrenched in the U.S., this portion of the FTC Act was left unamended. Today, the language easily could be construed overseas as an affirmation of the FTC’s subservience to the executive branch. In the event that foreign readers of the Act fail or do not choose to connect the historical dots, they would be unable to find any undergirding support for agency independence in Section 5 or 6. Indeed, novel expansions of FTC autonomy in Section 5 cases still risk political crossfire for “going beyond established principles of antitrust doctrine—principles set in the resolution of Clayton or Sherman Act disputes creat[ing] immediate opportunities to scold the Commission for taking ‘unprecedented’ measures or entering ‘uncharted’ territory,” per Kovacic.78 The originators of the legislation would not have had it any other way.

**Protectionism causes global wars**

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Marc-William Palen, "Protectionism 100 years ago helped ignite a world war. Could it happen again?," The Washington Post, 6-30-2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/

The liberal economic order that defined the post-1945 era is disintegrating.

Globalization’s foremost champions have become the first to signal the retreat in the wake of the Great Recession. Economic nationalism, historically popular in times of economic crisis, is once again on the rise in Britain, France and the United States. We are witnessing a return to the antagonistic protectionist politics that defined a bygone era that ended with World War I — suggesting that today’s protectionist revival threatens not just the global economy, but world stability and peace.

Leading liberal democracies have turned their back on free trade. Britain, through Brexit, announced its retreat from European market integration. Before the parliamentary elections, British Prime Minister Theresa May announced a new Industrial Strategy, which includes state subsidization of select industries and stringent immigration restrictions on foreign workers at “every sector and every skill level.” Despite her post-election collapse in support, May continues to move forward with leaving the European Union single market thanks to an unholy alliance with the Democratic Unionist Party, Northern Ireland’s far-right supporters of Brexit.

Likewise, in the recent French presidential elections the vast majority of candidates ran on a platform of “patriotisme économique.” Marine Le Pen, leader of the French far-right National Front party, made a strong bid for the French presidency through a campaign that combined a condemnation of globalization alongside the promise of extreme economic nationalist legislation and an end to immigration into France. President-elect Emmanuel Macron is now pushing hard for a “Buy European Act” to placate French anti-globalization forces.

But nowhere has the anti-trade turn been more marked than in the United States, where “globalism” has become a dirty word. “Free trade’s no good” for the United States, as Donald Trump put it in 2015. President Trump has threatened to shred the North American Free Trade Agreement and to impose protective tariffs on imports from Mexico and China, two of America’s largest trading partners.

In January, a paranoid Trump pulled the United States out of the Trans-Pacific Partnership negotiations — a massive free-trade deal that included a dozen countries in the Asia Pacific — because he believed that the Chinese were secretly plotting to use it to take advantage of the U.S. market.

And in April, Trump signed a “Buy American, Hire American” executive order that forces U.S. government agencies to purchase domestically made products and limits the immigration of foreign skilled workers.

This widespread fear of the global marketplace and the looming threat of tit-for-tat trade wars herald a return to late 19th-century geopolitics. Then, too, many of the leading economies of the day took shelter behind high tariff walls to halt the forces of globalization. Following the onset of an economic depression in the early 1870s, one industrializing country after another turned against trade liberalization. Trade wars, colonialism and closed markets became the name of the geopolitical game.

In stark contrast to today, back then only Britain stuck to free trade with “all the world.” Yet even free-trade bastion Britain was not without its domestic economic nationalist enemies.

In response to the late 19th-century turn to protectionism among Britain’s competitors, formidable right-wing British organizations like the Fair Trade League and the Tariff Reform League emerged to champion retaliatory tariffs and an imperial trade preference system. And the political leader of the turn-of-the-century British imperial protectionist movement was none other than Joseph Chamberlain, Theresa May’s “political hero.”

“Fortress France” turned away from free trade in 1892, the culmination of a decade-long “protectionist backlash” to the ongoing economic depression. The protectionist measure exacerbated the Franco-Italian trade war, which Italy had started with its turn to protectionism in the mid-1880s. Trade between these countries fell considerably, pushing Italy ever closer to Austria-Hungary and Germany — the Triple Alliance — in the years before the First World War.

The United States, however, topped the list of protectionist states. The political and ideological power of protectionism in late 19th-century America — the Gilded Age — was palpable. The Republican Party, formed as the party of antislavery in the 1850s, fast remade itself as the party of protectionism following the Civil War.

Hoping to protect U.S. industries from the unpredictable gales of unfettered global market competition, the ultranationalist party tacked its sails to the “American System” of high tariffs and government subsidization of domestic industries.

More than a century before Trump’s “America first” policy, slogans like “America for Americans — No Free Trade” filled Republican Party convention halls.

For paranoid Gilded Age Republican protectionists, free trade became tantamount to conspiracy.

The GOP’s lead spokesman on the tariff at that time was a short, cigar-smoking politician from Ohio named William McKinley. “The Napoleon of Protection,” as he was dubbed, had well earned the moniker by the time he entered the White House in 1897.

Like the Trump administration today, McKinley viewed free trade with suspicion, although the target of McKinley’s free-trade conspiracy theories was the industrial powerhouse of Britain instead of Trump’s China. McKinley, throughout his long Republican career, charged his pro-free-trade political opponents with being part of a vast British conspiracy that sought to sap America’s high tariff walls and undermine infant American industries. The conspiracy, he argued, included “free trade leaders in the United States and the statesmen and ruling classes of Great Britain”; American free traders were pawns, agents of “the manufacturers and the traders of England, who want the American market.”

Countering Republican conspiracy theorists, late 19th-century U.S. free traders argued that trade liberalization fostered international stability and peace, and that, by contrast, the era’s global uptick in imperialism and war only illustrated how protectionism fomented geopolitical rivalry and conflict.

Trump, tapping into long-standing Republican fears of free trade, is knowingly returning the GOP to its paranoid protectionist roots — a move against globalization that is also building up populist momentum in Britain and France.

The protectionist resurgence among the leaders of post-1945 globalization — be it Brexit, patriotisme économique, or “America first” — holds dire consequences for the liberal economic order by pitting nations against one another and breeding suspicion, distrust and conspiratorial thinking. The ultranationalism, militarism and tariff wars of the late 19th century spilled over into the 20th century, and ended in world war — suggesting a return to the protectionism of old could damage far more than national economies.

## Innovation Adv

### 1NC – Turn

DA turns China scenario – they’re worse for competition

### 1NC – tech competition robust

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

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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: Solves China

#### No internal link – no reason small firms wouldn’t cooperate with China

### 1NC – antitrust can’t solve

#### Antitrust is the wrong instrument for tech regulation

**Rosoff 21** – Matt Rosoff, Editorial Director, Digital at CNBC

Matt Rosoff, “Op-ed: This week showed how the Big Tech antitrust campaign is totally misguided,” June 30, 2021, CNBC, <https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html>

On Wednesday, the tech industry saw five companies debut on public stock markets. One of them, Chinese ride-hailing giant Didi, is worth nearly $70 billion. Two others, Taboola and Integral Ad Science, compete in the online advertising industry -- one of the markets that has supposedly been ruined by Alphabet (in particular) and Facebook.

More generally, this year has seen the hottest IPO market in years, and investors continue to pile into start-ups at a record pace -- Q1 saw more than $64 billion in venture funding, a record.

This does not look like a deserted wasteland of stifled innovation and broken dreams.

Meanwhile, the general public doesn’t see tech power as a particularly pressing issue. In a survey funded by a tech industry group, 44% of respondents ranked tech industry regulations as the lowest priority on a list of five options, behind the economy, public health, climate change and infrastructure. Yes, 53% of the respondents thought some legislation was a good idea. But that does not mean the public wants Congress and the courts to aim the antitrust cannon at these giants.

As I wrote four years ago, antitrust is the wrong approach here.

None of these companies have monopolies over meaningfully defined relevant markets -- you really have to stretch and squeeze the market definitions for their dominance to come into clear view. The real state of the tech industry is an all-out business war between the five giants, a constantly shifting landscape of rivalries and backbiting -- think Great Powers Europe before World War I -- with numerous well-funded competitors of all sizes waiting to seize any opportunity and fill any gap they leave open.

For instance:

Google dominates search and Facebook is the biggest social media company by far. But the main source of their revenues is online advertising, and they compete bitterly for every available online ad dollar, with Amazon coming quickly up behind. And yet, there’s still enough space for TikTok, Twitter, Snap and a dozen small ad-tech competitors to build sustainable, thriving ad-supported businesses.

Amazon, Microsoft and Google are locked in a hard-knocking three-way war for supremacy in cloud computing infrastructure. And yet, there are dozens of companies delivering thriving cloud services on top of or alongside these platforms, including Snowflake, which debuted last year and is now worth more than $70 billion, and Zoom, which went public in 2019, and is worth almost $115 billion.

Facebook hates Apple and complains about its control over iPhone apps every chance it gets -- except, Mark Zuckerberg now admits that Facebook might actually be stronger after Apple’s recent privacy changes to the iPhone. Meanwhile, Apple’s iOS is actually a minority competitor, as Google’s Android operating system is the dominant mobile platform in the world -- and Microsoft just signed a deal with Amazon to support Android apps on Windows.

To be perfectly clear: Yes, it is in the public interest to regulate these tech giants more strictly.

For instance, Facebook and Google’s YouTube exercise an enormous amount of influence over public discourse and politics by allowing misinformation to spread almost unchecked.

Amazon and Apple control extremely valuable marketplaces that reach hundreds of millions of people, and can use this control to pit suppliers against each other and extract arguably onerous fees.

Union advocates allege Amazon illegally interfered in a recent attempt to unionize in Alabama, and many workers have complained about working conditions in warehouses and delivery vehicles.

All of the companies have used acquisitions to enter adjacent markets and, arguably, to stifle potential competitors before they got too big -- a tactic also used by companies outside the Big Five, such as Oracle in past years and Salesforce more recently.

Several of their founders are now centi-billionaires, a perfect example of the runaway income inequality that many progressives believe must be curbed.

But all of these activities can be addressed with targeted regulations or stricter enforcement of existing laws. Antitrust is a blunt instrument meant to address major market distortions created by true monopolists. Being big, in itself, is not illegal. Applying antitrust law to these companies is misguided, wrong, and will not have the desired effect of curbing their power in meaningful ways.

### 1NC – AT: big four hurt startups

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

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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>)

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

### 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: 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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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: 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.

## Democracy Adv

### 1NC – Antitrust No Solve Disinfo

#### No internal link – even if they make big tech liable, it won’t be for misinformation

#### Competition makes disinformation worse – consumers prefer bad news

Hurwitz 17 – Assistant professor of law and co-director of the Space, Cyber, and Telecom law program at the University of Nebraska College of Law.

Gus Hurwitz, “Fake News’s Not-So-real Antitrust Problem: Content Remains King,” *Competition Policy International Antitrust Chronicle*, 2017, pp. 3-4, https://laweconcenter.org/wp-content/uploads/2018/01/CPI-Hurwitz.pdf.

II. NEWS COMPETITION IN ABUNDANCE

A central aspect of Hubbard’s thesis is that Facebook and news compete with one another and that, in light of this, Facebook is using its dominant position in various markets to harm the news media. This argument is important in order to bring the thesis into an antitrust framework. If Facebook isn’t abusing a dominant market position – if there is no harm to the competitive process – then we are not operating in the realm of antitrust. But while Facebook competes in the “news” market, as discussed above it is far from dominant. It arguably competes in the more generalized “attention” market, but it is not dominant there, either. News is an input into the social media market. But Facebook has no incentive to harm news producers if they are creating a valuable input. And while Facebook’s significant share of the online advertising market has certainly harmed the traditional news industry, Facebook has little incentive to use that power to further harm the industry. In other words, neither horizontal nor vertical theories of harm present concerns about Facebook’s relationship with the traditional news media.

The best way to see the problems with Hubbard’s argument is to start with her proposed solution. Generally, she advocates a need for more competition between big tech platforms. She presents a hypothetical in which “there were five Facebooks and five Googles, all with different algorithms.” She posits that this would make it more difficult for purveyors of fake news to game the algorithms (because it is more costly to game ten than two, a reasonable assumption) and that consumers would reward the platform that developed the best algorithm with their patronage. She goes on to argue that, because consumers would reward platforms that sent them to higher quality news sources, those news sources would be in a better bargaining position against the platforms so they could negotiate more favorable deals with the platforms that returned higher-quality results.

This hypothetical points to a serious problem in how Hubbard imagines competition in social media – and in much of the modern news industry – works. Consumers do not reward the platform that provides them the best information any more than they reward fast food restaurants that have the best fruits and vegetables or dentists that provide the most thorough tooth cleaning. Changing the assumption from one in which consumers reward news providers and platforms for providing high quality news content to one in which they provide attention-grabbing reverses the outcome of Hubbard’s hypothetical: competitive platforms will work to develop the most attention-grabbing content, eschewing quality for that which grabs the most attention at the lowest cost. Their algorithms do not need to be “gamed” in order for fake news to outperform real news. They are designed precisely to ensure this outcome. And, in turn, purveyors of quality news will be in a weaker bargaining position, both in absolute terms and compared to those purveyors of attention.

Antitrust law is about protecting the process of competition. It is therefore important to understand what that process looks like in a given market. It turns out that competition doesn’t always yield pretty results in media markets – an idea to which we will return below. The consumer is the sine qua non of competition – the process of competition caters to maximizing what consumers what. The basic problem of fake news isn’t that a lack of competition causes the market to under-produce the high quality information that consumers want. It’s that consumers prefer interesting, attention-grabbing, simple to understand, entertaining fake news. Competition is causing the market to produce exactly the fake news that consumers do want.

There is no concern about a lack of horizontal competition driving this process. Rather, in the social media market – the market for attention – the platforms are rewarding, and the traditional news media is increasingly producing, a low-quality product because this is what the marginal consumer wants. This is a process that is driven by horizontal competition. Facebook competes with news producers for the attention of consumers; and Facebook competes with other social and search platforms to provide consumers attention-drawing content. High quality news is too costly and insufficiently interesting for the marginal consumer, so the market produces and directs consumers to something else. That’s no more Facebook’s fault than the decline of cobblers is the fault of industrial-scale shoe manufacturing.

Nor are there vertical – or to use the antitrust newspeak, platform – concerns driving the problem of fake news. Facebook is a platform-based distributor of information, including news. This means that news is (one of many) inputs into Facebook. Hubbard suggests that Facebook’s gatekeeper position allows it to harm the traditional media in an effort to keep people on Facebook’s own site. She points, in particular, to Facebook’s use of its proprietary in-app browser and Instant Articles feature, arguing that Facebook uses these to lock users in to Facebook’s platform, denying third-party news sites valuable analytics and advertising revenue, and making it more difficult for users to navigate away from Facebook.

As an initial matter, in-app browsers have become common. Facebook, Twitter, and Google News all use them. This suggests that they have been implemented to address a technological problem – to make the mobile browsing experience better for users of each platform. And, indeed, this is the case. Websites that have not been redesigned specifically for mobile platforms often do not work well. Even websites that do have mobile versions often do not work particularly well. The user experience between those websites is often nonstandard, which inconveniences users and may encourage them to discontinue their use of both that website and the platform that sent them there. By using an in-app browser – and especially by offering a standardized format for presenting news content across sites in that browser – platforms can (at least in principle – I will not defend the quality of many in-app browsers, with the recognition that they are a new and improving technology) offer users a superior experience. This means that they will make more use of a platform, yes, benefitting, for instance, Facebook – but it also means that they will consume more content via that platform, benefitting, for instance, media outlets.

Importantly, mobile browsing, where we see these in-app browsers, is different from browsing in a desktop environment. When a user is sent to a website for an article on a mobile device, they are unlikely to stay on that website once they are done with the article. Rather, they are likely to exit out of the browser, which sends them back to whatever source sent them to the website initially. This means that users are “locked in” to the Facebook platform no matter whether it uses an in-app or external browser.

Hubbard is exactly right that in-app browsers and Instant Articles are an effort to keep users engaged with the Facebook platform. But the alternative is not users engaging more with news outlets’ platforms. The alternative is users getting frustrated with news outlets’ mobile experiences and finding more enjoyable ways to spend their time than waiting for poorly-rendered webpages to load. Facebook knows that if they can make articles quick and easy to access, more people will spend more time on their phones. This is why Facebook is willing to offer content providers a significant share of ad revenue. And, to the extent that publishers of any sort continue to produce content that Facebook users want to engage with, those publishers will continue to be able to demand such a share of revenue. Facebook has no incentive to deny its users access to content linked to via Facebook. To the contrary, it has every incentive to get them seamless access to that content, and is willing to pay to do so.

### 1NC – Rant

#### No solvency – platforms like Twitter cracked down on misinformation and booted Trump from their platform, but small, alternative platforms like Parler market themselves on promotion of free speech and lack of censorship

### 1NC – No Disinfo Impact

#### Disinformation has existed forever – no evidence it’s gotten worse

Sacher and Yun 17 – Seth B. Sacher is an economist and John M. Yun is the director of economic education at the Global Antitrust Institute, Antonin Scalia Law School, George Mason University.

Seth B. Sacher and John M. Yun, “Fake News is Not An Antitrust Problem,” *Competition Policy International Antitrust Chronicle*, 2017, pp. 3-4, https://poseidon01.ssrn.com/delivery.php?ID=790086090127101092028065127099113117016083053010057028103075006126104106078100004074010017029060104024054109104067100082004104005023049082020121111079087110115127065007060101082025070104091106114091007106004122008120087126107116091075098099088026121&EXT=pdf&INDEX=TRUE.

While use of the term “fake news” has spiked, it is not a new phenomenon. Figure 2 indicates that the frequency of the term “fake news” in books written in English and scanned by Google spiked in 1940 and also more markedly in 2008 (which is the end of the sample).10

Corroborating Figure 2, according to a Merriam-Webster article, the term fake news began to enjoy “general use at the end of the 19th century.”11 The generation and distribution of intentionally false stories is not a new phenomenon even if it went under different names such as “false news” or even outright “lies.” For instance, in Figure 3, we compare the frequency of the phrase “fake news” and “false news” in English books.

Thus, Figure 3 suggests the problem of “fake news” and “false news” is not a new one. Before the rise of the Internet, tabloids publishing outlandish claims have fueled conspiracy theories for decades (e.g., assertions the Apollo moon landings were fake; Elvis sightings). Importantly, it is not clear that fake news is having any greater or more harmful impact today than in previous times.

### 1NC – AT: Democracy !

#### Alt causes to democracy – their ev is from 2019 and doesn’t assume the Capitol riots, election conspiracies, OR state-level voting restrictions

#### No democracy impact---new tech, non-state actors, military autonomy, and eroding institutional constrains undermine DPT

Potter, 16 - Assistant Professor in the Department of Politics at the University of Virginia (Philip B.K. Potter, "Four Trends That Could Put the Democratic Peace at Risk," *Political Violence at a Glance*, 10-14-2016,

The point is that it’s not democracy alone that matters. Rather it is the limits that these regimes can put on their leaders to force them to be careful and selective when doing things like making threats and starting fights. This also means it’s not a baked-in advantage that a democracy can take lightly – even well-meaning leaders in democracies have every incentive to figure out how to slip these constraints. Limits yield long-term advantages, but in the immediate term they tie leaders’ hands, preventing them from engaging with the international problems or opportunities that they feel they should.

There are four trends that indicate this process is well under way and is putting the “democratic advantage” at risk.

Militaries are less closely tied to voters

Democratic advantages in conflict are commonly traced to the nature of democratic militaries and their relationship with political power. Going all the way back to Kant, there has been the notion that societies with citizen soldiers and the vote are not going to support unnecessary wars when they are going to bear the costs. The problem is that Kant’s vision isn’t what modern armies look like, and they’re intentionally moving away from the target rather than toward it.

In the US, military service is all-volunteer, and the recruits are increasingly drawn from concentrated segments of society. This divorces the consequences of fighting from the day-to-day experience of most voters. Increasingly, this is a limited force supplemented by private sector contractors, placing even more distance between the individual with the gun and the democratic process.

The emphases on covert operations, Special Forces, and technological superiority further water down the link between society and soldiers. This was, in fact, part of the point of moving to an all-volunteer force and one of the rationales for investments in stealth, information technology, and precision guided munitions, e.g. the precision strike complex. By replacing bodies with dollars, planners have consistently sought to increase the flexibility that the US has in its use of force. In the immediate term, that goal makes sense – it allows policy makers to do what they believe needs to be done without having to worry about a fickle public. But over the long term, it has the potential to lead to less caution and selectivity when engaging in conflicts.

Adversaries are proliferating and changing

The emergence of non-state actors as a primary threat has further loosened constraints on leaders. The shift from the possibility of total war with the Soviet Union to myriad smaller-scale challenges accelerated the transition from a mass military to an elite, highly specialized force more isolated from society. Compounding the challenge, this type of adversary and conflict leads to more significant informational advantages for leaders, which make democratic constraints less binding. Citizens and political opposition are always playing catch-up with the executive when it comes to foreign policy information, but the challenge is harder when the adversaries are less familiar, the engagements shorter, and the issues more complex.

Technology is reducing constraint

New technologies are driving citizens and political opposition ever further out of the loop. The extraordinary rise of unmanned vehicles in combat reduces the risk of casualties and extends the range for projecting force. This has undeniable strategic advantages, but there is less visibility and, accordingly, less accountability associated with the use of this technology. This means leaders worry less about the ex-post constraints and costs that typically come with casualties.

Institutions and practices increasingly favor the president

The recent nuclear agreement with Iran was an executive agreement rather than a treaty. This is the norm – most international agreements are now unilateral actions of the president. A polarized Congress is ever more cautious in its exercise of what little foreign policy power it has; two years into the campaign against Islamic State and Congress still hasn’t weighed in one way or the other. In the US this is an expansion of the widely accepted argument that there are two presidencies – a constrained one in domestic politics and a relatively autonomous one abroad. What’s unappreciated is that this growing presidential autonomy (which may well be needed to run a Superpower) also decreases constraint and with it the foreign policy “advantages” we associate with democracy.

While these advantages are real, they are also fragile. Key institutional constraints – such as a robust political opposition and a knowledgeable citizenry – are susceptible to seemingly minor changes in institutions and/or practices that loosen the limits of leaders’ foreign policy decisions. As technologies advance, threats shift, and institutional constraints wax and wane, the foreign policy advantages embedded within democratic systems may begin to erode. The potential for such a shift is a possibility that should not be taken lightly.

### 1NC – non-econ AT fails

#### Tech companies can’t be broken up for non-antitrust reasons

**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>)

Finally, there is no sound basis for breaking up any of the tech platform companies for the non-antitrust reasons I address later in the essay – privacy, security, and preservation of the integrity of election campaigns. To be sure, the concentration of data held by various private firms exposes individuals and society to greater risks, since data leaks at any one of these entities would have wider impacts than if data were more dispersed. But these dangers are analogous to those our society faces in other contexts: for example, the risks posed to all of us from a cyber- and space-based electromagnetic pulse attack to the nation’s electricity grid, to which our homes and places of work are connected. These risks can be reduced (though not eliminated) by hardening the plants and grid against these attacks and by having “shut off” switches that insulate or uncouple parts of the grid from other parts that may be disabled or “infected.” Yet no one seriously thinks, nor should they, of preemptively dismantling the nationwide electricity grid and replacing it with locally-based generating systems unconnected by transmission lines to any other localities. The reason preemptive breakup of the grid is unthinkable is that the costs to society – and especially to many less-populated areas of the country – of doing so would be too high.

Much the same calculus militates against the preemptive breakup of any one or more of the large tech companies – or of other non-tech companies that have huge warehouses of highly sensitive data (those in the financial and health sectors, for example) – simply because of the risks posed by the unauthorized use or theft of these data. As already discussed, courtordered breakups of companies for antitrust sins have been rare in our history, and the net benefits of preemptive breakups of companies simply because they warehouse a lot of data are dubious at best. Were Congress somehow to order this result, it is not clear what company (in or out of tech) would be safe from breakup – a prospect that would severely chill innovation and expansion by large numbers of companies in our economy.

#### Antitrust law is structurally deficient at solving non-economic harms

**Lao 20** – Professor of Law, Seton Hall University School of Law

(Marina Lao, “NO-FAULT DIGITAL PLATFORM MONOPOLIZATION,” William and Mary Law Review, Vol. 61: 755, 2020)

B. Other More Appropriate and Less Risky Instruments for Addressing Social and Political Ills

Of course, the primary motivation for the no-fault proposals may be noneconomic. Some critics have linked the immense economic power of the largest technology platforms to a variety of social and political ills, including rising economic inequality, the insufficient creation of good jobs, the dearth of opportunities for small businesses, political corruption, privacy intrusions, the problem of "fake - news," and interference with our elections which threaten our democracy."8 2 Jonathan Baker and Steven Salop have argued persuasively that stronger and wiser antitrust enforcement can help reduce economic inequality by reducing monopoly profits, since monopoly profits represent a transfer of consumer wealth from consumers to the monopoly's shareholders and senior executives, who generally tend to be more affluent than average consumers.18 3 But, beyond that, antitrust law is not primarily a wealth and income distribution tool. Nor is it tailored specifically to create good jobs, or to address other social and political issues.

I question the advisability of using antitrust law as a primary tool to try to resolve serious societal problems unrelated, or only tangentially related, to market competition. While Amazon may be responsible for the loss of many retail jobs, for example, and the largest technology firms may employ fewer workers relative to firms of comparable size in "traditional" industries,"8 4 it is not clear that no-fault deconcentration is the right way to deal with these monumental social problems rooted in technological advances. A more direct approach, using existing or new laws and policies targeted to the problems at issue, should deliver better results and have fewer collateral costs. In other words, consumer protection laws or privacy and data security regulations would be better than antitrust at dealing with possible transparency, data security, and consumer deception issues."8 5 And tax and labor laws, job-training and education initiatives and so forth would be far better suited than antitrust to tackle the array of other social and political problems.186

# Block

## Adv CP

### 2NC—solves democracy

#### Creating opt-in data-sharing requirements solves privacy while improving innovation – reduced access to consumer data forces companies to create new, privacy-centric profit mechanisms

Magnuson 21 – Senior legal editor for privacy and data security at Thomson Reuters’ Practical Law Group. JD from Duke University.

Beth Magnuson, “Data privacy vs. innovation: The new rules of the road,” *Venture Beat*, 29 May 2021, https://venturebeat.com/2021/05/29/data-privacy-vs-innovation-the-new-rules-of-the-road/.

Apple’s move to a more private, consumer-driven data model with the announcement of its App Tracking Transparency (ATT) feature puts the consumer in the driver’s seat of data privacy, allowing them to opt-in or opt-out of data sharing. The move is creating tension among businesses, especially big tech, who worry that giving up control of their data will stifle innovation — but nothing could be further from the truth. It’s not about who’s driving the car, it’s about establishing rules of the road.

It may be hard to believe, but the internet is still in a relatively nascent stage, similar to the mass production of cars in the early 1900s. When people were accustomed to horse-drawn carriages and walking as a primary means of transportation, hearing an engine rev and seeing a gas-powered contraption barrel down the road was equally as exciting as it was alarming. The same can be said with data privacy and the internet. Consumers are inexplicably fascinated by its possibilities, but neither they nor businesses have yet to grasp its full potential — for better or worse.

It will take the coordination of governments, Big Tech, and consumers to implement common bedrock principles in order to protect privacy and pave the way for safe data travel in the internet age. While fear is often associated with change, everyone can win if we learn to be creative with a shared set of privacy standards. Such standards should include:

Looking both ways: Understanding the ad ecosystem

More often than not, consumers incorrectly assume that their data is isolated to one particular app, when in fact it’s usually shared with a whole network of partners. The ad ecosystem is highly complex, with companies approaching it from every angle, leaving many people unintentionally perplexed. There is an element of education needed first before the industry can begin to build common rules of the road. Companies are responsible for communicating to their customers exactly how and when their data will be used — beyond just their immediate purposes. This can be challenging; just look at the Google Incognito lawsuit. While the private web browser splash screen indicated that websites may be able to collect information about a user’s browser activity, users still expected, given the name, that their data would be kept confidential and they would not be tracked. Keeping data safe is very different from keeping it private, yet people often conflate the two.

Information must be presented in a way that is easy for consumers to understand. Long words and small fonts can sometimes be the leaky tire that leads to a crash.

Red light/green light: Allowing for consumer consent

Once consumers understand how their data is being used, the second step is setting up the figurative traffic lights. Companies should allow consumers to opt in or out, just like Apple’s ATT feature. What remains to be seen is whether or not the opt-in feature is designed and presented in a way that’s understandable to consumers or if it will be just another button people click without a second thought.

One thing companies should consider when creating consent options is the use of dark patterns. These carefully crafted user interfaces can be designed to either enlighten or confuse a user. Examples include confusing language that contains double negatives, such as “don’t not sell my personal information” and making it appear that the user must submit or share non-essential information to continue using a product or access a webpage. Companies should take what they’ve learned about dark patterns and user behavior to help consumers understand what they consent to. This will establish better relationships with their customers in the long run.

Stop signs: What happens when a consumer clicks disagree?

Change is always scary and can feel restrictive. Consumers are fearful about how their data is being used and the lack of control with regard to where it’s sent. Businesses worry that less access to data will negatively impact their bottom line. For too long companies have taken consumer data for granted, resting on the way things have always been done. But just because a consumer opts out doesn’t mean you’ve hit a stop sign — just turn right!

User consent can provide a wakeup call to companies who still believe consumer privacy is on the other end of the pendulum of innovation. Now is the time to rethink your digital ad strategy and re-evaluate how to connect with customers in a privacy-centric way, or risk losing them all together.

#### Bot identification and removal solves – it’s both feasible and way more effective than the squo

Gibson et al 21 – Professor of political science at the University of Manchester. Her research focuses on the impact of new information and communication technologies on political parties and elections.

Oliver Beatson, Rachel Gibson, Marta Cantijoch Cunill, and Mark Elliot, “Automation on Twitter: Measuring the Effectiveness of Approaches to Bot Detection,” *Social Science Computer Review*, vol. 20, pp. 17-18, 2021, https://journals.sagepub.com/doi/pdf/10.1177/08944393211034991.

What these findings suggest is that bot detection, and particularly the detection of an orchestrated PA campaign using bots, is extremely difficult and often throws up results which are impossible to verify. This is particularly the case when the analysis takes place either during or shortly after the period of time of the event being investigated without the benefit of a ground truth data set. This then begs the question of how the average user is expected to be able to identify when another user isn’t real or trying to mislead them. This is also the case within academia. Without a ground truth data set, that has been confirmed by Twitter, it is impossible to say with absolute certainty that an account is a bot.

Given that Twitter and bot detection services like Botometer can be unreliable, it would appear that for the time being at least, the onus is on the individual user to explore suspected Twitter accounts and report them if they are seen to be acting against the rules of Twitter. Central to this, however, is the ability of individuals to be able to detect these accounts and make informed decisions on them. At present, it would appear that the sole measure of success that can be applied in this respect is down to the time difference between the point of the data collection and of the analysis which allows for some level of confirmation of the malpractice of certain accounts, as a result of having been suspended. However, if accounts have not been suspended, there is little that can be done to prove with outright certainty that they are fake or bots. This means that any attempt at detecting bots or an astroturf campaign in real time are all but impossible. As a result, actors can carry out such campaigns with relative impunity, and users will only be aware they have been manipulated after the fact. This is an issue that social media companies in general have to face up to, especially in relation to future elections. These organizations have done very little in terms of efforts to work with academics and journalists to make data available and to try to assess the impact that their products are having on individuals and on democratic processes. The black box practices which they operate mean that they have access to data we could never have before dreamed of, with the possibility to create an unparalleled understanding of human nature. It is, therefore, not beyond the realms of possibility to believe that they have the ability to know which accounts are real, label all instances of disinformation in a timely manner, and ultimately to remove accounts that are seeking to do harm in real time.

#### Reforming Section 230 solves – forces companies to be liable for misinformation on their platforms

Reardon 21 – CNET reporter since 2004.

Marguerite Reardon, “Section 230: How it shields social media, and why Congress wants changes,” *CNET*, 29 July 2021, https://www.cnet.com/news/section-230-how-it-shields-social-media-and-why-congress-wants-changes/.

Last week, Sens. Amy Klobuchar of Minnesota and Ben Ray Luján of New Mexico introduced the Health Misinformation Act, a bill that would create an exception to Section 230, a provision in the Communications Decency Act that gives legal protections to social media companies over user-generated content. This exception would make companies like Facebook, Twitter and YouTube liable for inaccurate statements about health information, including misinformation about COVID-19 vaccines, in addition to other false health-related claims.

The bill is the latest in a slew of legislation aimed at reforming the liability shield. Democrats and Republicans on Capitol Hill generally agree that changes need to be made to Section 230. Calls for reform have taken on new urgency as social media sites battle a flood of troubling content, including disinformation about the coronavirus vaccines, the outcome of the US presidential election and the deadly attack on the US Capitol.

It's not just theoretical: Extremist content and conspiracy theories posted on social media platforms have led to real-world violence. In spite of the companies' efforts to address these concerns, lawmakers have expressed frustration that it's not enough, and they've urged the companies to do more.

"Earlier this year, I called on Facebook and Twitter to remove accounts that are responsible for producing the majority of misinformation about the coronavirus," Klobuchar said in a statement. "But we need a long-term solution."

Republicans have widely called for the reform or repeal of the law because of their perception that the Silicon Valley powerhouses are biased against conservative views and work to censor conservatives, like former President Donald Trump, while giving liberal politicians a pass.

Democrats agree that reforms are needed, but they see the problem differently, arguing that Section 230 prevents social media companies from doing more to moderate their platforms, such as taking down or limiting hate speech and misinformation about COVID-19.

"Throughout the COVID-19 pandemic, social media companies like Facebook, Twitter, and YouTube did little while COVID-19 related misinformation spread on their platforms -- fueling distrust in public health officials, promoting conspiracy theories, and putting lives at risk," Luján said in a statement.

### 2NC—AT: best remedy

#### The CP solves comparatively better—

#### 1] 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.

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

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. 51-52, 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.

#### 3] solves democracy better—Targeted regulations are comparatively better at solving non-competition issues.

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(Daren Bakst and Gabriella Beaumont-Smith, “A Conservative Guide to the Antitrust and Big Tech Debate,” Heritage Foundation, December 1, 2020, <https://www.heritage.org/sites/default/files/2020-11/BG3563_0.pdf>)

Antitrust Should Be Used Judiciously and Not Used for Unrelated Issues. Unlike targeted regulations that address specific problems, antitrust law can be used to completely reshape an industry and potentially the entire economy by reshaping numerous industries. Therefore, antitrust is not a policy tool to be used lightly. Yet, many proposed reforms, such as in the recent House Subcommittee report, would use concerns about Big Tech as a way to make broad-based changes to antitrust law.

Just because a concern is raised about the power of Big Tech, this does not mean that antitrust is the tool to address that concern. For example, policymakers may want to address Big Tech’s censorship of speech or address data and privacy issues. These issues, though, are distinct from the competition issues addressed by antitrust law. Trying to use antitrust to address these unrelated issues will undermine antitrust and gives the impression that the goal is simply to punish Big Tech.

### 2NC—AT: companies adapt

#### Antitrust action is drawn-out and results in watered-down settlements

**Chakravorti 20** – Bhaskar Chakravorti is the Dean of Global Business at The Fletcher School at Tufts University and founding Executive Director of Fletcher’s Institute for Business in the Global Context. He is the author of The Slow Pace of Fast Change.

Bhaksar Chakravorti, “Antitrust Isn’t the Solution to America’s Biggest Tech Problem,” 10-2-20, Harvard Business Review, https://hbr.org/2020/10/antitrust-isnt-the-solution-to-americas-biggest-tech-problem

For months now, the drumbeat for reining in Big Tech has been getting louder. Critics have suggested solutions from breaking up Facebook and Amazon to regulating social networks and search engines as public utilities. This summer, the heads of major tech firms were hauled before Congress, and the House Antitrust Subcommittee reportedly is following up with a major report calling for a breakup of the biggest of the Big Tech companies as a capstone to its 15-month investigation.

As fall began, the Senate Commerce Committee announced plans to subpoena top social media company CEOs to compel testimony on the legal provision that provides them broad legal immunity around content on their platforms, and the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights prepared for hearings on antitrust enforcement. Most significantly, the Department of Justice (DOJ) reportedly started briefing state attorneys general on its proposal to launch a landmark antitrust lawsuit against Google — the most important anti-tech antitrust action since the 1998 case against Microsoft.

There is clear legal, regulatory, and political momentum behind taking action, and soon there will be no turning back. The question is: Is anti-tech antitrust the right tool to address America’s biggest technology problem?

Historic as this push to challenge the power of these companies may be, the long history of antitrust action against Big Tech is not encouraging — particularly if you are hoping for a big company to be broken up outright. In 1956, the Bell System monopoly was left intact after a seven-year legal saga. The antitrust action against IBM lasted 13 years. Outcome? You guessed it: The behemoth remained unbroken. The 1998 action against Microsoft, in which the government argued that bundling of applications programs into Microsoft’s dominant operating system constituted monopolistic actions, ended three years later with a settlement and the company intact.

Today’s technology industry is more complex than it was in the time of the Bell System, IBM, or Microsoft cases. Moreover, while public sentiment had swung against Big Tech after the 2016 presidential elections, revelations of social media manipulation, and breaches of privacy, it has also improved during Covid-19, as Americans rely on tech products more than ever.

Any antitrust action against these companies will be long and drawn-out — no matter its conclusion — for a number of reasons., First the complaints against the industry are varied, ranging from anti-competitiveness to privacy issues, data protection, and vulnerability to misinformation. Second, there are multiple large companies in the crosshairs, with different products and different suggested remedies. Third, multiple agencies are pursuing action, from the DOJ and the Federal Trade Commission to the House initiative led by Democrats to the Senate initiative led by Republicans, and each has a different approach, motivation, and timeline. Fourth, the technology itself keeps evolving. Finally, there is a precedent for settling with the tech industry: Previous antitrust actions have resulted in settlements or consent decrees where lawmakers got something from each of the companies in exchange for leaving them intact, which might well encourage companies to drag the fight out as long as possible. Putting these considerations together, it reasonable to expect a lengthy process that risks frittering away the current momentum, and which ends with a settlement that resolves issues on the margins.

#### Antitrust authorities lack legal authority to intervene in non-economic concerns—narrow application is best for consumers

**MacCarthy 18** – professor in Georgetown University's Communication, Culture & Technology Program (Hoya Saxa)

Mark Maccarthy, 10-1-2018, "Privacy Is Not An Antitrust Issue," Forbes, <https://www.forbes.com/sites/washingtonbytes/2018/10/01/privacy-is-not-an-antitrust-issue/?sh=65e3a07700d9>

Antitrust authorities have the authority and the responsibility to look into these data issues in so far as they affect non-price aspects of competition such as diversity of privacy practices and innovation.

But, going beyond these competition issues to review conduct or mergers based on non-competition issues like privacy itself is a bridge too far. It simply won’t pass muster under current antitrust standards.

The FTC majority said as much in approving the Google-DoubleClick merger. It expressed reservations about intervening ‘in transactions for reasons unrelated to antitrust concerns, such as concerns about environmental quality or impact on employees.’ It said clearly that ‘the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition’ and concluded that the Commission lacks ‘legal authority to require conditions to this merger that do not relate to antitrust.’

This does not mean that our privacy laws are fully adequate as they are. In fact, the time is ripe for Congress to step up to the plate and pass a broad privacy law that establishes strong consumer protections to insulate people from consumer harms associated with the unreasonable collection, dissemination or use of personal information.

There is an irony that the agency best positioned to implement and enforce such a new privacy law is the Federal Trade Commission, which also has authority to enforce the antitrust laws. Under Section 5 of the FTC Act, the Commission is empowered to prohibit ‘unfair or deceptive acts or practices.’ They have already exercised this authority in numerous cases to protect consumers whose privacy has been invaded.

Congress can solidify and extend this authority by making it clear in the new privacy legislation that unreasonable or harmful data practices are violations of the prohibition on unfair or deceptive practices.

Keeping antitrust in its own policy arena is not a recipe for consumer abuse. The antitrust laws are a very powerful tool of national public policy, but they are also designed for a very narrow purpose, which is to preserve competition so as to vindicate the consumer interest in high quality, low-priced and innovative goods and services. Other tools of policy, including a new national privacy law enforced by the FTC, will be needed to defend consumer privacy interests.

#### Antitrust is the wrong instrument for tech regulation

**Rosoff 21** – Matt Rosoff, Editorial Director, Digital at CNBC

Matt Rosoff, “Op-ed: This week showed how the Big Tech antitrust campaign is totally misguided,” June 30, 2021, CNBC, <https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html>

On Wednesday, the tech industry saw five companies debut on public stock markets. One of them, Chinese ride-hailing giant Didi, is worth nearly $70 billion. Two others, Taboola and Integral Ad Science, compete in the online advertising industry -- one of the markets that has supposedly been ruined by Alphabet (in particular) and Facebook.

More generally, this year has seen the hottest IPO market in years, and investors continue to pile into start-ups at a record pace -- Q1 saw more than $64 billion in venture funding, a record.

This does not look like a deserted wasteland of stifled innovation and broken dreams.

Meanwhile, the general public doesn’t see tech power as a particularly pressing issue. In a survey funded by a tech industry group, 44% of respondents ranked tech industry regulations as the lowest priority on a list of five options, behind the economy, public health, climate change and infrastructure. Yes, 53% of the respondents thought some legislation was a good idea. But that does not mean the public wants Congress and the courts to aim the antitrust cannon at these giants.

As I wrote four years ago, antitrust is the wrong approach here.

None of these companies have monopolies over meaningfully defined relevant markets -- you really have to stretch and squeeze the market definitions for their dominance to come into clear view. The real state of the tech industry is an all-out business war between the five giants, a constantly shifting landscape of rivalries and backbiting -- think Great Powers Europe before World War I -- with numerous well-funded competitors of all sizes waiting to seize any opportunity and fill any gap they leave open.

For instance:

Google dominates search and Facebook is the biggest social media company by far. But the main source of their revenues is online advertising, and they compete bitterly for every available online ad dollar, with Amazon coming quickly up behind. And yet, there’s still enough space for TikTok, Twitter, Snap and a dozen small ad-tech competitors to build sustainable, thriving ad-supported businesses.

Amazon, Microsoft and Google are locked in a hard-knocking three-way war for supremacy in cloud computing infrastructure. And yet, there are dozens of companies delivering thriving cloud services on top of or alongside these platforms, including Snowflake, which debuted last year and is now worth more than $70 billion, and Zoom, which went public in 2019, and is worth almost $115 billion.

Facebook hates Apple and complains about its control over iPhone apps every chance it gets -- except, Mark Zuckerberg now admits that Facebook might actually be stronger after Apple’s recent privacy changes to the iPhone. Meanwhile, Apple’s iOS is actually a minority competitor, as Google’s Android operating system is the dominant mobile platform in the world -- and Microsoft just signed a deal with Amazon to support Android apps on Windows.

To be perfectly clear: Yes, it is in the public interest to regulate these tech giants more strictly.

For instance, Facebook and Google’s YouTube exercise an enormous amount of influence over public discourse and politics by allowing misinformation to spread almost unchecked.

Amazon and Apple control extremely valuable marketplaces that reach hundreds of millions of people, and can use this control to pit suppliers against each other and extract arguably onerous fees.

Union advocates allege Amazon illegally interfered in a recent attempt to unionize in Alabama, and many workers have complained about working conditions in warehouses and delivery vehicles.

All of the companies have used acquisitions to enter adjacent markets and, arguably, to stifle potential competitors before they got too big -- a tactic also used by companies outside the Big Five, such as Oracle in past years and Salesforce more recently.

Several of their founders are now centi-billionaires, a perfect example of the runaway income inequality that many progressives believe must be curbed.

But all of these activities can be addressed with targeted regulations or stricter enforcement of existing laws. Antitrust is a blunt instrument meant to address major market distortions created by true monopolists. Being big, in itself, is not illegal. Applying antitrust law to these companies is misguided, wrong, and will not have the desired effect of curbing their power in meaningful ways.

## Innovation adv

### 2NC—plan hurts defense industry

#### The DA solves this advantage—it spurs DIB innovation—in the squo it’s high now—firms are scaling up tech now, but the plan wrecks it by chilling the business environment.

**Defense merger markets are opening now---that allows opportunities for firms to invest in new lines of innovation**

**Aaronson et al. 20** – Matt Aaronson leads BCG’s Aerospace and Defense practice globally; Doug Belair is the former Senior Vice President of Strategy and Corporate Development for BAE Systems, Inc., and current Senior Advisor for the Boston Consulting Group; Paul DeLia is a Senior Advisor at The Boston Consulting Group; Drosten Fisher is a Partner in BCG's New York office; Stephen O’Bryan is Senior Advisor for the Boston Consulting Group; Mel Wolfgang serves on Boston Consulting Group's Industrial Goods practice leadership team and the North American management team

Matt Aaronson, Doug Belair, Paul DeLia, Drosten Fisher, Stephen O’Bryan, and Meldon Wolfgang, "Building Beachheads in the US Defense Market Through M&A," Boston Consulting Group, 7-23-2020, <https://www.bcg.com/publications/2020/building-beachheads-us-defense-market-through-mergers-acquisitions>

Despite the serious economic pain that the coronavirus pandemic has created for some defense companies—sapping their ability to undertake acquisitions—**all is not lost**. Defense M&As are **still an option**. Historically, industry **consolidation** occurs when US defense spending is on the decline, and, given the trajectory of such spending today, the industry could well be on the **cusp** of another **period of consolidation.**

Of course, some formidable challenges await companies that want to tap into the enormous US defense market, as well as for companies that hope to expand an established presence. A wave of consolidation over the past decade has cemented positions, leaving a relatively small number of large players that would be logistically difficult to acquire. Any major deal would surely face careful regulatory scrutiny. With those caveats in mind, companies should plan now for how they could seize opportunities to establish new platforms and beachheads in the US defense market.

The Next Consolidation Wave?

US defense spending tends to go in waves, and we may be about to enter **another downturn** with **aggressive cuts** similar to those proposed by the Budget Control Act in 2011. (See Exhibit 1.) While the President’s FY21 defense budget requests an annual 2% increase, our modeling suggests an increase is **unlikely**, given the size of the **stimulus package** to counter COVID-19. We forecast a range of scenarios, with the best case being essentially a flat budget, and the worst being a steep decline. If the worst case occurs, it’s likely that new programs will be postponed, R&D cut for all but the most strategic efforts, and current procurements will slip. There could also be pressure to keep existing programs in service longer than planned—which could increase their sustainment costs and modernization requirements.

[[figure omitted]]

Such downturns have historically been **periods of consolidation** in the industry, a chance for **stronger companies** to buy firms in financial distress and either **establish a beachhead** in the US or **expand their presence**. (See Exhibit 2.) This presents a **near-term opportunity** for companies—whether they are foreign firms, domestic commercial aerospace companies, private equity investors, or existing players looking to create new platforms.

[[figure omitted]]

For example, BAE Systems took advantage of the downturn in the 1990s to acquire the Sanders electronics business from Lockheed Martin. This put BAE on the path to building a $12 billion business in the US, accounting for 50% of the group’s revenue and making it a major prime contractor. The Sanders acquisition helped BAE establish a Special Security Agreement with the US Department of Defense (DOD), which eventually regarded the company’s US business as a domestic company. Using this as a foundation, BAE went on to acquire United Defense and the Bradley Fighting Vehicle franchise in 2005. The company followed up this acquisition in 2007 with the purchase of Armor Holdings a provider of tactical vehicle and soldier protection equipment. The land vehicle acquisitions proved highly lucrative in the Iraq and Afghanistan wars.

While it’s true that few companies have the financial resources of a BAE, or the risk appetite for multibillion dollar acquisitions, we still see **many opportunities** to create **custom plays**—to **assemble** what a company wants in a **few steps** instead of one fell swoop—and at a **lower cost** than buying a large firm (and with less regulatory scrutiny).

Become A **Conduit Of Innovation**

It’s important to understand that while the prime contractors (aka, “the primes”) are huge, their R&D budgets are **relatively constrained**—typically **just 2%** or so of revenue. They tend to focus on winning new programs and developing existing programs but **not pure innovation**. As a result, their “cash cows” can sometimes get shortchanged on the R&D front. The primes still value these programs, but they must prioritize and often **cannot spare the resources** to upgrade them.

This **creates opportunities** for others. A prime might **happily divest** a seemingly stagnant component business (in order, hypothetically, to focus on system integration) but would be very interested if the new owner of that component business **pursued R&D** and did the **necessary conversion work** to help extend the life of the prime’s existing system integration program. In addition, the Pentagon is looking to **diversify its sourcing** to more creative and flexible vendors who will assume more of the financial risk of system **modification and development.**

With that mind, we believe that **ambitious companies** should consider **M&A strategies** that help them become “**conduits of innovation**” for the main players. The aspiring company may need to **acquire several subunits** from existing players to build a **cohesive whole**, then marry **industry knowledge** (such as where to find certain expertise or anchor capabilities) together with an **analytical understanding** of where the leading edge of the industry is trending. This approach requires a coherent vision for what a successful player will look like in three to five years. (See the sidebar, “Six M&A Success Factors.”)

**Increased antitrust scope sends chills throughout the industry---changes in substantive antitrust deter defense mergers**

**Carroll 21** – Partner in the Antitrust & Competition Practice Group in the Washington, D.C. office, former member of the Mergers I Division of the Federal Trade Commission’s Bureau of Competition

John D. Carroll, "How a New Era in Antitrust Enforcement May Impact Government Contractors," The National Law Review, 2-24-2021, https://www.natlawreview.com/article/how-new-era-antitrust-enforcement-may-impact-government-contractors

With a new presidential administration promising vigorous antitrust enforcement, and a new Democratic majority in Congress seeking to make **drastic changes** to U.S. **antitrust laws**, the technology and healthcare industries have found themselves the main targets of increased antitrust scrutiny. Though companies engaging in government contracting, particularly in the **aerospace and defense industries**, already have had to deal with a **range of antitrust issues** – for example, the Department of Justice, Antitrust Division (the “DOJ”) launched the Procurement Collusion Strike Force (“PCSF”) in 2019 (discussed in more detail here), which focused on “deterring, detecting, investigating and prosecuting antitrust crimes … in government procurement, grant and program funding” – they may find themselves subject to **increased antitrust enforcement** in 2021. In fact, on February 23, 2021 PCSF Director Daniel Glad confirmed he is “focus[ed] on three things in 2021: expanding our platform with PCSF building out our data analytics program; and bringing investigations to the recommendation/disposition stage.”

Antitrust enforcement is not typically a “hot button” issue in modern American politics, nor is it at the top of agendas for new administrations’ enforcement priorities. In fact, historically antitrust enforcement has not changed materially when new presidential administrations or Congressional majorities have come into power, even when those administrations or majorities are from a different political party. Recently, however, antitrust has become a prominent issue, as there has been a growing concern among academics, practitioners, and elected officials that U.S. antitrust enforcement is not adequately addressing competition issues and needs major changes.

While it only has been a month since the 117th Congress and the Biden administration have come into power, and many key antitrust positions at the DOJ and Federal Trade Commission (“FTC”) have yet to be filled, the government already has suspended Early Termination (“ET”) for all mergers and acquisitions reportable under the Hart-Scott-Rodino Act, over the objections of two FTC Commissioners – meaning that all such deals now must undergo the full 30 calendar waiting period. In Congress, Senator Amy Klobuchar (D-MN), the Chair of the Antitrust Subcommittee of the Judiciary Committee, introduced the Competition and Antitrust law Enforcement Reform Act on February 4, 2021, that seeks to overhaul U.S. antitrust enforcement, by among other things, placing significant restrictions on businesses that have more than 50% market share in their relevant markets.

Given concerns by some regarding increased concentration in certain aerospace and defense industries – after all, in January 2021, the Pentagon raised concerns about “drastic consolidation” in the defense sector in its annual Industrial Capabilities report to Congress – companies may find their **transactions and personnel practices** under **even more scrutiny** by the DOJ and FTC.

With respect to transactions, companies’ proposed mergers or acquisitions of competitors have received close looks by the government in recent years, especially in concentrated industries, with the Department of Defense (“DOD”) playing a crucial role in determining the scope and result of review by the FTC or DOJ. **Teaming agreements,** which the DOD and antitrust enforcement agencies recognize **can be pro-competitive**, may be **even more closely examined** by government, and it is possible that the **current guidance** from the government regarding its antitrust evaluation of such agreements **could be changed**.

Because government contractors often operate in industries where there is a **limited supply of potential employees** with the necessary skills and credentials, they should be especially careful about **restrictive provisions** in their transaction and employment agreements, such as non-competes and non-solicits. Also, government contractors should be wary about engaging in discussions or **sharing** confidential compensation information sharing with competitors, particularly in light of the government’s recent **criminal antitrust actions** against “**no poach” agreements** entered into between competitors.

Though it is early, it is clear that the Biden administration is going to make antitrust enforcement a priority, and we can expect they may be enforcing **new, more rigorous laws** passed by Congress. Government contractors should therefore **be prepared** to face increased scrutiny of their operations. Antitrust enforcement can have **profound consequences** on a company’s business, as it can place **limitations on transaction strategy** and potentially **expose a company** to **significant** civil or even criminal **liability**.

**That causes global war---they read the impx for us**

### 2NC – AT: big tech market power bad

#### 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 competition robust

1NC 2 – tech competition is 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

**Dolmans 18** – LLM, Columbia Law School. Partner at Cleary Gottlieb.

(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.

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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.

### 2NC – at is wrong

1NC 4 – antitrust is the wrong instrument for addressing the problems of big tech firms

#### 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

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. 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.

## Democracy adv

### 2NC – Antitrust No Solve Disinfo

#### Procompetitive crackdowns can’t solve free speech issues

**Epstein 17** – Antitrust attorney based in DC

Mark Epstein, 1-3-2017, "Tackle Internet censorship directly — not through antitrust law," TheHill, <https://thehill.com/blogs/pundits-blog/technology/312536-tackle-internet-censorship-directly-not-through-antitrust-law>

Sewlyn Duke’s recent op-ed for The Hill, “Antitrust should be used to break up partisan tech giants like Facebook, Google,” addresses the serious problem of how a few privately owned internet companies have unprecedented control over the distribution of information.

As Jeffrey Rosen has noted, “lawyers at Google, YouTube, Facebook, and Twit­ter have more power over who can speak and who can be heard than any president, judge, or monarch.”

However, using antitrust laws to address this would be ineffective and likely illegal without new legislation.

While Duke does not propose how to break up the companies, presumably the government would force them divest their subsidiaries such as Facebook’s Instagram and WhatsApp and Google’s Youtube and Android. However, smaller companies are not necessarily more conducive to free speech.

Twitter, which is only the fraction of the size and value of Google or Facebook, is continually embroiled in controversy over its speech policies. All other significant, but still comparably small, social media platforms such as Pinterest, LinkedIn, Tumblr, Four Square, and Reddit have similar speech restrictions as Facebook and Google.

Breaking up the actual platforms would seriously harm consumers. Google’s algorithm improves with more searches and Facebook’s users value the ability to connect with the other billion people on the network.

Reducing their size eliminates these benefits without increasing free speech. Antitrust regulators recognize this type of economy of scale, known as network effects, when evaluating a company’s market concentration.

Increased social media censorship did not result from the market share of any company or even the political ideology of its executives.

Facebook initially resisted calls to suppress “fake news,” while Twitter once called itself the “free speech wing of the free speech party.” Google refused to remove the controversial “Innocence of Muslims” film from Youtube, even when the White House pressured it to do so.

Over the last year, many in the media along with advocacy groups like the Anti-Defamation League and the Southern Poverty Law Center have increasingly demanded the platforms remove supposed hate speech and, more recently, fake news. Politicians, including Barack Obama and Hillary Clinton, recently criticized Facebook for facilitating fake news.

This bad publicity creates financial pressure for social media platforms to restrict their content. Disney and Salesforce cited reputation concerns when declining to purchase Twitter.

Additionally, many European countries require social media platforms to remove hate speech and are considering legal penalties against fake news. Some social networks set their global terms of service to comply with the more restrictive laws. Breaking up Facebook or Google into smaller companies does not remove these incentives.

Even if it were desirable, the government lacks legal authority to use antitrust law to promote free speech.

Over the years, activists have asked the Federal Trade Commission to consider tangential concerns such as privacy, employee wages, and environmental impact into antitrust regulation.

The Commission explained in its Google/Doubleclick merger statement that while:

“Such issues may present important policy questions for the Nation, the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition.”

The Federal Communications Commission considers public interest concerns, including viewpoint diversity, in merger review, but its jurisdiction does not extend to internet content providers.

### 2NC – antitrust can’t solve

#### Courts and the FTC have consistently ruled big data is outside the scope of AT

**Sokol 16** – Daniel Sokol, Professor of Law at University of Florida and Senior Of Counsel Wilson, Sonisini Goodrich & Rosati. Roisin Comerford, Associate, Wilson, Sonisini Goodrich & Rosati.

Daniel Sokol and Roisin Comerford, “Does Antitrust Have A Role to Play in Regulating Big Data?,” 1-27-2016, Cambridge Handbook of Antitrust, Intellectual Property and High Tech, <https://som.yale.edu/sites/default/files/SSRN-id2723693.pdf>

4. Is Antitrust Enforcement the Right Way to Regulate Big Data?

In order to consider whether antitrust is the most appropriate forum within which to explore, and potentially address, Big Data concerns, one should consider how antitrust case law has treated Big Data issues to date, how Big Data might fit within existing antitrust analysis framework or remedies, what legal or practical dangers might result from applying antitrust to Big Data, and whether an alternative framework is better suited to these issues.

(a) Case Law Does Not Support the Contention that Big Data Is an Antitrust Problem

A thorough search of case law and agency actions does not reveal case law nor have the antitrust agency consents ever affirmatively concluded that consumer data constitutes a barrier to entry, and available precedent does not counsel in favor of using antitrust as a tool to right Big Data “wrongs.”16 While competition agencies and courts have concluded that data-related entry barriers may exist for the sale of data that cannot be sourced from consumers or big data marketplaces, they have yet to come to the same conclusion regarding data collected from consumers over the internet. Over the last five to ten years, antitrust agencies, and to a lesser extent the courts, have considered a number of mergers and instances of conduct involving potential theories of harm built around Big Data. One of the earliest examples of this was Google’s acquisition of DoubleClick in 2007. At the time, both parties were large players in the market for search advertising – Google was a large online advertising intermediary, and DoubleClick was a leading online ad server. Both parties had vast stores of data relating to user search and browsing history.

Similarly, both the FTC and the European Commission examined Facebook’s 2014 acquisition of web-based messaging platform WhatsApp. Upon announcement of the transaction, several consumer groups complained to the FTC that the transaction would bolster Facebook’s access to data which could be monetized through advertising, contradicting prior statements by WhatsApp.17 The FTC cleared the transaction within two months, and sent a clear indication that the issues raised rested squarely within consumer protection law. The FTC, upon clearing the transaction, sent a letter to the parties from the Director of the Bureau of Consumer Protection reminding them of their continuing obligations under privacy law.18

The European Commission also reviewed the Facebook/WhatsApp merger, in doing it provided an analytical framework for exclusionary behavior in Big Data industries, and ultimately cleared the transaction without conditions.19 While the Commission acknowledged that network effects could sometimes pose a barrier to entry in communications markets, it concluded that this particular transaction was not likely to raise barriers to entry, noting “consumers can and do use multiple apps at the same time and can easily switch from one to another,”20 and adding that “there are currently a significant number of market participants that collect user data alongside Facebook,” including Google, Apple, Amazon, eBay, Microsoft, AOL, Yahoo, Twitter, IAC, LinkedIn, Adobe and Yelp.21 That investigation was significant as it recognized the factual inexistence of network effects as a barrier to entry in such a fast moving online market. The basis for this conclusion was due to: (i) the Commission finding that messaging apps were a “fast-moving sector”22 with low switching costs; therefore, “any leading market position even if assisted by network effects is unlikely to be incontestable.”; (ii) the finding that usage of one particular messaging app did not “exclude the use of competing [messaging] apps by the same user;” in this context, multi-homing was common and facilitated by the “ease of downloading a consumer communications app;”23 and (iii) acknowledgment that users of messaging apps “are not locked-in” to a given network.24 The Commission found that even in Facebook were to begin collecting data from WhatsApp users, competitive harm would not result, as “there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook’s exclusive control.”25 The Commission’s decision also explicitly rejected the idea of considering a potential market for personal data in this case, citing the fact that the parties were not actually engaged in the sale of data to third parties.26 In the US, there is a similar outcome with regard to Nielson/Arbitron, where the data was merely an input.27 Such cases where data is merely an input are different from cases where data is a market that is sold to consumers (Tucker and Welford 2015).

Outside the merger context, the Federal Trade Commission’s 2011-2012 investigation of Google centered at least partially on the competitive significance of data. In a recent statement responding to the inadvertently release of portions of the FTC’s Bureau of Competition Staff Report, Chairwoman Ramirez, and Commissioners Brill and Ohlhausen noted that the Commission’s “exhaustive” investigation into Google’s internet search practices, including agreements for syndicated search and advertising services were not, “on balance, demonstrably anticompetitive.”28

#### Even if it could be used, market definition is impossible, which decks solvency

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Daniel Sokol and Roisin Comerford, “Does Antitrust Have A Role to Play in Regulating Big Data?,” 1-27-2016, Cambridge Handbook of Antitrust, Intellectual Property and High Tech, <https://som.yale.edu/sites/default/files/SSRN-id2723693.pdf>

(a) Big Data as Its Own Product Market

Market definition and market power still form the backbone of antitrust analysis under the current law. Some practitioners have suggested that data collection should form its own product market for the purpose of antitrust analysis (Jones Harbour and Koslov 2010). The precise contours of such a market would be difficult, if not impossible, to define. In both the U.S. and Europe, substitution, via the hypothetical monopolist test, is an essential prerequisite to defining a market. The primary goal of defining a market is to measures a firm’s ability to exercise market power and the relevant market determines goods or services that potentially compete, to the exclusion of those that do not. Data itself is not a relevant product in the sale of online advertising. Advertising services are the relevant product. Data is used (for the most part) by online providers as an input in their service, as opposed to actually being sold as a product to consumers. There is, therefore, no competition between providers for the actual sale of data, and no substitution. As such, under current antitrust law, no relevant market can be defined for the collection of consumer data. In reviewing the Facebook/Whatsapp acquisition, the European Commission overtly declined to define a market for Big Data since neither party was active in the provision of data to third parties.29

(b) Consumer Protection Should Address Big Data Issues

The laws of consumer protection and antitrust serve different goals, protect consumers from different harms, and operate via different spheres of the same agency (Feinstein 2015). A review of the economics of privacy notes complexity as to how to regulate privacy (Acquisti, Taylor, and Wagman 2015). However, this recent review does not find a strand of academic literature in which on a theoretical basis or empirical basis antitrust should be used as a policy tool to address privacy concerns. Such a finding is not surprising. Consider for a moment though other product elements such as product safety and efficacy that also constitute forms of non-price competition. Those elements, though potentially affected by competition, are not primarily policed by the antitrust agencies but through consumer/data protection law (Schepp and Wamback 2015; Ohlhausen and Okuliar 2015). The antitrust laws are not designed to address harm to privacy – an efficient market, bolstered by the consumer protection laws, provides adequate protection from those harms. Suggested safeguards intended to prevent the misuse of Big Data by a dominant firm such as enabling the consumer to more easily select privacy preferences or to identify providers that match their privacy preferences, sit squarely within the remit of the consumer protection agencies (Stucke and Grunes 2015b). Where an imbalance of power between users and online firms leads to diminished data portability, individual consumers or competitors might suffer but the mechanics of data collection is not for the antitrust laws to govern. Antitrust law is only a suitable choice where there is harm to competition. Antitrust’s role is not to fill gaps in the privacy laws.

(c) Are Antitrust Remedies Appropriate?

Some have suggested that antitrust remedies may be appropriate where a dominant firm has misused Big Data to gain or sustain an improper competitive advantage. The imposition of such remedies presents obvious problems. From an antitrust perspective, forced sharing of information with rivals infers the essential facilities doctrine, and such forced dealing with competitors in the Big Data environment is far beyond the limits of what a duty to deal would require. If Big Data were deemed an essential facility and a duty to deal imposed, the competitive dynamics of the market would be dramatically altered. Such an extreme and far-reaching remedy is out of line with current antitrust policy (Orbach and Avraham 2014).

Practically speaking, requiring affirmative user consent before data is collected may detract from the user experience and lessen quality; prohibiting or restricting data collection may stifle innovation and present users with lower quality services; and divestiture or separation of distinct product lines may also stifle innovation and hinder a firm’s ability to offer personalized services (Tucker and Welford 2014).

Antitrust remedies haphazardly applied to the collection and use of consumer data may not only harm competition, but also may in fact raise separate, legitimate, privacy issues (Goldfarb and Tucker 2012). Antitrust remedies may also create privacy concerns as they would require data to be shared with rival firms even though consumers have not consented to their data being used in this way. Likewise, a forced sharing of data could violate a company’s already existing consent decrees with the FTC (Tucker and Welford 2014).

The FTC, in the Closing Statement from its investigation into the Google/DoubleClick merger, the Commission rejected the notion that antitrust remedies should be imposed to address privacy harms:

[T]he sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition. Not only does the Commission lack legal authority to require conditions to this merger that do not relate to antitrust,

regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry.30

(d) Practical and Legal Dangers of Antitrust Intervention

Using antitrust as a sword to address Big Data concerns risks reducing competition and innovation from new products (Ohlhausen and Okuliar 2015). Antitrust enforcement agencies are well advised to proceed cautiously in areas of rapid innovation, in order to avoid stifling competition, and the natural unfolding of the marketplace. While an industry is in its relative infancy, it can be difficult to distinguish between procompetitive innovation and changes that are designed to (or actually do) stifle competition. Even in established markets, antitrust should never be used as a replacement for sound business judgment. As the FTC’s closing statement in Google investigation explained, “Challenging Google’s product design decisions in this case would require the Commission—or a court—to second-guess a firm’s product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence.”31

Consumer welfare is enhanced most dramatically by “leapfrog” competition, as opposed to incremental improvements. It is crucial that the antitrust laws cultivate and maintain an environment in which robust and rapid innovation is not only possible, but also incentivized. A paternalistic approach to Big Data will neither cultivate nor maintain such an environment, and may instead lead to stagnation and fear among platform providers.

Conclusion

This literature review suggests that antitrust law is ill-suited to police Big Data and its use by online firms. The empirical case regarding Big Data as an antitrust concern is still lacking. Further, from a theoretical perspective, not enough work has yet been done to thoughtfully study and analyze how antitrust could, or should, be applied to specific issues involving Big Data. In fact, the lack of empirical evidence, robust theories or indeed legal precedent suggests that there is no cause for concern in this arena. All that is available at present are general theories of exclusion applied to this new area. Until theories of harm can be matched with specific factual circumstances and negative economic competitive harm can be shown, the antitrust case against Big Data is a weak one. The existing theories of harm conflict with the realities of Big Data (e.g., non-rivalrous, ubiquitous, low barriers to entry noted above) and consumer online behavior (e.g., multi-homing, Salinger and Levinson 2015). And while the case is weak, and the theories uncertain, antitrust authorities should proceed with caution. Antitrust intervention over market forces threatens consumer welfare, especially is fast moving markets, and proposed remedies, such as limiting the collection and use of Big Data or forcing large firms to share with rivals, are likely to harm competition and innovation, and in fact may raise privacy concerns.

### 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.

## FTC DA

### Kick

**Bank collapse is unique---triggers the cessation of modern life and total economic collapse---no possibility for an ’08 recovery**

**Partnoy 20** – Law professor at UC Berkeley, international research fellow at Oxford University, member of the Financial Economists Roundtable

Frank Partnoy, "Will the Banks Collapse?," The Atlantic, July/August 2020, https://www.theatlantic.com/magazine/archive/2020/07/coronavirus-banks-collapse/612247/

You can perhaps guess much of the rest: At some point, rumors will circulate that one major bank is near collapse. Overnight lending, which keeps the American economy running, will **seize up**. The Federal Reserve will try to arrange a bank bailout. All of that happened last time, too.

But this time, the bailout proposal will likely face **stiffer opposition**, from both parties. Since 2008, populists on the left and the right in American politics have grown suspicious of handouts to the big banks. Already irate that banks were inadequately punished for their malfeasance leading up to the last crash, critics will be outraged to learn that they so egregiously flouted the spirit of the post-2008 reforms. Some members of Congress will question whether the Federal Reserve has the authority to buy risky investments to prop up the financial sector, as it did in 2008. (Dodd-Frank limited the Fed’s ability to target specific companies, and precluded loans to failing or insolvent institutions.) Government officials will hold frantic meetings, but to no avail. The faltering bank **will fail, with others lined up behind it.**

And then, sometime in the next year, we will all stare into the **financial abyss**. At that point, we will be **well beyond the scope** of the previous recession, and we will have either **exhausted the remedies** that spared the system last time or found that they **won’t work this time** around. What then?

Until recently, at least, the U.S. was rightly focused on finding ways to emerge from the coronavirus pandemic that prioritize the health of American citizens. And economic health cannot be restored until people feel safe going about their daily business. But health risks and economic risks must be considered together. In calculating the risks of reopening the economy, we must understand the true costs of remaining closed. At some point, they will become more than the country can bear.

The financial sector isn’t like other sectors. If it fails, **fundamental aspects of modern life** could fail with it. We could lose the ability to get loans to buy a house or a car, or to pay for college. Without reliable credit, many Americans might struggle to pay for their daily needs. This is why, in 2008, then–Treasury Secretary Henry Paulson went so far as to get down on one knee to beg Nancy Pelosi for her help sparing the system. He understood the alternative.

## Innovation DA

### 1NR

#### Link alone turns case – big companies will use the aff’s expanded liability to screw over competitors— especially tru because they get rid of the monopoly requirement, which means their liability will be used to squash competition

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.

#### 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.

#### And, aff’s incentive is so blunt it chills activity everywhere – prevents large tech from investing in small firms, which is key to get them off the ground

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(Gary Dushnitsky and Daniel Sokol, “Competition laws could be a death knell for startup mergers and acquisitions,” 7/22/2021, The Hill, https://thehill.com/opinion/white-house/564321-competition-laws-could-be-a-death-knell-for-startup-mergers-and?rl=1)

Technology entrepreneurs and innovations yet to be imagined are in the crosshairs of misguided antitrust legislation. Antitrust policy is under the microscope from both political parties.

The Biden administration’s Executive Order on Promoting Competition in the American Economy lays the groundwork for the first-ever antitrust regulations for technology companies and internet platforms, and proposed legislation by Sens. Amy Klobuchar (D-Minn.) and Josh Hawley (R-Mo.) would rewrite antitrust law. Both bills and the order seek to limit merger activity focused on acquisitions of smaller companies by larger technology companies, with their proposals ranging from presuming anticompetitive effects to outright prohibitions.

However, these proposals likely will have unintended consequences that would hamper innovation and entrepreneurship. The result is that certain potential deals will never leave the boardroom and others will be abandoned because the risks of antitrust intervention are too high.

For deals that do move forward, many will be challenged under more stringent merger laws. Such a change in the law will fundamentally alter the ability of U.S. companies to innovate in the technology sector, and result in collateral damage across a wide range of traditional industries such as biotech, consumer goods and finance, along with sustainability-focused or previously neglected sectors.

Investors and founders must be able to realize returns on their investments and efforts, commonly referred to as ‘entrepreneurial exit,’ or they will not take the risk of investing in startups and commercializing emerging technologies. Without the ability to exit, neither founders nor investors will be able to reap the gains of entrepreneurial value creation. If the proposed legislation becomes law, it will foreclose many merger and acquisition exits and thus lessen the incentives for founding and growing a business. It therefore makes investment in innovative ventures less likely since founders and investors cannot reap the rewards of a relatively timely exit at high valuations. When certain potential acquirers can no longer make acquisition bids, venture capital investors will lose the ability to make significant returns and funding to the entrepreneurial ecosystem may wither.

#### 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.

#### Reliant on arg that concentration reduces innovation – that’s dead wrong – Mrket concentration doesn’t reduce competition and is *positively correlated* with productivity gains

**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, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

National market concentration measures, however, do not necessarily prove that actual competition is declining. Carl Shapiro, one of the nation’s leading industrial organization economists and former chief economist for the Justice Department’s antitrust division, has shown that national concentration measures of product or service markets do not always constitute a relevant geographic market where competition takes place.23 Shapiro identifies several industries where this difference is important. Although national chains may account for larger shares of revenue in these industries, there is (yet) no evidence of reduced competition at the local level where these firms tend to compete: accommodations and food, finance, health care, professional services, property, retail trade, transport and warehousing, utilities, and wholesale trade.24

Nonetheless, the growth rate of labor productivity in the U.S. has remained low by historical standards – at around 1 percent – over the past decade. This is worrisome because productivity growth is the key to rising living standards.

One reason for the productivity growth slowdown may be the decline in the rate of formation of new firms, which, over the past two centuries, have been disproportionately responsible for commercializing disruptive innovations.25 Likewise, workers are moving less frequently than they once did – either between firms in the same city or between cities.26

The temptation is great also to blame poor productivity performance on increasing industry concentration, but it should be resisted for several reasons. For one thing, as already noted, trends in national concentration statistics are poor measures of the state of competition. Moreover, as Shapiro has noted, even the increases in concentration that have occurred in narrowly defined industries at the national level – some of which can be attributed to relaxed merger enforcement by the Department of Justice after it updated its Merger Guidelines in 1982 – are mostly in unconcentrated industries and not of a magnitude that would indicate any material diminution of competition.27 And, if competition has not materially declined, then the state of competition cannot be linked to the decline in productivity growth or other measures of economic “dynamism” such as startup activity or worker mobility.

Statistical studies also do not support any connection between the modest increases in national industry concentration and the decline in productivity growth. David Autor and colleagues, who have been critical of increased concentration for its impacts on the labor market, have found a statistically positive relationship between an industry’s concentration level and its productivity improvements.28 Likewise, there is evidence linking investment in information technology (which is productivity enhancing for the firms making the investment), with more industry concentration. However, Bessen argues that – because much IT investment is proprietary and not diffusing to the rest of the economy – the economy-wide impact on productivity may be less than optimal.29

#### 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.

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

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Business, ‘17

(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.

#### Link turn is wrong for big tech—acquisition is key to effectively leveraging startup ideas, otherwise innovation is too complex and resource intensive

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(Joe, “Monopoly Myths: Is Big Tech Creating “Kill Zones”? November 9, <https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones>)

As in much of the anti-monopoly movement’s criticism of technology industries, the critique of killer acquisitions does not reflect the unique nature of technology industries, wherein continued innovation is key and product platforms are complex and require many different components, often ones that companies simply do not have capabilities in. As Edward Roberts and Wenyun Kathy Liu wrote in 2001:

The most dramatic change in global technological innovation—the movement toward externally oriented collaborative strategies that complement internal research-and-development investments—began more than a decade ago. Today companies use alliances, joint ventures, licensing, equity investments, mergers and acquisitions to accomplish their technological and market goals over a technology’s life cycle.20

Unlike most other industries, the large Internet companies have plenty of cash to invest in new research. Their markets also experience rapid technological innovation that threatens to displace them if they do not continue to offer a better service than their rivals. The high capacity for internal investment reduces the need for venture capital. But the dynamic nature of the markets ensures continuous innovation, even without entrants. A market leader that merely buys up companies to protect itself from having to innovate will soon be eclipsed by the next new thing. This is part of the reason these companies spend significantly more on research as a portion of their revenue than virtually any other public companies in the world.21

This is why, despite expressing many concerns about the competitive threat posed by large Internet firms, a recent report for the European Commission urges caution in toughening merger policy for digital companies:

In the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them.22

Likewise, economist Luis Cabral argued that several features of digital platforms make acquisitions a more attractive form of technology transfer.23 First, the evolution of business models is much harder to predict. Partly for this reason, preemptive actions are difficult to judge given the poor definition of markets and the uncertainty in identifying future rivals. Second, intellectual property is more difficult to protect than in markets such as pharmaceuticals. As a result, companies cannot be sure of what they are licensing. Nor can they be confident that a rival will not simply copy their technology for free. Cabral noted that, out of hundreds of mergers completed by these companies over the last decade, only a handful typically attract any criticism. As an anecdote, he mentioned Alta Vista’s refusal of an offer to purchase Google for $1 million. He pointed out that Google’s substitutability and superiority was not apparent at the time. In fact, two years later, Alta Vista still had more than double Google’s market share.

Also, while the tech industry does use acquisitions as a way to gain needed technology and talent, it does not do so as a substitute for investing in its own innovation. According to the 2019 EU Industrial R&D Scorecard, of the top companies globally with the largest increase in research and development (R&D) expenditures, four were large U.S. tech companies (Apple, Facebook, Google, and Microsoft). And of the top 5,000 companies in the world ranked by R&D spending in 2019, Alphabet (Google’s parent) ranked number 1, Microsoft 3, Apple 6, and Facebook 11. And according to the EU, Amazon would have ranked first overall if it had broken out its R&D and content development expenditures. Even with the ability to acquire other firms, these firms seem to have plenty of incentive to invest in R&D. Moreover, it is precisely their size and market power that gives them the ability to invest so heavily in R&D.24

So-Called Kill Zones Could Maximize Welfare and Innovation

To the extent established companies are conducting research in a narrow market, it makes sense for entrants to avoid head-on competition and instead exploit complementary markets. This is almost as likely to be true whether the industry is dominated by one firm or five. Breaking into an industry with relatively mature technology dominated by large players is never easy. That is why many industries have gone through periods of heavy investment in the early stages of an industry as companies try to become one of the dominant players. Once the industry has matured to achieve economies of scale or network effects, new entrants tend to focus on complementary technology rather than trying to challenge the larger companies head-on.

Few complained after the 1930s automobile-sector start-ups declined precipitously. By the 1930s, it made little sense to invest in new automobile companies when it was clear the technology system (internal combustion engine) and major players (American Motors, Chrysler, Ford, and GM) had already been established. Investment to create new entrants would have represented a waste of societal resources. Instead, funding went to emerging industries such as radios, chemicals, and machine tools.

Today is no different. The technology and business models for search, social networks, and Internet retailing are relatively mature; society is better off if entrepreneurs and venture capitalists focus on other areas. Indeed, to the extent investors may be focusing their capital outside a few areas where large firms have established positions in what are somewhat mature technologies, it is arguably a good thing because it means there is more capital for other promising areas. Hathaway, in fact, acknowledged the possibility that “venture capital investment may have increased in non-tech sectors too, so that the tech giants have simply diverted the flow of capital to other areas.”25 The is buttressed by an earlier study by Oliver Wyman, which shows that acquisitions by Facebook, Google, and Amazon have not had a negative effect on the amount of venture capital flowing into tech industries.26 (See figures 1 and 2.)

Acquisitions Often Increase Innovation

There is often an assumption that acquisitions decrease innovation, but a number of studies suggest the opposite. A Dutch study looks at acquisitions in the manufacturing sector, which includes technology companies, and finds that both acquisitions and divestitures are positively correlated with increased innovation.27

Likewise, a paper by Igor Letina, Armin Schmutzler, and Regina Seibel argues that prohibiting killer acquisitions strictly reduces the variety of innovation projects in an industry because it deters innovation.28 They built a model in which prohibiting acquisitions has a positive effect on consumer surplus only if the bargaining power of the entrant is small and competition in the industry is not too intense, because both raise the incentives for an incumbent to do its own innovation rather than purchasing that of others. They cautioned:

While prohibiting acquisitions always has a strictly negative innovation effect in the case without commercialization (i.e. for killer acquisitions), it is not necessarily true for acquisitions with commercialization. Thus, even though killer acquisitions may appear to be particularly problematic, the case for prohibiting them is not necessarily stronger than for acquisitions with commercialization if one takes ex-ante innovation incentives into account.29

Moreover, Will Rinehart of the Center for Growth and Opportunity wrote that the large majority of acquisitions are motivated by the desire to purchase either the technology or the talent of the specific firm, rather than to stifle a potential rival.30 Sometimes termed “acqui-hires,” these acquisitions refer to when a company is acquired largely as a means to hire its workforce, and the newly hired team is often more productive after acquisition, in part because of economies of scope and increased resources.31 These acquisitions also often benefit both parties by integrating new technology into a broader network and helping the new firm scale up. They also benefit consumers by disseminating innovations more broadly.

#### 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.

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