# 1AC

## Platforms

#### Advantage 1 is Platforms

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

The Amex decision created a de facto “platform exceptionalism” rule that prevents plaintiffs from challenging any instance of platform dominance

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

A. Against Platform Exceptionalism

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

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

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

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

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

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

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

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

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

[Begin fn76]

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

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

[End fn76]

The Court overlooked all of these problems. 77

#### That burden reverberates throughout the economy—stymies enforcement

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

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

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

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

#### Uncontested platform exclusion stifles innovation

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

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

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

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

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

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

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

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

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

B. Private Sector Institutional Dynamics

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

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

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

Ii. The Competition Shortcomings

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

A. Entry Barriers

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

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

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

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

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C. International Competitiveness

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

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

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

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

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

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

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

Maintaining U.S. Leverage

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

#### Specifically, North Korea and Iran

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Peter E. Harrell and Elizabeth Rosenberg, “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” *Center for a New American Security*, 2019, pp. 14-15, http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic\_Dominance-final.pdf.

Technology

Technological developments have also played an important role in strengthening U.S. coercive economic leverage. New analytic computer technologies have increased the capacity of both U.S. government agencies and private-sector companies to detect and stop suspected sanctions evasion. Surveillance technologies have also improved in recent years, providing government agencies, reporters, and activists with new tools to track evasion. For example, the recent deployment of sophisticated, low-cost global imaging satellites has improved the tracking of North Korean and Iranian ships involved in sanctions evasion.41 The importance of, and—at least to date and in the short term—the relative lack of alternatives for U.S. technologies, particularly for telecommunications or computing, in global supply chains has also increased U.S. coercive economic leverage, as the ZTE case illustrates.

Other technological developments, however, have had an adverse, if limited, impact on U.S. coercive economic measures. A prominent development has been the rise of cryptocurrencies, such as Bitcoin, which many have used to skirt sanctions. North Korea, for example, has used multiple avenues to obtain cryptocurrencies, including cryptocurrency mining, using ransomware attacks and demanding payment in cryptocurrency, and stealing cryptocurrency by hacking into cryptocurrency exchanges.42 Iranian groups have also relied on cryptocurrencies as a way of facilitating illicit activities. This prompted the U.S. Treasury Department in November 2018 for the first time to publicly issue identifying information for specific digital currency addresses (unique strings of alphanumeric digits identified/associated with specific digital currency wallets) in an effort to freeze Iranian cryptocurrency accounts subject to U.S. jurisdiction and to persuade foreign cryptocurrency exchanges to cease dealing with Iran.43 In October 2018, the U.S. Treasury’s Financial Crimes Enforcement Network (FinCEN) also warned about potential Iranian use of cryptocurrencies in an advisory highlighting a range of illicit Iranian financial activities and sanctions evasion tactics.44 To date, however, the adverse impact of these technological developments on U.S. coercive economic measures has been comparatively small. Furthermore, it has generally been on par with those of other types of criminal activity by sanctions evaders, rather than representing a major new threat. For example, North Korea’s cryptocurrency efforts appear to be significantly smaller in value than many other North Korean revenue-raising activities conducted in violation of sanctions, including selling labor overseas and traditional criminal smuggling. The value of Iranian cryptocurrency schemes is estimated to be in the millions, not billions, of dollars.45 Cryptocurrencies are not widely enough accepted by companies around the world for sanctioned actors to use to them to engage in significant commercial trade, such as selling oil or other commodities on global markets, or to make large-scale purchases of key economic inputs. In addition, U.S. authorities have already demonstrated that they can restrict sanctioned actors’ ability to use cryptocurrencies. Following the November 2018 U.S. Treasury action identifying Iran-linked digital currency addresses, several major cryptocurrency exchanges, including non-U.S. exchanges such as Binance, appear to have decided to withdraw from offering services in Iran.46

Technological developments may have the potential to enable meaningful impacts on U.S. coercive economic measures over the longer term, however. Financial technology developments—new digital ways to demarcate, raise, store, and move monetary value—as a factor in the continuing utility of U.S. coercive economic measures will be discussed later in this paper.

#### North Korean sanctions evasion escalates—tech innovation key

Elizabeth Rosenberg, Elizabeth Rosenberg Former Senior Fellow and Director, Energy, Economics and Security Program, CNAS, and ​Neil Bhatiya Former Adjunct Fellow, Energy, Economics, and Security Program, CNAS, March 4, 2020, Busting North Korea’s Sanctions Evasion, https://www.cnas.org/publications/commentary/busting-north-koreas-sanctions-evasion

The Problem is Growing

North Korea raises money to support its nuclear and ballistic missile programs in various ways. Some methods are relatively new, even for seasoned North Korea watchers, and exploit countries and economic areas where there is very little, or absolutely no, awareness about their exposure to North Korean illicit activity.

The Kim regime maintains a sophisticated offensive cyber capability, which it uses to steal financial resources and move money around the global banking system. In the past, hacking groups credibly linked to North Korea have successfully penetrated central banks, cryptocurrency exchanges, and some of the largest corporate banks in the world. The United Nations North Korea Panel of Experts has accused North Korea of stealing up to $81 million from Bangladesh’s Central Bank and laundering the money through casinos in the Philippines. These North Korean criminals have also hacked ATMs in more than 11 countries, stealing hundreds of millions of dollars. Other North Korean–linked entities have sold information technology services, including website and application development services, to firms around the world as a strategy to covertly raise funds for Pyongyang’s illicit aims. Financial institutions are often reluctant to admit that they have been hacked, which makes it difficult for the financial community to absorb lessons learned and harden institutions from future intrusions. Conversely, governments, including the United States, suffer from poor interagency coordination and a lack of institutional knowledge and awareness of North Korea’s malicious cyber activities. Most high-level U.S. policymakers and members of Congress lack basic familiarity with the underlying technology and North Korea’s cyber heist and hacking activities, which makes developing policy and regulatory proposals to counter it difficult. This ignorance is coupled with a government aversion to share useful information with the private sector.

North Korea conducts illicit ship-to-ship transfers of energy resources in violation of United Nations sanctions. The transfers include the import of refined petroleum products, which serves as essential inputs for North Korea’s domestic economy. North Korea also exports coal, including to United Nations Security Council members China and Russia, in violation of the sanctions. An international network of shipbrokers, trading companies, and maritime operators aids North Korea in these efforts. Much of this activity takes place in international waters, making it difficult for the United States and its partners to shut down completely such activity.

North Korean laborers have long operated worldwide, in violation of United Nations Security Council Resolutions enacted in 2017 to curtail such activities. At the peak of North Korean laborers working abroad, 100,000 workers generated about $2 billion a year for the regime. The majority of workers had been concentrated in Russia and China, which the United States has frequently accused of lax enforcement. A deadline for repatriating all North Korean laborers came and went in December 2019, with reports suggesting that these workers continued to be employed in these countries. Future United Nations Panel of Experts reports will likely highlight continuing violations of the rules against employing North Korean overseas laborers.

All told, these strategies potentially deliver hundreds of millions to billions of dollars to North Korea. (United Nations estimates of cyberactivity alone state the total proceeds could be “up to 2 billion,” although the methods North Korea uses makes it difficult for analysts to say with certainty that North Korea’s hackers have been able to move all of that money back to Pyongyang). Through organized and persistent sanctions evasion, this rogue nation has shown the world that it is possible to sustain and continue to develop its nuclear weapons capability in the midst of severe economic constraints. Indeed, the broad nature of the sanctions regime is moving Pyongyang to successfully invest significantly more resources to improve and diversify its revenue generating and financial movement strategies. North Korea is gaining major ground in its use of cyber technologies to finance and conduct illicit operations because the international community is so weak at developing countermeasures in the cyber sector.

As for the tradecraft North Korea uses to stay miles ahead of global banks, companies, and regulators, the regime relies on technological tools of the trade as well as networks of trusted agents that constantly update aliases, shell companies, and front men. The Office of Foreign Assets Control (OFAC), the agency that leads sanctions implementation and enforcement for the U.S. government, works hard to keep up. It regularly discloses new aliases for North Korean proliferation agents, as well as new individuals engaged in this activity. The Financial Crimes Enforcement Network (FinCEN), the Financial Intelligence Unit of the United States, has also distributed advisories on North Korean typologies for illicit fundraising. But it is impossible for federal offices to collect, declassify, and publicly disclose the full array of North Korean sanctions evaders and proliferation fundraisers. Also, by the time that the U.S. government names them in formal sanctions actions, the North Korean agents have changed aliases, locations, and front companies.

Nevertheless, this information disclosure is important, not least because it makes painfully clear that North Korea never paused aggressively fundraising for its nuclear and missile programs when Chairman Kim and President Trump met in Singapore in June 2018. Though they may have committed to a diplomatic process, which included pledges to temporary freezes in bomb and missile testing, North Korea’s track record over the last few years demonstrates that it never intended to halt its race for a bigger and more lethal nuclear arsenal. A significant problem in the current environment is the inadequate international control regime to spot and stop North Korea’s money trail, particularly its blind spot on North Korea’s malicious, highly active, and unfortunately very successful cyber and information technology activities.

Given all of these challenges, is it even possible to halt the financing of proliferation by this dangerous nuclear state?

As a theoretical legal and regulatory matter, the answer is yes. However, such an effort would require two exceedingly difficult-to-achieve goals for every country. It must be every country because universal enforcement is essential to avoid circumvention and dodging by North Korea. The requirements are:

real, high-level political will, and

greater technical capacity to implement and enforce U.N. sanctions and other financial controls on North Korea and North Korean-linked entities.

The international community cannot allow the daunting challenge of making true progress to impede North Korea’s illicit money trail be an excuse for inaction. A small cadre of innovative thinkers from the financial industry and law enforcement community are figuring out targeted strategies for better catching North Korean financing of proliferation, notwithstanding today’s deficit of political will and technical capacity. Scaled up, these strategies could have an outsized impact in catching North Korean criminals and proliferators. Moreover, a handful of well-placed policy shifts in leading economies, starting in Washington, D.C., can also have a big effect.

What’s the Plan?

We know that the challenges are large. So, what’s the plan?

First, the international community must more accurately diagnose the problem. How is North Korea raising and moving money right now? Some bank compliance officials describe the effort to answer this question as looking for a needle in a stack of needles. Essentially, they suggest that scanning hundreds of millions of financial transaction records and pieces of client data against sanctions blacklists, and the known aliases for the blacklisted North Koreans, is a fool’s errand.

But other compliance officials in banking, global shipping, manufacturing, and insurance think the way to spot North Korean footprints lies in getting away from list-checking. They are pioneering approaches to create big lakes of data and sophisticated algorithmic methods, improved by machine learning and overseen by expert humans, to hunt down, and ultimately spot in real time, North Korean patterns of activity. Policymakers can augment these with declassified intelligence and produce shareable reports to inform other governments and companies also tracking proliferation finance. Analysts describe these efforts as exercises in behavioral analytics, trained on tracking North Korean financial footprints. And this work can create a feedback loop for national governments and the private sector to respond to the threats.

A few pathbreaking global firms are putting into practice these behavioral analytic models for tracking North Korean proliferation. They run into significant problems coping with data privacy rules that make it difficult to share data across borders and between institutions. Also, they cope with the skepticism of financial regulators and supervisors who are slow to get comfortable with these new analytics and require a lengthy process to validate computer models. This slow and skeptical approach can be a drag on innovation and creative strategies to catch North Korean proliferators.

Regulators are right to be cautious and to demand that companies to rigorously protect themselves and their customers from North Korean abuse. No global company should let up on sanctions pressure on North Korea for as long as the rogue regime presents a proliferation and regional destabilizing threat. But tough regulation and compliance should be compatible with innovative approaches to catching and halting North Korean proliferators.

Along with better understanding the problem, a second element to undercut North Korean financing of proliferation is for policymakers to embrace innovative approaches to tracking illicit finance as a top and public priority. Only through an evident sense of urgency can policymakers make it a top priority for companies. Companies will take their cue from clear, unambiguous law and regulation. Furthermore, if done right, policymakers will create the space for safe information sharing and a culture of collaboration to identify and halt the money trail for the nuclear threats emanating from North Korea. Dialing up the ingenuity through new policy approaches for identifying and sharing information on financing of proliferation is essential to stop North Korea’s money trail. In fact, it might be the only real path for progress when the diplomatic process between the United States and North Korea has stalled out and against the backdrop of Kim’s threats of renewed provocations.

#### Strong sanctions cap all global conflict AND prevents great power war with Russia and China

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Dr. Salvatore, 10/3/2017, Professor of Sociology at the University of Sydney, “Money Talks: The Rise of Geoeconomics Is Playing Right Into Washington’s Hands”, World Politics Review, https://www.worldpoliticsreview.com/articles/23295/money-talks-the-rise-of-geoeconomics-is-playing-right-into-washington-s-hands

Geopolitics is dead. Long live geoeconomics. Since the turn of the millennium, the geoeconomics of sanctions and sweeteners has slowly been replacing the geopolitics of diplomacy and war. With U.S. forces actively engaged across a wide swath of Africa and the Middle East, the transition from geopolitics to geoeconomics may not seem all that obvious. But on closer inspection, it becomes clear that military intervention these days is limited to places that lack functioning economies that can be effectively sanctioned. Most of the world, and all of the economically productive world, lies in the sphere of geoeconomics.

That economically productive section of the world, spanning the Atlantic and Pacific basins with North America at its center, incorporates more than 80 percent of global GDP into an interwoven fabric of transnational production networks. In this zone of integration, outright war is obsolete as a tool of foreign policy. Those who suggest that the “great powers” of today might repeat the mistakes of 1914 and stumble into war fail to understand that 21st century economic integration is much deeper than the international trade of the early 20th century. It’s hard to imagine China invading Taiwan when Taiwanese firms employ more than 15 million people in China itself.

The U.S. still maintains by far the most powerful—and most expensive—military force in the world. China will find it very difficult to catch up, even more so as its economic growth slows. But military power is less and less the main source of American influence in the world. If the U.S. was the preeminent geopolitical power of the 20th century, it is the geoeconomic behemoth of the 21st. The U.S. may account for a declining share of global GDP, but its corporations increasingly dominate global value chains and its institutions hold overwhelming sway at international forums. Just as important, the U.S. is at the center of the financial, technological, educational and other networks that form the backbone of the 21st-century global economy.

The centrality of the U.S. in the 21st-century economy makes it a new kind of sanctions superpower.

Geoeconomic power is generated more by centrality than by sheer size, and the centrality of the U.S. in the 21st-century economy makes it a new kind of sanctions superpower. Few people are even aware of EU sanctions that are not part of larger American-coordinated efforts. Countries don’t worry much about being the target of Russian economic sanctions, and China tends to offer economic carrots rather than punish with economic sticks. The EU, Russia and China all have some geoeconomic power, but only the U.S. has the power to exclude individuals, firms or even entire countries from participation in the larger global economy. In the realm of geoeconomics, the U.S. isn’t just a major player, or even the lone superpower. Quite simply, it exercises many of the functions of a global government.

The New Middle Kingdom

The U.S. is in effect the spider at the center of the web of the integrated global economy. This position makes it disproportionately influential and by far the most powerful player in the new great power game of geoeconomics. The dominance of the U.S. dollar is well known, and the global financial system has been centered on the U.S. since the end of World War I, when France, Germany and the United Kingdom all found themselves financially dependent on New York, America’s financial capital. But today the virtual infrastructure of the internet, operating systems, app stores and the entire online economy is also centered on the U.S., as are the worlds of higher education, science, medicine, publishing, business services and a host of other “post-industrial” industries.

From Asia to Europe, the giants of China, Japan and Germany also host key nodes in the 21st-century economy, but American firms and institutions predominate because they occupy leading positions not just in one or two fields, but in nearly every field simultaneously. This generates network effects that multiply American influence. What’s more, many of the leading firms and institutions that are not American are based in countries that are closely allied to the United States. Twenty-two of the 28 EU member states are also members of NATO; Canada, Australia, Japan and South Korea are all close U.S. allies; Taiwan is in effect a U.S. protectorate.

The world’s only major economic power that is not a U.S. ally is China, but China is highly dependent on investment from and exports to the U.S. and its allies. Many of the most productive and profitable niches in China’s own economy are foreign-owned, with China’s moribund state-owned enterprises claiming the majority of what remains. Even China’s world-class internet companies are locked into an American-managed industrial infrastructure. Google search may be blocked in China, but 99 percent of Chinese mobile phones run Google’s Android or Apple’s iOS operating system.

The centrality of the U.S. in what has been called the “zone of integration” created by the globalization of the world’s economy is a new phenomenon, but it’s not unprecedented. In the premodern era, before the emergence of a single global economy, the world was fragmented into separate regional economies. One of those regional economies was the East Asian economy centered on China. The English word for China descends from the ancient Roman and Greek name, “Sinae,” or the “the land of the Qin,” named for China’s founding Qin Dynasty (221-206 B.C.). But in Chinese, China is simply Zhongguo, the “Central State” or, more poetically, the “Middle Kingdom.” Premodern China was always at the center of its own world.

In all the other major languages of East Asia, China is also called by some variant of Zhongguo. Some other countries even defined themselves in relation to China. Japan is the “land of the rising sun”—as seen from China. The “nam” in Vietnam means “south,” placing Vietnam to the south of China. Japan and Vietnam, along with Korea, Mongolia, Tibet and much of Southeast Asia, once formed an integrated economic region centered on China. The Chinese name for this area, which represented the world as seen from China, was tianxia, meaning “sky-encompassed” or “all under heaven.”

By the time of the Ming Dynasty (A.D. 1363-1644), the Chinese tianxia was an integrated economic zone covering all of East Asia and extending at times into the Indian Ocean as far west as Somalia and Tanzania. This precursor to globalization with China at the center was the historical inspiration for Chinese President Xi Jinping’s One Belt, One Road initiative, known as OBOR. The two components of OBOR—the Silk Road Economic Belt and the 21st-Century Maritime Silk Road—are explicitly designed to put China back at the economic center of the Afro-Eurasian landmass. The Chinese government clearly appreciates the geoeconomic value of centrality.

The problem for China is that although the OBOR strategy of “build it and they will come” might work for the physical infrastructure of ports and railways, it is not an effective way to improve China’s position in the virtual infrastructure of the 21st-century economy. Centrality in human networks depends very little on physical connectivity. China can send all the rail cars in the world chugging across Central Asia to Western Europe, but it won’t change the fact that Western Europeans are more likely to use Facebook than WeChat—and more likely to educate their children in North America than in China.

The fact that Chinese parents are themselves beating down the doors to educate—and even give birth to—their children in North America makes the prospect of a new Chinese tianxia even more remote. Instead, as Chinese individuals seek out the most advantageous positions for themselves and their families in global economic networks, they reinforce the centrality of the U.S. in those networks. As a result, the U.S. is becoming a kind of new Middle Kingdom of what might be called an American Tianxia. The emerging American Tianxia is very different in language, culture and politics from the old Chinese tianxia, but it does share one crucial trait: the leveraging of network centrality into world-spanning geoeconomic power.

The Zone of Irrelevance

The historian Wang Gungwu, writing in 2013, was the first to suggest that the Chinese term tianxia might be applied to today’s American-centered world. He described the word tianxia as depicting “an enlightened realm that Confucian thinkers and mandarins raised to one of universal values that determined who was civilized and who was not” and suggested that today’s American Tianxia performs the same function. Replace “Confucian thinkers and mandarins” with “political pundits and NGOs” and you get the point.

The globalized people who participate in the networks of the American Tianxia—the journalists, think tankers, businesspeople, academics and other opinion leaders who are much more closely tied to the U.S. than to, say, Syria or North Korea—get to mold the image of nations and their leaders, with clear results. It’s no mystery what they think of Assad, Kim Jong Un or Abu Bakr al-Baghdadi—or even Vladimir Putin and Recep Tayyip Erdogan, who are skating on thin ice. By contrast, Saudi and Emirati attempts to stigmatize Qatar have fallen flat, since Qatar is in many ways the most liberal of the Gulf states. And with a reported 11,000 U.S. military personnel based in Qatar, it is unlikely that the U.S. would ever bring its full geoeconomic power to bear against the Qatari government. Reversing his initial condemnation of Qatar, even U.S. President Donald Trump is now offering to mediate the dispute.

China can send all the rail cars in the world chugging toward Western Europe, but it won’t change the fact that Europeans are more likely to use Facebook than WeChat.

The world may seem to be awash in conflict today, but terrible as those wars may be, they are concentrated in countries that are peripheral to the larger global economy. Conflict hotspots like Syria, Afghanistan, South Sudan, Ukraine, Myanmar and Yemen are only tenuously connected to the outside world and are completely excluded from sophisticated global production networks. They form what from a geopolitical perspective has been called the “zone of intervention” but which from a geoeconomic perspective might just as well be called the “zone of irrelevance.” Who wins these wars may make an enormous difference to the people who live in the countries affected, but it will have no meaningful impact on the larger global economy.

Geoeconomic stigmatization via the imposition of economic sanctions is also focused on countries that are relatively isolated from global economic networks. Autarkic Russia is routinely criticized for its democratic failures, yet globally networked China is not a democracy at all. It is perhaps no coincidence that while it costs the U.S. very little to sanction Russia, it would cost a fortune to sanction China. The distinction between civilization and barbarism in the American Tianxia may be based on the acceptance of universal values, but it is mainly American pundits and NGOs who make the distinction, and these days they’re much better networked with China than with Russia. As a result, China tends to get a pass from the Western expert class, at least for now. Russia does not.

The few remaining “hot” conflicts or crises that affect economically consequential areas of the world, like the ones in Iraq and North Korea, are legacies of 20th-century geopolitics. They also involve countries that are not themselves integrated into 21st-century value chains. Iraq may be oil-rich and North Korea surrounded by advanced economies, but neither is itself very well networked economically. Their very irrelevance, ironically, limits their susceptibility to geoeconomic pressure. Islamic State forces in Iraq must be confronted by military power precisely because they have no formal economy to govern, even if they have overseen a black market for oil. North Korea is similarly relatively immune to sanctions because its economy is so meager.

China is particularly careful to keep its geopolitical conflict zones clear of geoeconomic entanglements. China has broadly supported the U.S. in applying economic sanctions on North Korea because China no longer has any geopolitical use for North Korea. By contrast, in the South China Sea, where China does have geopolitical interests, it ensures that these do not interfere with the smooth functioning of important economic systems. It may be true that one-third of global ocean trade passes through the South China Sea, but it is less often pointed out that most of that trade is China’s. Thus China speaks loudly but carries a small stick when it comes to the possibility of real conflict in the South China Sea.

China’s recently resolved Doklam Plateau standoff on its border with India and Bhutan similarly illustrates China’s separation of geopolitics from economics. The Doklam Plateau is almost literally in the middle of nowhere. China’s road-building there was in many ways similar to its island-building in the South China Sea. Both represent the development of infrastructure in remote locations in order to establish a permanent Chinese presence in previously unoccupied territories. They are bold geopolitical provocations, but they are geoeconomically irrelevant. With China, as in the rest of the world, geopolitical conflicts are confined to the zone of irrelevance. In the parts of the world that matter, geoeconomics is the order of the day.

Belts and BRICS

With its OBOR initiative, China is at the forefront of moving from geopolitics to geoeconomics as the basis of its foreign relations. Unlike in the Doklam and the South China Sea, China has no territorial ambitions along its belt and road routes. Instead, it seeks to leverage economic statecraft for political gain. For example, not long after Chinese state-owned shipping company COSCO made a major investment in Athens’ port of Piraeus, the Greek government blocked an EU effort to criticize China’s human rights record. Similarly, at China’s behest the Dalai Lama has repeatedly been denied a visa to enter South Africa. South Africa is a major beneficiary of Chinese largesse that has gained entry into the BRICS summit club—joining Brazil, Russia, India and China—entirely at China’s behest.

The problem for China is that it does not control access to major global networks that people value for their own sake. As a result, China’s geoeconomic checkbook diplomacy is fundamentally transactional. This is very different from the classical Chinese tianxia, under which the countries of East Asia valued access to China’s learning, technology and unique products and thus were willing to accept the trappings of nominal Chinese suzerainty in exchange for the privilege of trading with China. In the old tianxia, China was the center of the world and could use that position to its advantage. In the new geoeconomics, China must pay full price to meet its foreign policy goals.

In its exercise of geoeconomic power, China rewards while the U.S. punishes.

The most recent BRICS summit in early September is a case in point. Just a week before the opening of the summit in Xiamen, in eastern China’s Fujian province, Chinese and Indian troops were facing off on the remote Doklam Plateau 1,700 miles to the west. But Xi presumably didn’t want to see the crisis disrupt an economic summit on his own home turf; early in his career he had served as deputy mayor of Xiamen and governor of Fujian. So he bought India off with a geopolitical withdrawal in order to meet his geoeconomic goals.

China can afford its many geoeconomic initiatives—the BRICS-sponsored New Development Bank, its own Asian Infrastructure Investment Bank, multiple OBOR initiatives, diplomatic offensives to isolate Taiwan—but the fact that it has to pay for them underlines the point that for China, geoeconomics is a costly game. China has to buy its friends. The U.S., by contrast, gets its friends for free. People are even willing to pay to join the U.S. “club,” as when countries buy U.S. airplanes or military hardware as the price of U.S. friendship.

In its exercise of geoeconomic power, China rewards while the U.S. punishes. That’s because the U.S. is in the enviable position that mere access to its geoeconomic infrastructure is valuable in itself. Countries are not paying China for the privilege of joining OBOR; China is paying them to join. China has effectively paid India to keep quiet and stay in the BRICS, paid Greece to plead its case at the EU, and paid dozens of African countries to allow Chinese state-owned firms to build infrastructure at below-cost rates. China even donated a new headquarters building for the African Union—and sent a Chinese crew to Addis Ababa to build it.

By contrast, more than a million international students—nearly a third of them Chinese—pay to study in the U.S., subsidizing American colleges while absorbing American values. More than 500 foreign companies are listed on the New York Stock Exchange, subjecting themselves to U.S. government oversight, and the U.S. dollar is on one side of the deal in 88 percent of all international currency transactions. The whole world relies on the American-dominated internet, the American-provided Global Positioning System (GPS) and American-owned computer and mobile phone operating systems. It is difficult to do business of any kind in today’s integrated economy without using U.S.-linked systems of one kind or another, which is why the U.S. is uniquely powerful in the imposition of economic sanctions.

Geoeconomics isn’t everything, and sanctions may not be able to solve all of the world’s geopolitical crises. Sometimes boots on the ground and missiles in the air are the only ways to achieve important policy and humanitarian goals. But geoeconomics is increasingly important, and in that realm, the U.S. is vastly more powerful today than postwar America was in its Cold War heyday. It is worth remembering that the U.S. at its geopolitical zenith struggled to contain an impoverished China in the Korean War and failed to contain an impoverished North Vietnam in Southeast Asia. Today, geoeconomic centrality gives the U.S. much more power to influence the policies and behaviors of other countries than military force ever did. Hegemony is dead. Long live centrality.

#### But big is NOT NECESSARILY bad—a fact-specific rule of reason inquiry allows tailored remedies that ferret out bad practices but maintain efficiencies

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

More Creative Alternatives

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

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

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

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

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

a. Enabling Competition Within the Platform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

over 15,500 members.357

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

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

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

## Conduct

#### Advantage 2 is Conduct

#### The exact scope of *Amex* is unclear—companies will exploit that lack of clarity to do dubious things on their platforms—*Amex*’s burden makes that effectively impossible to police

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

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

Antitrust laws have never permitted monopolistic firms to wield their market power against one set of customers so long as they benefit another set of players. Yet this kind of “balancing” is exactly what the Second Circuit ratified. Consider: Under the logic the appeals court used, an anticompetitive scheme by Uber to suppress driver income would not be considered illegal unless those bringing the suit showed that riders were also harmed.

What’s more, the court said, plaintiffs have to meet this new burden at the very earliest stage of litigation.

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

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

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

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

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

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

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

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

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

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

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

Antitrust in tech markets after American Express

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

Sabre/Farelogix

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

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

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

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

Qualcomm

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

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

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

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

Down the competitive effects rabbit hole

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

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

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

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

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

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

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

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

A modern antitrust in peril

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

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

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

#### Amex undermines enforcement against nascent acquisitions

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(Steven, “Dominant Digital Platforms: Is Antitrust Up to the Task?” yalelawjournal.org/pdf/SalopEssay\_rnon2ejq.pdf)

This most recent agency loss involved an acquisition by a dominant digital platform. Sabre is a digital platform that permits airlines to post schedules, fares and seat availability and allows travel agents to access this information, make travel bookings and pay for them. Sabre proposed to acquire Farelogix, which provides technology to airlines. This technology allows an airline to disintermediate Sabre by allowing the airline to connect directly to travel agencies and provide travel agencies with information and ticket-booking services itself. Thus, this acquisition was analytically like a vertical merger, where Farelogix sells a critical input (i.e., its technology) to airlines, which they use to compete with Sabre for the business of travel agents. The competitive concern is that Sabre would foreclose airlines’ ability to acquire the Farelogix technology input.

Perhaps attempting to exploit the horizontal-merger structural presumption and avoid the difficulties they faced in AT&T/Time Warner, the DOJ did not litigate the case as a vertical merger. Instead, the complaint alleged that Sabre and Farelogix competed in the provision of booking services for airline tickets sold through travel agencies. This competition is indirect, resulting from Farelogix working with the individual airlines to disintermediate Sabre. However, the trial court did not miss the point. It observed that “Sabre and Farelogix view each other as competitors” and found that “the record reflects competition between Sabre’s and Farelogix’s direct connection solutions for airlines.”94

Having concluded that competition was reduced by the merger, the trial court nonetheless rejected the DOJ’s complaint on the grounds that Farelogix and Sabre do not compete in the two-sided platform market.95 While Sabre provides services to customers on both sides (i.e., to both airlines and travel agencies), Farelogix provides services to only one side (i.e., to airlines, but not to travel agencies). The travel agency services are provided by the airlines themselves, using the Farelogix technology.

This approach was both defective and unnecessary because Sabre competed with the combination of Farelogix and the airlines.96 Yet the court thought that American Express compelled the opposite result, despite its own fact-finding and the vertical nature of the transaction. If other U.S. courts similarly follow this same defective approach, the result will be underdeterrence of anticompetitive acquisitions by digital platforms.97 Indeed, this approach would lead to ludicrous results. Under this reasoning, Microsoft could have legally ended the competitive threat from Netscape and Java simply by acquiring them instead of trying to destroy them.

#### Prospect of big tech acquisition dampens innovation

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

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

E. Whither Innovation?

As a theoretical matter, big tech’s refusals to deal and predatory copying suppress innovation. A retailer with a new idea for a household product will be less inclined to invest in producing it if he knows Amazon can appropriate the returns. A developer with a better “app for that” will be less likely to bring it to market if she believes Apple or Facebook might someday remove it from their platforms. And if a rival search company cannot hope to keep its data private from Google, it will not invest in building a better search engine to try to take on the giant.

Whether big tech stifles innovation as an empirical matter is less clear, but there is anecdotal evidence that it does. During a recent hearing following the House Judiciary Committee’s investigation into competition abuses among high-tech firms, Representative Cicilline read a quote that he said was typical of the entrepreneurs he interviewed: “If someone came to me with an idea for a website or a web service today, I’d tell them to run. Run as far away from the web as possible.”111 Venture capital, while booming overall,112 is shy about funding projects that might compete with Big Tech. The best-case scenario for a start-up is acquisition by one of the big four—a lucrative payday, for sure, but nothing compared to what could come from actually toppling a dominant firm. This puts a ceiling on the upside, and with the ever-present risk of failure, it likely leads to under-investment in new ideas. As one funder put it, “[w]e don’t touch anything that comes too close to Facebook, Google or Amazon.”113

CONCLUSION: “ANTITRUST IS GREEDY”

The promise that we saw in high tech during its first boom—that it would change the way we work, communicate, shop, and play—has largely been realized. Few can argue with the efficiencies that digital communication and commerce have brought to our lives and markets. But, as Professor Herbert Hovenkamp has said, “antitrust is greedy.”114 It wants not only efficiency in end products, but efficiency in the competitive process that brings them about. During the dot-com era, American antitrust institutions became enthralled with the idea that encouraging the development of dynamic, innovative products required compromising our commitment to dynamic, innovative markets. That compromise contributed—in a way that is often overlooked—to the current competition crisis in big tech.

#### Specifically, AI acquisitions have increased six-fold.

CB Insights ’19 – data analytics company [CB Insights; private company with a business analytics platform and global database that provides market intelligence on private companies and investor activities, targeted at private equity, venture capital, investment banking, angel investing, and consulting professionals by providing insights about high growth private companies; 9-17-2019; "The Race For AI: Here Are The Tech Giants Rushing To Snap Up Artificial Intelligence Startups"; CB Insights; https://www.cbinsights.com/research/top-acquirers-ai-startups-ma-timeline/; accessed 8-15-2021]

Artificial intelligence has long been a major focus for tech leaders across industries. Big corporations across every sector, from retail to agriculture, are trying to integrate machine learning into their products. At the same time, there is an acute shortage of AI talent.

This combination is fueling a heated race to scoop up top AI startups, many of which are still in the early stages of research and funding.

Below, we dig into AI acquisition trends, from which companies are the most acquisitive to what areas of focus are attracting the most attention.

TECH GIANTS LEAD IN AI ACQUISITIONS

The usual suspects are leading the race for AI: tech giants like Facebook, Amazon, Microsoft, Google, & Apple (FAMGA) have all been aggressively acquiring AI startups in the last decade.

Among the FAMGA companies, Apple leads the way, making 20 total AI acquisitions since 2010. It is followed by Google (the frontrunner from 2012 to 2016) with 14 acquisitions and Microsoft with 10.

Apple’s AI acquisition spree, which has helped it overtake Google in recent years, was essential to the development of new iPhone features. For example, FaceID, the technology that allows users to unlock their iPhone X just by looking at it, stems from Apple’s M&A moves in chips and computer vision, including the acquisition of AI company RealFace.

In fact, many of FAMGA’s prominent products and services came out of acquisitions of AI companies — such as Apple’s Siri, or Google’s contributions to healthcare through DeepMind.

That said, tech giants are far from the only companies snatching up AI startups.

Since 2010, there have been 635 AI acquisitions, as companies aim to build out their AI capabilities and capture sought-after talent (as of 8/31/2019).

The pace of these acquisitions has also been increasing. AI acquisitions saw a more than 6x uptick from 2013 to 2018, including last year’s record of 166 AI acquisitions — up 38% year-over-year.

In 2019, there have already been 140+ acquisitions (as of August), putting the year on track to beat the 2018 record at the current run rate.

#### Tech behemoths won’t take DOD contracts. Antitrust would encourage smaller firms to develop AI for the sole purpose of defense needs.

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3. Are smaller vendors more likely to produce innovative products that meet the Pentagon’s needs?

Tech industry leaders have relatively **little incentive** to work with the Pentagon. Their companies already enjoy **broad customer bases** and financial independence from U.S. government contracts—including those **at the Pentagon**.89 DOD contracts involve **applying** AI technology in varied, complex, and **operationally demanding** environments with **low tolerance** for error. Similarly, industry has **little motivation** to take on unique DOD **data management** and privacy requirements, such as data compartmentalization, protection against deceptive or compromised data inputs, and strict **data accountability** provisions complicating **algorithm training**.90 Finally, some commercial AI advances will easily convert into Pentagon applications. Others will require significant, difficult adaption and productization.

Antitrust action could create **smaller AI firms** targeting DOD business as their “**niche**.” With the Pentagon as their **sole customer**, these firms could focus on its unique needs, tailoring broader AI innovations for the Pentagon through **productization** and **organizational adaptation**. They could follow the example of **Palantir**, which makes 50 percent of its revenue from **government contracts**,91 or Kratos (60 percent).92 In the last five years, a **number of companies** have emerged in this mold, including Anduril Labs (2017), Shield AI (2015), Descartes Labs (2014), and Uptake (2014). As smaller firms’ primary, high-value customer, the Pentagon can **dictate** their innovation objectives, ultimately yielding AI applications better suited to **defense needs**.

#### Military AI ushers in the erosion of conventional deterrence – developing it is necessary to prevent great power wars.

Brose ’19 – Senior Fellow at the Carnegie Endowment for International Peace [Christian; Senior Fellow at the Carnegie Endowment for International Peace; 2019; "The New Revolution in Military Affairs"; Foreign Affairs; <https://www.foreignaffairs.com/articles/2019-04-16/new-revolution-military-affairs>]

The idea of a future military revolution became discredited amid nearly two decades of war after 2001 and has been further damaged by reductions in defense spending since 2011. But along the way, the United States has also **squandered** hundreds of **billions** of dollars trying to modernize in the **wrong ways**. Instead of thinking systematically about buying faster, more **effective kill chains** that could be built now, Washington poured **money** into **newer versions** of **old military platforms** and **prayed** for **technological miracles** to come (which often became acquisition debacles when those miracles did not materialize). The result is that U.S. battle networks are not nearly as **fast** or **effective** as they have appeared while the United States has been fighting lesser opponents for almost three decades.

Yet if ever there were a time to **get serious** about the coming revolution in **military affairs**, it is **now**. There is an emerging consensus that the United States' top **defense-planning priority** should be **contending** with **great powers** with **advanced militaries**, primarily **China**, and that **new technologies**, once intriguing but speculative, are now both **real** and **essential** to **future military advantage**. Senior military leaders and defense experts are also starting to agree, albeit belatedly, that when it comes to these threats, the United States is **falling dangerously behind**.

This reality demands more than a revolution in technology; it requires a revolution in thinking. And that thinking must focus more on how the U.S. military fights than with what it fights. The problem is not **insufficient spending** on defense; it is that the U.S. military is being countered by **rivals** with **superior strategies**. The United States, in other words, is playing a **losing game**. The question, accordingly, is not how **new technologies** can improve the U.S. military's ability to do what it already does but how they can enable it to operate in **new ways**. If American defense officials do not answer that question, there will still be a **revolution in military affairs**. But it will primarily **benefit others**.

It is still possible for the United States to adapt and succeed, but the scale of change required is enormous. The **traditional model** of U.S. **military power** is being **disrupted**, the way Blockbuster's business model was amid the rise of Amazon and Netflix. A military made up of **small numbers** of **large**, **expensive**, **heavily manned**, and **hard-to replace** systems will not **survive** on **future battlefields**, where swarms of **intelligent machines** will deliver violence at a **greater volume** and **higher velocity** than **ever before**. Success will require a **different kind of military**, one built around **large numbers** of **small**, **inexpensive**, **expendable**, and **highly autonomous** systems. The United States has the money, human capital, and technology to assemble that kind of military. The question is whether it has the imagination and the resolve.

NEW TECHNOLOGIES, OLD PROBLEMS

**Artificial intelligence** and other emerging technologies will change the way **war is fought**, but they will not change its nature. Whether it involves longbows or source code, war will always be violent, politically motivated, and composed of the same three elemental functions that new recruits learn in basic training: move, shoot, and communicate.

Movement in warfare entails hiding and seeking (attackers try to evade detection; defenders try to detect them) and penetrating and repelling (attackers try to enter opponents’ space; defenders try to deny them access). But in a world that is becoming one giant sensor, hiding and penetrating—never easy in warfare—will be far more difficult, if not impossible. The amount of data generated by networked devices, the so-called Internet of Things, is on pace to triple between 2016 and 2021. More significant, the proliferation of low-cost, commercial sensors that can detect more things more clearly over greater distances is already providing more real-time global surveillance than has existed at any time in history. This is especially true in space. In the past, the high costs of launching satellites required them to be large, expensive, and designed to orbit for decades. But as access to space gets cheaper, satellites are becoming more like mobile phones—mass-produced devices that are used for a few years and then replaced. Commercial space companies are already fielding hundreds of small, cheap satellites. Soon, there will be thousands of such satellites, providing an unblinking eye over the entire world. Stealth technology is living on borrowed time.

On top of all of that, quantum sensors—which use the bizarre properties of subatomic particles, such as their ability to be in two different places at once—will eventually be able detect disruptions in the environment, such as the displacement of air around aircraft or water around submarines. Quantum sensors will likely be the first usable application of quantum science, and this technology is still many years off. But once quantum sensors are fielded, there will be nowhere to hide.

The future of movement will also be characterized by a return of mass to the battlefield, after many decades in which the trend was moving in the opposite direction—toward an emphasis on quality over quantity—as technology is enabling more systems to get in motion and stay in motion in more places. Ubiquitous sensors will generate exponentially greater quantities of data, which in turn will drive both the development and the deployment of artificial intelligence. As machines become more autonomous, militaries will be able to field more of them in smaller sizes and at lower costs. New developments in power generation and storage and in hypersonic propulsion will allow these smaller systems to travel farther and faster than ever. Where once there was one destroyer, for example, the near future could see dozens of autonomous vessels that are similar to missile barges, ready to strike as targets emerge.

Technology will also transform how those systems remain in motion. Logistics—the ability to supply forces with food, fuel, and replacements—has traditionally been the limiting factor in war. But autonomous militaries will need less fuel and no food. Advanced manufacturing methods, such as 3-D printing, will reduce the need for vast, risky, and expensive military logistics networks by enabling the production of complicated goods at the point of demand quickly, cheaply, and easily.

In an even more profound change, space will emerge as its own domain of maneuver warfare. So far, the near impossibility of refueling spacecraft has largely limited them to orbiting the earth. But as it becomes feasible to not just refuel spacecraft midflight but also build and service satellites in space, process data in orbit, and capture resources and energy in space for use in space (for example, by using vast solar arrays or mining asteroids), space operations will become less dependent on earth. Spacecraft will be able to maneuver and fight, and the first orbital weapons could enter the battlefield. The technology to do much of this exists already.

THE MILITARIES OF TOMORROW

Technology will also radically alter how militaries shoot, both literally and figuratively. Cyberattacks, communication jamming, electronic warfare, and other attacks on a system’s software will become as important as those that target a system’s hardware, if not more so. The rate of fire, or how fast weapons can shoot, will accelerate rapidly thanks to new technologies such as lasers, high-powered microwaves, and other directed-energy weapons. But what will really increase the rate of fire are intelligent systems that will radically reduce the time between when targets can be identified and when they can be attacked. A harbinger of this much nastier future battlefield has played out in Ukraine since 2014, where Russia has shortened to mere minutes the time between when their spotter drones first detect Ukrainian forces and when their precision rocket artillery wipes those forces off the map.

The militaries of the future will also be able to shoot farther than those of today. Eventually, hypersonic munitions (weapons that travel at more than five times the speed of sound) and space-based weapons will be able to strike targets anywhere in the world nearly instantly. Militaries will be able to attack domains once assumed to be sanctuaries, such as space and logistics networks. There will be no rear areas or safe havens anymore. Swarms of autonomous systems will not only be able to find targets everywhere; they will also be able to shoot them accurately. The ability to have both quantity and quality in military systems will have devastating effects, especially as technology makes lethal payloads smaller.

Finally, the way militaries communicate will change drastically. Traditional communications networks—hub-and-spoke structures with vulnerable single points of failure—will not survive. Instead, technology will push vital communications functions to the edge of the network. Every autonomous system will be able to process and make sense of the information it gathers on its own, without relying on a command hub. This will enable the creation of radically distributed networks that are resilient and reconfigurable.

Technology is also inverting the current paradigm of command and control. Today, even a supposedly unmanned system requires dozens of people to operate it remotely, maintain it, and process the data it collects. But as systems become more autonomous, one person will be able to operate larger numbers of them single-handedly. The opening ceremonies of the 2018 Winter Olympics, in South Korea, offered a preview of this technology when 1,218 autonomous drones equipped with lights collaborated to form intricate pictures in the night sky over Pyeongchang. Now imagine similar autonomous systems being used, for example, to overwhelm an aircraft carrier and render it inoperable.

Further afield, other technologies will change military communications. Information networks based on 5G technology will be capable of moving vastly larger amounts of data at significantly faster speeds. Similarly, the same quantum science that will improve military sensors will transform communications and computing. Quantum computing—the ability to use the abnormal properties of subatomic particles to exponentially increase processing power—will make possible encryption methods that could be unbreakable, as well as give militaries the power to process volumes of data and solve classes of problems that exceed the capacity of classical computers. More incredible still, so-called brain-computer interface technology is already enabling human beings to control complicated systems, such as robotic prosthetics and even unmanned aircraft, with their neural signals. Put simply, it is becoming possible for a human operator to control multiple drones simply by thinking of what they want those systems to do.

Put together, all these technologies will displace decades-old, even centuries-old, assumptions about how militaries operate. The militaries that embrace and adapt to these technologies will dominate those that do not. In that regard, the U.S. military is in big trouble.

A LOSING GAME

Since the end of the **Cold War**, the United States' approach to **projecting military force** against regional powers has rested on a series of **assumptions** about how conflicts **will unfold**. The U.S. military assumes that its forces will be able to move **unimpeded** into forward positions and that it will be able to **commence hostilities** at a time of **its choosing**. It assumes that its forces will operate in **permissive environments**-that adversaries will be **unable to contest** its **freedom of movement** in any domain. It assumes that **any quantitative advantage** that an adversary may possess will be **overcome** by its own **superior ability** to **evade** detection, **penetrate** enemy defenses, and **strike targets**. And it assumes that U.S. forces will suffer **few losses** in combat.

These **assumptions** have led to a force built around relatively **small numbers** of **large**, **expensive**, and **hard-to-replace** systems that are optimized for moving undetected close to their targets, shooting a limited number of times but with extreme precision, and communicating with impunity. Think stealth aircraft flying right into downtown Belgrade or Baghdad. What's more, systems such as these depend on **communications**, **logistics**, and **satellite networks** that are almost **entirely defenseless**, because they were designed under the **premise** that no adversary would ever be able to **attack them.**

This military enterprise and its underlying suppositions are being called into question. For the past two decades, while the United States has focused on **fighting wars** in the **Middle East**, its competitors-especially **China**, but also **Russia**-have been dissecting its way of war and **developing** so-called anti-access/area-denial (or A2/AD) capabilities to **detect U.S. systems** in **every domain** and **overwhelm them** with large salvos of precision fire. Put simply, U.S. rivals are fielding **large quantities** of **multimillion-dollar weapons** to destroy the United States' **multibillion-dollar military** systems.

China has also begun work on **megaprojects** designed to **position it** as the **world leader** in **artificial intelligence** and other advanced technologies. This undertaking is not exclusively military in its focus, but every one of these **advanced-technology megaprojects** has **military applications** and benefits the **People's Liberation Army** under the doctrine of "**military-civil fusion**." Whereas the U.S. military still largely treats its data like engine exhaust-a **useless byproduct**-China is moving with **authoritarian zeal** to stockpile its data like **oil**, so that it can power the **autonomous** and **intelligent** military systems it sees as **critical** to **dominance** in **future warfare**.

The United States' position, **already dire**, is **rapidly deteriorating**. As a 2017 report from the rand Corporation concluded, "U.S. forces could, under plausible assumptions, lose the **next war** they are **called upon to fight**." That same year, General Joseph Dunford, chairman of the Joint Chiefs of Staff, sounded the alarm in stark terms: "In **just a few years**, if we do not **change** the **trajectory**, we will **lose** our qualitative and quantitative **competitive advantage**."

The **greatest danger** for the United States is the **erosion of conventional deterrence**. If leaders in **Beijing** or **Moscow** think that they might **win a war** against the United States, they will run **greater risks** and **press their advantage**. They will take actions that steadily undermine the United States' commitments to its allies by casting doubt on whether Washington would really send its military to defend the Baltics, the Philippines, Taiwan, or even Japan or South Korea. They will try to **get their way** through **any means necessary**, from coercive diplomacy and economic extortion to meddling in the domestic affairs of other countries. And they will steadily harden their **spheres of influence**, turning them into areas ever more **hospitable** to **authoritarian ideology**, **surveillance states**, and **crony capitalism**. In other words, they will try, as the military strategist Sun-tzu recommended, to "win without fighting."

#### Platform monopoly enables algorithmic discrimination

Noble, PhD, Associate Professor of Gender Studies and African American Studies at the University of California, ‘18

(Safiya Umoja, *Algorithms of Oppression: How Search Engines Reinforce Racism*, New York University Press, p. 36–38)

Google has become a ubiquitous entity that is synonymous for many everyday users with “the Internet” itself. From serving as a browser of the Internet to handling personal email or establishing Wi- Fi networks and broadband projects in municipalities across the United States, Google, unlike traditional telecommunications companies, has unprecedented access to the collection and provision of data across a variety of platforms in a highly unregulated marketplace and policy environment. We must continue to study the implications of engagement with commercial entities such as Google and what makes them so desirable to consumers, as their use is not without consequences of increased surveillance and privacy invasions and participation in hidden labor practices. Each of these enhances the business model of Google’s parent company, Alphabet, and reinforces its market dominance across a host of vertical and horizontal markets.22 In 2011, the Federal Trade Commission started looking into Google’s near- monopoly status and market dominance and the harm this could cause consumers. By March 16, 2012, Google was trading on NASDAQ at $625.04 a share, with a market capitalization of just over $203 billion. At the time of the hearings, Google’s latest income statement, for December 2011, showed gross profit at $24.7 billion. It had $43.3 billion cash on hand and just $6.21 billion in debt. Google held 66.2% of the search engine market industry in 2012. Google Search’s profits have only continued to grow, and its holdings have become so significant that the larger company has renamed itself Alphabet, with Google Search as but one of many holdings. By the final writing of this book in August 2017, Alphabet was trading at $936.38 on NASDAQ, with a market capitalization of $649.49 billion.

The public is aware of the role of search in everyday life, and people’s opinions on search are alarming. Recent data from tracking surveys and consumer- behavior trends by the comScore Media Metrix consumer panel conducted by the Pew Internet and American Life Project show that search engines are as important to Internet users as email is. Over sixty million Americans engage in search, and for the most part, people report that they are satisfied with the results they find in search engines. The 2005 and 2012 Pew reports on “search engine use” reveal that 73% of all Americans have used a search engine, and 59% report using a search engine every day.23 In 2012, 83% of search engine users used Google. But Google Search prioritizes its own interests, and this is something far less visible to the public. Most people surveyed could not tell the difference between paid advertising and “genuine” results.

If search is so trusted, then why is a study such as this one needed? The exploration beyond that first simple search is the substance of this book. Throughout the discussion of these and other results, I want to emphasize the main point: there is a missing social context in commercial digital media platforms, and it matters, particularly for marginalized groups that are problematically represented in stereotypical or pornographic ways, for those who are bullied, and for those who are consistently targeted. I use only a handful of illustrative searches to underscore the point and to raise awareness— and hopefully intervention— of how important what we find on the web through commercial search engines is to society.

Google’s monopoly status,25 coupled with its algorithmic practices of biasing information toward the interests of the neoliberal capital and social elites in the United States, has resulted in a provision of information that purports to be credible but is actually a reflection of advertising interests. Stated another way, it can be argued that Google functions in the interests of its most influential paid advertisers or through an intersection of popular and commercial interests. Yet Google’s users think of it as a public resource, generally free from commercial interest. Further complicating the ability to contextualize Google’s results is the power of its social hegemony.26 Google benefits directly and materially from what can be called the “labortainment”27 of users, when users consent to freely give away their labor and personal data for the use of Google and its products, resulting in incredible profit for the company.

There are many cases that could be made to show how overreliance on commercial search by the public, including librarians, information professionals, and knowledge managers— all of whom are susceptible to overuse of or even replacement by search engines— is something that we must pay closer attention to right now. Under the current algorithmic constraints or limitations, commercial search does not provide appropriate social, historical, and contextual meaning to already overracialized and hypersexualized people who materially suffer along multiple axes. In the research presented in this study, the reader will find a more meaningful understanding of the kind of harm that such limitations can cause for users reliant on the web as an artifact of both formal and informal culture.28 In sum, search results play a powerful role in providing fact and authority to those who see them, and as such, they must be examined carefully. Google has become a central object of study for digital media scholars,29 due to recognition on these scholars’ parts of the power and impact wielded by the necessity to begin most engagements with social media via a search process and the near universality with which Google has been adopted and embedded into all aspects of the digital media landscape to respond to that need. This work is addressing a gap in scholarship on how search works and what it biases, public trust in search, the relationship of search to information studies, and the ways in which African Americans, among others, are mediated and commodified in Google.

#### Monopoly enables algorithmic oppression

Asher-Schapiro, Digital Rights Correspondent, Reuters, ‘20

(Avi, “'Algorithms of oppression': Big tech urged to combat discrimination,” November 10, <https://www.reuters.com/article/us-tech-conference-discrimination-interv/algorithms-of-oppression-big-tech-urged-to-combat-discrimination-idUSKBN27R02K>)

Nearly a decade has passed since Safiya Noble googled “Black girls” and found the search results were mostly pornographic - a discovery that drove her to explore how algorithms can perpetuate discrimination and inequality.

Google went on to fix that search engine issue, but Noble said the problem is far from solved. Research this year found Google’s advertising platform linked the search phrases “Black girls,” “Latina girls,” and “Asian Girls” to adult content ads.

“The Black girl search is the thread on the sweater we are trying to unravel. It’s a way into a larger conversation about the future of knowledge,” said Noble, who will speak on a digital rights panel at the Thomson Reuters Foundation’s annual event, Trust Conference, being held online on Wednesday.

Noble, a leading technology scholar at the University of California, Los Angeles (UCLA), went on to coin the term “algorithms of oppression” and has written a book with the same name.

“Algorithms of oppression are everywhere,” she said. “I’m talking about computational software that might be embedded in large-scale platforms - or even household brands - that are used to disenfranchise, marginalize, and misrepresent.”

That Google’s search engine had been built to assume those looking for information about Black girls were interested in pornography “reinforced misrepresentations,” Noble said.

Cathy Edwards, vice president of engineering at Google Images, said in emailed comments that because the company’s systems “are organizing information from a constantly-changing web, our results can sometimes show negative stereotypes.”

But she added that Google has “a fully staffed team working on scalable solutions for these types of issues” and is “committed to making diversity, equity, and inclusion part of everything we do — from how we build our products to how we build our workforce.”

GREATER DIVERSITY

Beyond search engines, Noble said she was also concerned about algorithms used in a whole suite of technologies - from predictive policing software to facial recognition tools, or social media platforms that accelerate disinformation.

These technologies not only tend to single out minorities for unfair treatment, but also provide little recourse for them to seek redress.

“(These technologies) are particularly deployed towards vulnerable people oftentimes communities of color, poor people, and people who are the least empowered to resist,” she said.

Greater diversity in the technology industry would help, she said, but would not erase the harm technology can do to vulnerable groups.

“You can’t see the flaws in your system when you have a fairly homogeneous group of designers, who are designing for a diverse set of societies around the world, and communities,” she said.

“We know that every year Silicon Valley says it’s going to get more diverse. But there’s no improvement, even though for 10 years we’ve been gathering more evidence about the harms of their products.”

Noble applauds renewed public interest in scrutinizing and putting pressure on technology platforms, the so-called “techlash” that set in after the 2016 U.S. election.

Technology scholars, researchers and journalists are making an increasing effort to track how Facebook facilitates the spread of disinformation and contributes to a polarized electorate, she said.

Noble belongs to the “Real Facebook Oversight Board”, a group of academics and activists established to question the social media network’s policies and content moderation decisions in the run-up to this month’s U.S. election.

Facebook did not reply to a request for comment about the Board, but in September a spokesman said it was “mostly longtime critics creating a new channel for existing criticisms”.

Noble also welcomed potential government intervention to reduce the power of tech firms.

“When you have a monopoly advertising company controlling the information landscape you have a recipe for disaster,” she said. “Large tech companies prioritize their own profit at all costs.

“Who pays the price? We know it’s people who are less capitalized and minoritized, that’s just a fact.”

#### Aff solves—rule of reason approach creates clear, enforceable guidelines

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

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

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

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

Fine-tuning the proper aims of a nonpredictive antitrust

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

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

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

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

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

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

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

Nonpredictive antitrust enforcement in practice

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

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

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

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

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

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

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

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

## Mechanism

#### The third page is mechanism

#### Plan: The United States federal government should remove plaintiffs’ heightened burden of proof in platform markets.

#### Removing Amex’s special rule for platforms solves

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

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

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

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

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

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

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

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

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

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

#### This tailored approach is the least intrusive mechanism—it only punishes anticompetitive practices and allows innovative conduct to continue—cost of regulation is orders of magnitude higher

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

A common complaint about antitrust is that it is costly and slow. While both observations ring true, the social cost of fact-intensive decision making is much less than that of making incorrect decisions that can affect millions of consumers, employees, and other constituents. Antitrust is a litigation-driven enterprise that requires decisionmakers to focus on the specific practices and assets before them. Unlike legislative regulation, antitrust does not group classes of industries together for common treatment, but that also means it is less susceptible to regulatory capture.

Nevertheless, antitrust can be subject to interest-group biases. Consumer welfare is a public good. Consumers are numerous, heterogenous, and for the most part, poorly organized. By contrast, firms who profit from underenforcement are much fewer and more unitary in their goals. Individually, the stakes firms have in the preservation of monopoly are far higher than the individual gains that accrue from competition, even though consumers’ aggregate gains are much larger, particularly when those of labor are included.435

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

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

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

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

As the long history of antitrust shows, breaking apart assets can be dangerous because it threatens losses of beneficial economies of scale or scope. Other approaches with more promise include the restructuring of management rather than assets, or else mandated interoperability or pooling. Restructuring management can enable firms to function more competitively by treating their internal decision making as a market that is itself reachable under the antitrust laws. In appropriate cases, interoperability can expand the range of beneficial network effects while doing no harm to the firm’s internal efficiencies.

Competition problems in digital platforms present some novel challenges, but most are within reach of antitrust law’s capacity to handle them. The courts and other antitrust policy makers should treat digital platforms for what they are—firms that have unique features, but not so unique that we must abandon what we know about competition in high-technology, product-differentiated markets.

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

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

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

C. Plaintiffs Already Bear the Burden on Balancing

Balancing anticompetitive effects against procompetitive efficiencies is notoriously challenging. 196 It is intuitively sensible that, if there are countervailing welfare effects, the burden ought to be on the plaintiff to establish that the balance of effects results in a net injury. But it is incorrect to presume that the AmEx III decision-which requires balancing right out of the gates-was necessary to achieve this result.

Recall that, if the defendant establishes a procompetitive justification and the plaintiff fails to identify a less restrictive alternative, then the court must attempt to balance the countervailing effects. Here, the plaintiff carries the burden of persuasion by virtue of its underlying obligation to prove an anticompetitive effect by a preponderance of evidence. 1 9 7 As such, the rule of reason already ensures that the plaintiff bears the ultimate burden as to the balance of countervailing effects. But, critically, the usual approach delays the balancing inquiry until such time as the court can be sure it is necessary-namely, until after the defendant has established a significant efficiency that might warrant balancing.

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

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