# 1AC LHPC

### 1AC – Innovation

Advantage one is innovation

#### Scenario one is AI – dominant platforms stifle innovation via nascent acquisition and exclusion

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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.

#### Only nascent firms foster transformative tech innovation

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

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

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

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

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

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

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

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

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

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

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

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

#### China will overtake the U.S. in AI by 2030 – national policies to maintain our lead are key

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Graham Allison, “China Will Soon Lead the U.S. in Tech,” *The Wall Street Journal*, 7 December 2021, https://www.wsj.com/articles/china-will-soon-lead-the-us-in-tech-global-leader-semiconductors-5g-wireless-green-energy-11638915759.

Central Intelligence Agency Director Bill Burns announced in October that the agency is establishing two new major “mission centers,” one focusing on China and the other on frontier technologies. This action reflects his judgment that China is the “most important geopolitical threat we face in the 21st century” and that the “main arena for competition and rivalry” between China and the U.S. will be advanced technologies. The question Americans should be asking is: Could China win the technology race?

A new report on the “Great Technological Rivalry” from Harvard’s Belfer Center answers: Yes. The report isn’t alarmist but nonetheless concludes that China has made such extraordinary leaps that it is now a full-spectrum peer competitor. In each of the foundational technologies of the 21st century—artificial intelligence, semiconductors, 5G wireless, quantum information science, biotechnology and green energy—China could soon be the global leader. In some areas, it is already No. 1.

Last year China produced 50% of the world’s computers and mobile phones; the U.S. produced only 6%. China produces 70 solar panels for each one produced in the U.S., sells four times the number of electric vehicles, and has nine times as many 5G base stations, with network speeds five times as fast as American equivalents.

In the advanced technology likely to have the greatest effect on economics and security in the coming decade—artificial intelligence—China is ahead of the U.S. in crucial areas. A spring 2021 report from the National Security Commission on AI warned that China is poised to overtake the U.S. as the global leader in AI by 2030. U.S.-born students are earning roughly as many doctorates each year in AI-related fields as in 1990, while China is on track to graduate twice as many science, technology engineering and mathematics Ph.D.s as the U.S. by 2025. The Harvard report adds that China now clearly tops the U.S. in practical AI applications, including facial recognition, voice recognition and fintech.

The U.S. still has a dominant position in the semiconductor industry, which it has held for almost half a century. But China may soon catch up in two important arenas: semiconductor fabrication and chip design. China’s production of semiconductors has surpassed America’s, with its share of global production rising to 15% from less than 1% in 1990, while the U.S. share has fallen from 37% to 12%.

In 5G, the Pentagon’s Defense Innovation Board reports that China is on track to replicate the economic and military advantages America gained from being the global leader in 4G. China has installed 950,000 base stations to America’s 100,000. By the end of last year, 150 million Chinese were using 5G mobile phones with average speeds of 300 megabits a second, while only six million Americans had access to 5G with speeds of 60 megabits a second. America’s 5G service providers have put more focus on advertising their capabilities than on building infrastructure.

The Chinese Communist Party has made no secret of its ambitions: China intends to become the global leader in the technologies that will shape the decades ahead. The party’s 2013 economic reform plan highlighted technological innovation as the way to avoid the trap of getting stuck as a middle-income country. The celebrated “Made in China 2025” program aims to dominate domestic production of 10 emerging technologies, including 5G, AI and electric vehicles.

China also plans to extend its lead in robotics to sustain its position as the manufacturing workshop of the world. In May, Xi Jinping clearly stated his judgment that “technological innovation has become the main battleground of the global playing field, and competition for tech dominance will grow unprecedentedly fierce.” It is striking how successful China has been in meeting its ambitious technology targets.

In sum, although the U.S. remains the global leader in many important races, including aeronautics, medicine and nanotechnology, China has emerged as a serious competitor. Fortunately, Americans are beginning to wake up to this reality. In June the Senate passed the Innovation and Competition Act with bipartisan support, authorizing $250 billion of investment in science and technology over the next five years. Unfortunately, that legislation has stalled in the House and faces an uncertain future as part of the annual defense bill.

More recent congressional spending proposals, such as the $1.2 trillion infrastructure bill and the $1.7 trillion social-spending package, have included investments in research and development in areas like green technologies and energy storage. While these investments are greatly needed, it will take more attention and investment in strategic technologies to compete with China. Unless the U.S. can organize a national response analogous to the mobilization that created the technologies that won World War II, China could soon dominate the technologies of the future and the opportunities they will create.

#### Maintaining our innovative lead solves nuclear war

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

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

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

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

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

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

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

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

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

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

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

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

#### Scenario two is FinTech – 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.

#### Iran’s an emerging global hub for Bitcoin mining. Absent our internal link, they’ll obviate the role of financial institutions and effectiveness of sanctions.

**Erdbrink 19** --- Dutch journalist who is the Northern Europe bureau chief for The New York Times

Thomas, 1-29-2019, "How Bitcoin Could Help Iran Undermine U.S. Sanctions,” New York Times, https://www.nytimes.com/2019/01/29/world/middleeast/bitcoin-iran-sanctions.html

Iran’s economy has been hobbled by banking sanctions that effectively stop foreign companies from doing business in the country. But transactions in Bitcoin, difficult to trace, could allow Iranians to make international payments while bypassing the American restrictions on banks.

In the past, the threat of United States sanctions has been enough to squelch most business with Iran, but the anonymous payments made in Bitcoin could change that. While Washington could still monitor and intimidate major companies, countless small and midsize companies could exploit Bitcoin and other cryptocurrencies to conduct business under American radar.

The United States Treasury, well aware of the threat, is attempting to bring Bitcoin and the others into line. In recent weeks, in response to an internet fraud case originating from Iran, the Treasury imposed sanctions on two Iranians and the Bitcoin addresses, or ‘‘wallets,’’ they had used for trading in the currency.

The Treasury also has warned digital marketplaces that buy and sell Bitcoin and companies that sell computers used to process Bitcoin transactions that they should not provide services to Iranians. Several well-known trading sites are now blocking buyers and sellers from Iran. Some have confiscated money belonging to clients based in Iran.

“Treasury will aggressively pursue Iran and other rogue regimes attempting to exploit digital currencies,” the department said in a statement.

But by their nature, cryptocurrencies are uncontrolled by any person or entity. At best, efforts to regulate or monitor trade in them are episodic, whack-a-mole affairs. With Bitcoin and other cryptocurrencies, there is simply no way to duplicate the banking sanctions that have proved so damaging to the Iranian economy.

Bitcoin transactions are recorded on a digital ledger or database known as the blockchain, maintained communally by many independent computers. The system is designed explicitly to avoid central banks and large financial institutions. Like emails delivered without going through a central postal service, the computer network maintaining Bitcoin records enables the movement of money without going through any central authority.

The Iranian government has been slow to recognize the potential sanctions-evading possibilities of Bitcoin. But it is now considering the establishment of exchanges to facilitate trading, one official, Abdolhassan Firouzabadi, said recently. Despite the failure of Venezuela’s state-backed cryptocurrency, the Petro, Iran’s central bank said recently that it was seriously considering creation of something similar, possibly called the Crypto-Rial, named after the national currency, the rial.

Still, Iran’s venture into Bitcoin pales in comparison to what has been happening the former Soviet republic of Georgia, where thousands of people have jumped into the cryptocurrency business.

At the computerized processing operation in the Iranian desert, no one seemed particularly concerned with the geopolitical implications of Bitcoin.

The operation consisted of 2,800 computers from China, fitted into eight containers, which when linked are called a farm. It makes intense mathematical calculations, known as mining, needed to confirm Bitcoin transactions. Miners collect fees in Bitcoin for their services.

Ignoring the rain, the European visitor used the calculator on his mobile phone to determine how much money could be made from this particular farm, multiplying computer power and deducting electricity and operational costs.

He estimated about five Bitcoins a month, which at roughly $4,000 per Bitcoin at current price levels, would be about $20,000.

“Not too bad,” he said.

The currency fluctuates like any other, though it has proved particularly volatile, sinking to slightly less than $4,000 a unit from nearly $20,000 about a year ago.

“We’ll have two engineers on site to keep everything running, that’s it,” said Behzad, the chief executive of IranAsic, the company running the site. He, like the European investor, did not want to provide his family name, out of fear of penalties from the United States.

The Chinese computers, called Antminer V9s, were regarded as outdated by the European visitor. Still, he said, “I guess this is the last place on earth where they are still profitable.”

That helps explain why Iran seems to be taking its first baby steps toward becoming a global center for mining Bitcoins. Because of generous government subsidies, electricity — the energy for the computers needed to process cryptocurrency transactions — costs little in Iran. It goes for about six-tenths of a cent per kilowatt-hour, compared with an average of 12 cents in the United States and 35 cents in Germany.

In recent months, dozens of foreign investors from Europe, Russia and Asia have considered moving their mining operations to Iran and other low-cost countries like Georgia. “We have to be flexible in this industry and go where prices are the lowest in order to survive,” said the European investor.

#### Tracking solves Iranian evasion – US lead key.

**Robinson 21** --- Ph.D., Co-founder and Chief Scientist discusses cryptocurrency forensics, investigations, compliance, and sanctions.

Tom, "How Iran Uses Bitcoin Mining to Evade Sanctions and “Export” Millions of Barrels of Oil," Elliptic, <https://www.elliptic.co/blog/how-iran-uses-bitcoin-mining-to-evade-sanctions>

The Iranian state is therefore effectively selling its energy reserves on the global markets, using the Bitcoin mining process to bypass trade embargoes. Iran-based miners are paid directly in Bitcoin, which can then be used to pay for imports - allowing sanctions on payments through Iranian financial institutions to be circumvented.

This has become all but an official policy, with a think tank attached to the Iranian president’s office recently publishing a report highlighting the use of cryptoassets to avoid sanctions.

Many of those making the Bitcoin transactions and paying the fees to Iran-based miners will be located in the United States - the very country spearheading the sanctions. As the US government considers whether to lift some sanctions on Iran in exchange for a return to a nuclear deal, it will need to consider the role that Bitcoin mining plays in enabling Iran to monetise its natural resources and access financial services such as payments.

In the meantime, financial institutions should consider the sanctions risk they are exposed to due to Iranian Bitcoin mining - particularly those that are beginning to offer cryptoasset services. If 4.5% of Bitcoin mining is based in Iran, then there is a 4.5% chance that any Bitcoin transaction will involve the sender paying a transaction fee to a Bitcoin miner in Iran. Financial institutions should also be on the lookout for crypto deposits originating from Iranian miners that are seeking to cash-out their earnings.

Solutions for Sanctions Risks

However as we discuss in more detail our new sanctions guide, solutions to these challenges exist and are already used by financial institutions engaging in cryptoasset activity.

For example, blockchain analytics solutions such as those provided by Elliptic can be used by regulated financial institutions to detect and block cryptoasset deposits from Iran-based entities including miners. Techniques can also be employed to ensure that transaction fees are not paid to miners in high risk jurisdictions.

#### Effective sanctions key to prevent Iranian nuclear acquisition.

**Morrison 21** --- Master of Arts of Political Science, University of Waterloo.

Kallen, 2021, “Economic Sanctions and Nuclear Non-proliferation: A Comparative Study of North Korea and Iran, “University of Waterloo, Fulfilment of the thesis requirement for the degree of Master of Arts, https://uwspace.uwaterloo.ca/bitstream/handle/10012/16666/Morrison\_Kallen%20.pdf?sequence=3

Economic sanctions have been successful in stopping Iran from pursuing their nuclear program thus far. Iran has conceded multiple times to the United States and the international community to halt the enrichment of uranium and the advancement of their nuclear program. The most notable example of Iran’s concessions has been the signing of the Joint Comprehensive Plan of Action in which Iran agreed to halt and greatly reduce their nuclear program in return for substantial easing of economic sanctions. The second criteria has been met as Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Continued economic pressure has been paramount to bringing Iran to the negotiating table. While the United States and its regional allies do pose a military threat to Iran, that is unlikely a sufficient factor in dissuading Iran.

We have established that the level of political contestation in the targeted countries, their economic and security vulnerabilities, and the degree of international cooperation are important factors in determining if economic sanctions are effective at limiting nuclear proliferation. In Iran’s case the regime, while authoritarian, allows for limited political contestation. The general public gets to elect the president (even if candidates are handpicked by the supreme leader). Iranians have been able to protest against the government. One goal of economic sanctions is to galvanize the general public against the government and their policy decisions. Iranians have indeed been frustrated by the sanctions and voiced their discontent with the government policies targeted by the sanctions.

Iran’s international environment is also conductive for economic sanctions to be effective. Iran is a regional power with an impressive arsenal of missiles and extensive network of proxy forces. Therefore, nuclear weapons are not imperative for Iran’s defence. On the other end, Iran’s economy is largely based on oil and gas exports. Integration into the global market is very important for Iranians and a vital source of revenue for the government. Economic sanctions have hurt the Iranian economy and therefore have hurt Iranians. The economic squeeze has brought Iran to the negotiating table in the past and will likely do so in the future. The international approach to Iran has been encompassing with the European Union and the United Kingdom taking a common stand with the United States in preventing Iran from acquiring nuclear weapons. Even after the United States left the JCPOA the EU and UK have attempted to develop mechanisms to provide Iran with economic incentives to keep Iran abiding to the JCPOA. Even though China has given Iran an economic lifeline there is tension within Iran over concerns of becoming too economically dependent on China.

#### Israel would preempt before the nukes come online. Sparks a wider regional conflict that draws in all the major powers.

Scheinman 18 – Security Studies Chair, Nat’l War College; Nuclear Nonprolif Rep. for Obama

Adam M. Scheinman, What if Iran leaves the NPT?, 8 June 2018, <https://thebulletin.org/2018/06/what-if-iran-leaves-the-npt/>

Not to diminish the immensity of North Korea’s nuclear challenge, but Iran’s withdrawal from the NPT carries weightier risks. It would likely mean that Iran’s Supreme Leader had given the green light to an Iranian nuclear weapon, opening the floodgates to NPT withdrawals by other Arab states—Saudi Arabia, the UAE, and Egypt head that list. These and possibly other Sunni governments, none of whom can rely on a major power for defense, may conclude that they require their own nuclear weapon to check Iran’s rise. The Saudis are very clear and public on this point.

More immediately, Israel may feel compelled to strike Iranian nuclear facilities before they become fully operational. This raises the specter of a regional war that may draw in several of the nuclear weapon states—the United States, the UK, France, and Russia—and reshape the Middle East in ways we cannot predict. Whether the NPT could survive such a shock is another unknown.

#### Can’t stay contained—multiple pathways to global nuclear war.

Avery 13 – Lektor Emeritus & Associate Professor, U of Copenhagen

John Scales Avery, Lektor Emeritus, Associate Professor, at the Department of Chemistry, University of Copenhagen, since 1990 he has been the Contact Person in Denmark for Pugwash Conferences on Science and World Affairs, An Attack On Iran Could Escalate Into Global Nuclear War, 11/6/13, http://www.countercurrents.org/avery061113.htm

Despite the willingness of Iran's new President, Hassan Rouhani to make all reasonable concessions to US demands, Israeli pressure groups in Washington continue to demand an attack on Iran. But such an attack might escalate into a global nuclear war, with catastrophic consequences. As we approach the 100th anniversary World War I, we should remember that this colossal disaster escalated uncontrollably from what was intended to be a minor conflict. There is a danger that an attack on Iran would escalate into a large-scale war in the Middle East, entirely destabilizing a region that is already deep in problems. The unstable government of Pakistan might be overthrown, and the revolutionary Pakistani government might enter the war on the side of Iran, thus introducing nuclear weapons into the conflict. Russia and China, firm allies of Iran, might also be drawn into a general war in the Middle East. Since much of the world's oil comes from the region, such a war would certainly cause the price of oil to reach unheard-of heights, with catastrophic effects on the global economy. In the dangerous situation that could potentially result from an attack on Iran, there is a risk that nuclear weapons would be used, either intentionally, or by accident or miscalculation. Recent research has shown that besides making large areas of the world uninhabitable through long-lasting radioactive contamination, a nuclear war would damage global agriculture to such an extent that a global famine of previously unknown proportions would result. Thus, nuclear war is the ultimate ecological catastrophe. It could destroy human civilization and much of the biosphere. To risk such a war would be an unforgivable offense against the lives and future of all the peoples of the world, US citizens included.

### 1AC – Conduct

Advantage two is conduct

#### Scenario 1 is SMEs – Google uses self-preferencing to erode local businesses

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

Google Undermines Local Businesses:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Determines SMEs growth.

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

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

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

#### SMEs are key to rural economies – current recovery is inequitable and dominated by large-firm growth

Ajilore 20 – Senior economist at the Center for American Progress.

Olugbenga Ajilore, “Economic Recovery and Business Dynamism in Rural America,” *Center for American Progress*, 20 February 2020, pp. 4-8, https://cf.americanprogress.org/wp-content/uploads/2020/02/DynamismRural-brief.pdf?\_ga=2.241357442.1697020435.1644933424-2121460371.1644933424.

Small businesses, especially in the South as well as Rural Middle America, have been struggling to survive in the current economic environment, particularly due to the trends of consolidation and growing market concentration. This increasing concentration, especially in rural communities, has led to the rise of the modern company town, where a community is dominated by a single firm.9 In the agricultural sector, the number of federally inspected slaughterhouses declined 36 percent from 1990 to 2016.10 This rise in concentration has allowed these larger firms to exert market power on smaller firms and on their own employees—a trend that has been especially prevalent in the corn and soybean seed markets: The shares of the four largest firms in each of these two markets have risen to more than 85 percent and more than 76 percent, respectively.11 This increased concentration in rural communities may be a factor in limiting startup activity.

The ACP classification system shows that not all rural communities have experienced negative firm growth: Graying America, Hispanic Centers, and Latter-day Saints Enclaves saw an increase in net establishment growth since the Great Recession, although this growth may not be evenly distributed within these communities. Figure 3 maps this trend to show which parts of the country are experiencing significant growth. It specifically maps establishment growth in the counties represented by Graying America, Hispanic Centers, and Latter-day Saints Enclaves.

The counties highlighted in dark blue areas show large establishment growth. Many of these communities, especially among Graying America, are recreation-dependent. Research by Meghan Lawson for Headwaters Economics found that recreation counties attract new residents and are experiencing earnings growth.12 In the Hispanic Centers, on the other hand, several of the counties are mining-dependent, primarily in the oil and gas industry. Figure 3 illustrates that it is difficult to apply lessons learned and strategies used in the growing communities to other, more stagnant areas that are not rich in amenities or that lack abundant resources.

Immigration can help spur growth in rural areas

One lesson that may be applied to all rural communities is the importance of fostering population growth. Data from a 2019 CAP brief show that many nonmetro counties have been experiencing population loss,13 which an EIG report found has adverse impacts on housing markets, government finance, and business dynamism.14 On that last point, communities that are losing population see a decrease in the demand for goods and services and therefore experience greater firm deaths. Figure 4 shows that many of the nonmetro communities that have been experiencing population loss following the Great Recession are in the Southern and Midwestern regions.

Many communities have tried to reverse the trend of depopulation through welcoming immigrants, a strategy that can be successful.15 Figure 5 confirms a positive relationship between the net international migration rate and population change over the post-Great Recession period.

There are numerous examples of places throughout the country where immigrants have revitalized and benefited rural communities—not just in the agriculture sector but also in manufacturing, health care, tourism, and startups.16 Nebraska, for example, has seen a long influx of Mexican immigrants who are employed at Tyson meatpacking plant, thereby increasing the state’s population and in turn creating a demand for small businesses.17 Certain policies, such as the Heartland Visa, can encourage immigration targeted toward areas experiencing depopulation.18 Communities can also employ certain strategies to create social infrastructure to help immigrants thrive.19 For example, providing English as a second language (ESL) classes or other communication programs for migrants and their children to facilitate dialogue between new migrants and other community members is helpful.

Conclusion

Since the Great Recession, business growth nationwide has faltered relative to recoveries from previous recessions. Metropolitan counties have recovered in terms of establishment growth, but that recovery has been concentrated in the largest cities.20 In rural communities, the counties that had positive establishment growth were confined to recreation-dependent counties located in Florida and Texas and in the Central Valley of California, as well as communities rich in certain resources.

Many rural communities are taking steps to support local businesses through community development corporations and cooperatives, but there may be a role at the federal level to expand the capacity of these organizations. Policymakers need to create a better climate for small businesses to thrive and grow. This is important for all regions but vital for rural communities, as they are also struggling with other problems—such as higher rates of opioid use,21 hospital closures,22 and job loss23—that harm their viability. Until there are efforts at all levels of government to foster small-business growth and rural entrepreneurship, these communities will continue to fall behind the rest of the country.

#### Reinvigorating rural economies solves populism

Wilkinson 19 – Vice president for research at the Niskanen Center. Former politics correspondent for The Economist and research fellow at the Cato Institute.

Will Wilkinson, “The Density Divide: Urbanization, Polarization, and Populist Backlash,” *Niskanen Center*, June 2019, pp. 10-12, https://www.niskanencenter.org/wp-content/uploads/2019/09/Wilkinson-Density-Divide-Final.pdf.

Economic Output and Party Vote Share

The economic dimension of the divide is equally stark. The 472 Clinton counties also accounted for 64 percent of GDP – nearly twice the combined economic output of the 2,548 counties that favored Trump. This represents a dramatic shift since 2000, when the 659 counties that went for Gore produced 54 percent of GDP, compared to 46 percent generated by the 2,397 Bush counties. Economic productivity has become increasingly correlated with both education and population density.

The transition to the information economy has widened the productivity gap between workers with more and less education and between places with more or less dense agglomerations of those workers. As smaller, less-educated cities and towns languish, their best-schooled daughters and sons decamp to the metropolis, further widening the big city/small town productivity and employment gap.17

There has been, in the words of Mark Muro and Jacob Whiton of the Brookings Institution, “a truly eye-popping divergence of big-, medium-, small-sized communities’ growth progress – one that’s getting worse.” They report:

[T]he 53 very largest metro areas (those with populations over one million residents) have accounted for fully 93.3 percent of the nation’s population growth since the crisis, but an incredible 96.4 percent of it since 2014 (though they account for just 56 percent of the overall population). Even more significantly, the biggest metros generated fully two-thirds of output growth on the economic front and 73 percent of employment gains between 2010 and 2016.19

This concentration of growth and opportunity, they note, has recently intensified. Since 2014, millions-plus metros produced a whopping 72 percent of American output growth and 74 percent of the country’s employment gains.

Over generations, the escalating incentives to seek education and move to the city has filtered those most responsive to these inducements, and least wary of urban diversity, out of lower-density America. This has left the places they’ve fled poorer and less educated, and has left the people who remain in them almost uniformly white, averse to dynamic, multicultural cities, alarmed by the prospect of a majority-minority America, and receptive to pandering, demagogic explanations of their relative decline.

#### Populism causes extinction – causes war and destroys effective government response to crises

**Forthomme 18** – Economist, 25 years at the UN ending as Regional Rep. for Europe

Claude Forthomme, Seniore Editor of Impakter, graduate of Columbia University, Why Populism is Dangerous: The Propensity for War, 2018, https://impakter.com/populism-dangerous-propensity-war/

Populism is dangerous and has shown overtime an irresistible propensity for war. Public safety, health and the economy are at risk. But populist propaganda is hard to resist. Populist politicians thrive on fake news: it is so much easier to fuel people’s emotions if you feed them fabricated news of imaginary crises. And if you divert their attention from real economic problems with the irresistible lure of national identity politics and blaming foreigners**.** Previous articles have addressed the issue of austerity (here), the public health crisis (here) and the false “migrant crisis” (here). Here we take a look at populism’s propensity for war. Historically, populist leaders have been warmongers, Hitler first among them, for waging war across national borders and Pol Pot within borders. Nowadays, exhibit A is Putin’s invasion of Ukraine’s Crimea in 2014, diverting Russians’ attention from a deepening recession. Exhibit B is Trump’s rising militarism that has just jumped to the next level with John Bolton’s visit to Moscow this week to tell Putin the U.S. will withdraw from the I.N.F. Treaty. Mikhail Gorbachev, former president of the Soviet Union, has no doubts: A new nuclear arms race has begun, he writes in an opinion piece for the New York Times. He should know what he’s talking about. He is the man who signed with President Reagan in 1987 the I.N.F. treaty, one of the major arms non-proliferation treaties. For Europe, it is the most important since it aims at eliminating the arsenal of intermediate and shorter-range missiles. Back then, Gorbachev was at the helm of a dying Soviet Union shaken by the fall of the Berlin Wall, and he, more than anyone, believed in a new age of peace and international cooperation. He famously talked of a “Common European Home” and hoped to bring Russia inside Europe as an equal partner. That did not happen and the rise of Putin put paid to those hopes. In that article, Gorbachev reminds us that the I.N.F. treaty was followed by two more important ones, the Strategic Arms Reduction Treaty (a.k.a. Start 1, signed in 1991 by George H.W. Bush) and the New Start Treaty (2010 signed by Obama). By 2015, The US and Russia were able to report at the United Nations Nuclear Nonproliferation Review Conference that 85% of the arms had been retired and mostly destroyed. An amazing success that Trump, another Republican President, is about to reverse. Predictably, Russia is accused of violations, the standard way to break off treaties. And yet, the Republican party was not always the party of the military-industrial complex, a notion another Republican President warned America against: It was Eisenhower, in his farewell address in 1961, who identified the threat and famously coined that phrase. In the Trump era of America First, it’s hard to remember that just three decades ago, in the 1980s, there were politicians who had genuine liberal, progressive ideas – even in the Soviet Union that after 70 years of dictatorship looked like a hopeless case. Especially in the Soviet Union which, as events showed with Gorbachev’s Perestroika, was ready for a dramatic change, putting its Communist past and the Cold War in the dustbin of History. Now, History’s dustbin is about to be emptied on the world stage, bringing the Cold War back. Firebrand John Bolton, Trump’s National Security adviser (appointed last April) is having his moment of glory. A former U.S.Ambassador to the United Nations (under Bush), Bolton has always hated international treaties in general and the United Nations in particular. His fondest memory, he recalls in his 2007 memoir, was to pull the U.S. out of the International Criminal Court treaty. No matter the Court presented no particular danger to American sovereignty and that it was a major step forward for international law and justice. Bolton is an uncompromising hawk. For him the world is a jungle, justice is for sissies and the U.S. needs to be top dog. Now he is pushing Trump to withdraw from all international treaties – including further blocking the ICC and even moving out of some minor treaties like the Universal Postal Union, a 144 year-old postal treaty run by the United Nations, accusing it of letting China ship goods at an unfair discount. That was done last week. The fact that the ICC, as per its mandate, cannot prosecute any American without the consent of an American court is not mentioned by John Bolton or anyone in the Trump administration. They all prefer to present the ICC as illegitimate and a threat to American sovereignty. They do not accept the simple fact that the ICC is a UN body and therefore not illegitimate; and that it is never a threat to a country that respects international law and justice. And America used to be a paladin of justice but with populists in power, that has changed. Trump’s priority now is moving out of nuclear arms treaties – and that fits in nicely with his military build-up strategy. Let’s tick off the ways Trump has gone about re-militarizing the U.S.: Pumping up the defense budget to a historic high of $717 billion, even though America has always spent more than the rest of the world combined on military expenditures; of special note: $21.9 billion for the Department of Energy’s nuclear weapons programs that includes research and testing; Getting out of the 2015 deal to limit Iran’s nuclear activities; And now systematically pulling out of all remaining non-proliferation arms deals. To be fair to Trump, the U.S. had already pulled out of the Antiballistic Missile Treaty in 2002. That was done by the Bush administration without a good explanation, much to the dismay of the Federation of American Scientists, an association created in 1945 by the scientists who built the first atomic bomb. Their 2001 letter of protest to Congress ended with the following words that apply equally well to all the treaties that Trump is seeking to undo: “America has always sought to lead the world by example. Yet if other countries were to follow the example we have just set, the framework of international law would disintegrate. President Bush has just released NMD’s first shot, and it has landed squarely in the heart of American security.” Bolton’s trip this week in Russia was clearly intended to lay the ground to kill off the I.N.F. arms treaty, much to Putin’s barely concealed amusement. Watch him smile: This is exactly what makes Putin happy: He gets a green light from Trump to go ahead with building up his military arsenal, and takes none of the blame. The military build-up is entirely Trump’s. Bolton’s visit was relatively “friendly” and ended with an invitation to Putin to visit Washington in “early” 2019. Before then, Trump and Putin will see each other in Paris on 11 November, on the sidelines of the 100-year anniversary of World War I armistice. But Bolton stood his ground and warned Russia “not to mess with American elections”, threatening more sanctions to address Russia’s interference in its elections and its annexation of Crimea. What we get here is the American side of the story. But what is interesting is to look at the Russian side. Putin lays bare his thoughts, detailing the danger for Europe in the course of a recent press conference (25 October – Italian Prime Minister Conte was on a state visit). Putin’s candor is extreme: Should Europe worry? Judge for yourself. Putin puts it in very clear terms: The question is, he says, what will the Americans do with the new missiles they plan to build? Deliver them to Europe? If they do so, Russia will have no choice but to enter the arms race…Then he makes it even clearer: The European countries that agree to host American missiles need to realize that “they put their own territories under the threat of a strike response”. No matter how you interpret Putin’s statement or Trump’s breaking off arms treaties, there is little doubt that the Cold War will soon be back. Whether it will be as cold as the original one remains to be seen. But one thing is certain, populism’s obsession with national sovereignty is a source of tension, if not of out-and-out war. At least not yet.

Turns European cohesion.

Kendall-Taylor 19 – Senior Fellow and Director, Transatlantic Security Program – CNAS

Andrea-Kendall-Taylor, Center for a New American Security, former Deputy National Intelligence Officer for Russia and Eurasia at the National Intelligence Council (NIC) in the Office of the Director of National Intelligence (DNI), and Alina Polyakova, President and CEO - Center for European Policy Analysis, and former David M. Rubenstein Fellow in Foreign Policy in the Center on the United States and Europe at The Brookings Institution, Populism and the coming era of political paralysis in Europe, 2019, https://www.brookings.edu/blog/order-from-chaos/2019/05/28/populism-and-the-coming-era-of-political-paralysis-in-europe/

Europe’s populists seem set to pull off a major win in the European parliamentary elections this week. But populism’s real challenge to European democracy goes far deeper than its ability to force ideas long regarded as extremist or unsavory into the political agenda. Populist parties, even when not in the majority, are splintering the political party system, making governing more difficult. If support for populism and anti-establishment parties continues to grow, European democracies will remain on a trajectory toward an era of paralysis, unable to deliver results to an increasingly frustrated public.

Europeans, like many Americans, have grown disenchanted with politics as usual. In Europe, the financial crisis of 2008 and especially the refugee crisis of 2015 dealt a major blow to centrist parties that advocated for open markets and open borders. Greeks resented the economic austerity measures imposed on them by the European Union. Germans never got to vote on Chancellor Angela Merkel’s decision to allow more than 1 million refugees into their country. As a result, a growing swath of Europeans no longer view mainstream political parties as representing their interests. Far-right populist parties have been the biggest beneficiaries of this growing resentment. Today far-right parties have a presence in 23 out of 28 European parliaments.

As these parties gain a foothold in national parliaments, coalition-building—the bedrock of effective governance in parliamentary systems—is becoming increasingly difficult. More and more European citizens find themselves ruled by “weak coalition” governments, the results of political parties scrambling to form legislative majorities to keep the populists out.

Such coalitions typically take months of horse-trading to form. In Sweden, the surge in support for the far-right Sweden Democrats in last fall’s elections meant that the center-left and center-right parties fell short of a majority. It took the government 130 days to form a minority government to shut the far right out. After Germany’s 2017 federal elections, there was an unusually prolonged period of nail-biting negotiations until the Christian Democrats (CDU) and the Social Democrats (SPD) formed a grand coalition that excluded the far-right Alternative for Germany (AfD). Regardless of the strategy pursued by centrists, the outcome is the same: a government that is too weak and mired in disagreements to deliver results.

But the problem is much bigger than the immediate spike in support for the far right. The rise of new parties across the political spectrum is splintering party systems throughout Europe. In Spain, for example, the creation of new parties on the far right (Vox) and far left (Podemos) in 2014 transformed the country’s political system from a two-party system to one with five. Similarly, in Germany, the emergence of the far-right AfD in 2013 and the far-left Die Linke in 2007 contributed to the diffusion of power across seven national parties in the Bundestag. The Netherlands now has 13 parties in its parliament.

Because politics at the European level reflect national-level politics, populist-fueled fragmentation is coming to the European parliament as well. The center-right (EPP) and the center-left (S&D) parliamentary groups are likely to lose their narrow combined majority. In Italy, Matteo Salvini’s party, the League, received only 6 percent in the previous elections five years ago, but will probably sweep to first place this year to lead the far-right opposition together with France’s Marine Le Pen. While Le Pen’s rebranded National Rally party is running neck and neck with President Emmanuel Macron’s En Marche, she and Salvini have announced a plan to join forces in a Europe of Nations and Freedom (ENF) group. With En Marche expected to forgo joining the centrist bloc in favor of the liberal coalition (ALDE), the center-left faction will split. And as Britain brings an anti-European Union Brexit party to the parliament, one thing is certain: This European parliament will be the most divided in the union’s history.

The populist-fueled fracturing of politics is bad news for democracy. Not only does such fragmentation make it difficult to form a government, but it also impedes the ability to unite around a common vision or reach consensus. Recent elections suggest that Europe is just at the beginning of a growing trend toward fragmentation. As the number of conflicting interests grows, it will become more difficult for European governments to effectively address complex challenges such as sluggish economic growth, immigration and ineffective armies. In other words, populist-fueled fragmentation will produce political stasis that will make it difficult for democracy to deliver.

Democracies are, by design, competitive and thus often messy. But the kind of political fragmentation taking place in Europe today is pushing the boundaries of useful debate and deliberation. As voters become increasingly frustrated with a lack of results, they will look to “more effective” strongman models of the type embodied by Russia and China. As the competition between democracy and authoritarianism intensifies, democracies must be able to deliver. Unfortunately, populist-fueled fragmentation will make that harder. At the end of the day, people may be willing to forgo some of their freedoms in exchange for governments they view as capable of delivering results.

#### Scenario 2 is misinformation – platform dominance destroys local news sources – misinformation fills in the vacuum

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Pat Garofalo, “Close to Home: How the Power of Facebook and Google Affects Local Communities,” *American Economic Liberties Project*, August 2020, pp. 11-15, https://www.economicliberties.us/wp-content/uploads/2020/08/Working-Paper-Series-on-Corporate-Power\_6.pdf.

Facebook and Google Undermine Local News: According to the Save Journalism Project, 32,000 newsroom employees have been laid off in the last 10 years. 1,300 communities have lost local news coverage in the last 15 years. 60 percent of U.S. counties have no daily newspaper and 171 counties have no newspaper coverage at all.38 Significant outlets such as the Denver Post, the Columbus Dispatch, or the Fayetteville Observer, along with many others, have been acquired by financiers who gut newsrooms and consolidate publications in order to squeeze whatever remaining capital there might be out of the newspaper business.

This decline in news coverage has had several deleterious effects on local governance and commerce. First, it lowers democratic participation, as regular newspaper readers are more likely to vote.39 Areas that lose their daily newspapers see fewer candidates run for office, have incumbents win more often, and see voter turnout decrease.40 One study found that staff cuts at local newspapers are correlated with less competitive mayoral races, fewer candidates entering races and more incumbent-only races.41 Residents of areas with less local news coverage aren’t as likely to know the name of their member of Congress – and those members aren’t as responsive to their districts, bringing less federal money back.42

Lack of local news coverage also makes local financing more expensive. According to a 2018 study, municipalities that experience a newspaper closure have higher borrowing costs in the following years, with the average bond issue costing the municipality an extra $650,000.43 “Our evidence suggests that there is not a sufficient degree of substitutability between local newspapers and alternative information intermediaries for evaluating the quality of public projects and local governments,” the researchers wrote. Essentially, the lack of local news coverage led to the belief that officials would be worse stewards of the public dollar, so investors demanded higher interest rates.

This newsroom cataclysm occurred because Google and Facebook monopolized the digital ad market, hoovering up the revenue that used to support the journalism ecosystem. Currently, Google and Facebook receive 60 percent of digital ad revenue. Amazon and several other companies account for another 15 percent. That means every news publication in the country is fighting over, at best, 25 percent of the available ad revenue. In recent years, Google and Facebook have gained nearly all of the digital ad growth.44

Here is a quick look at how the two companies have used their monopolies to decimate the news industry:

GOOGLE

The key mechanism underlying Google’s ability to dominate the digital ad market is that it largely controls how digital ads are bought and sold, inserting itself into the middle of transactions between advertisers and publishers and taking a cut that would otherwise go to those publishers.45 Starting with its 2008 acquisition of DoubleClick, the corporation has rolledup of much of the underlying infrastructure for buying and selling display ads. As Professor Fiona Scott Morton and David Dinielli put it, “Google has made it nearly impossible for publishers and advertisers to do business with each other except through Google.”46

Google ties its ad software to search data generated by the Google homepage and YouTube content – which is a must-have property for advertisers due to high engagement levels – plus the analytics systems that supposedly provide insights into how successful an ad campaign is. Its pricing is opaque, so publishers are not certain how large a cut Google is taking from them, other than that it’s significant, and advertisers are not certain that their ads are reaching the audience Google says they are.47

Google also directly competes against those publishers, since it too sells digital ad space. But it can use inside information gleaned from its ownership of the ad market infrastructure to front-run orders and to steer advertisers toward Google-owned properties such as YouTube.48,49 Publishers have little choice but to continue using Google’s services, because there are few other places to turn, and because Google’s data collection is so vast, and thus its targeting capabilities so extensive.

Google not only dominates the ad market, but also uses its dominance of search to directly hurt legitimate news outlets. For example, it demanded that news outlets adopt Accelerated Mobile Pages (AMP), under threat of exclusion from mobile search results, which it now loads for users rather than directing them to publishers’ websites. This keeps users within the Google ecosystem and hurts publishers’ ability to build an audience.50 Publishers report lower ad revenue and lower traffic from AMP.51

Through its Google News and Google Discover apps, Google is also a news aggregator in its own right, providing sufficient content based off AMP pages that users often don’t have to leave for publishers’ sites, having gleaned the high points of the story they’re reading straight from Google.52 (As noted above, fewer than half of Google queries now result in a click away from Google.)53

Finally, Google search is using news content in several ways that keep users in its ecosystem, such as providing “snippets” of articles in response to search queries that are sufficient enough information that users won’t move to the publishers’ site, or linking product review articles to its own Google sales platforms, so users can see the key parts of those reviews without leaving Google.54 Those moves deprive publishers of traffic and insights into their audiences, which hurt their ability to build or monetize those audiences or generate higher traffic numbers in order to charge higher ad rates. 47 Ibid. 48 Srinivasan, Dina, “Why Google Dominates Ad

FACEBOOK

The Facebook undermines the news industry via its own propensity for spreading misinformation and literal fake news – stories concocted out of thin air by those hoping to profit from them. It serves as a breeding ground for local conspiracies, such as one falsely claiming Syrian refugees committed a rape in a small Idaho town (which had no Syrian refugees in it).55 Against that content, it sells targeted advertising – collecting the revenue that could be keeping local news outlets, with editorial judgment and a wall between the content creators and advertising sales teams, in business.

Facebook’s business model is based, first, on its reach. It has more than 1.7 billion daily users worldwide, and also controls other key social network tools such as Instagram and WhatsApp that it acquired through mergers.56 Facebook properties account for 75 percent of user time on social networks.57

Facebook gained that network using two methods. First, Facebook won more users than early competitors such as MySpace by pledging a safe space to both users and partners, promising it wouldn’t engage in the sort of data collection practices it currently employs across the web. Second, the corporation engaged in a merger spree to acquire competitors, most notably Instagram and WhatsApp.58 Facebook, today, uses exclusionary practices, such as prohibiting interoperability with rival social media platforms, locking in users and enabling the corporation to exclude competitors from taking advantage of its networked scale. Switching from Facebook is only useful if your entire network of friends, family, and business and personal contacts move at the same time. As a result, the cost of switching away from Facebook to another network is high.

Facebook’s dominance enables it to collect significant amounts of personal data from both individuals and publishing partners. It can then target users with personalized ads, outcompeting publishers by using their own audience data to enrich its ad targeting.

In 2018, the Pew Research Center reported that social media had surpassed local newspapers as a news source for Americans.59 But Facebook’s newsfeed is designed to serve up sensational and rumor-laden content that encourages users to keep coming back for more – allowing Facebook to collect ever larger amounts of data, which it then uses to sell ever more targeted ads. By one estimate, Facebook controls 50 percent of available display ad space in the ad market.60 Newspapers simply cannot achieve the reach or targeting capabilities for advertisers that Facebook can.

Then, adding insult to injury, Google and Facebook give a fraction of the money they’ve siphoned away from new outlets back to them in the form of grants that can never make up for what was lost.61,62

That dynamic leaves readers with fewer and fewer sources of real information able to sustain themselves, leaving local residents with less quality journalism on which to base their economic and democratic choices. Into that void have stepped hundreds of hyperpartisan sites pretending to be local news sources63 – which, of course, have a large presence on Facebook.64

#### Platforms maintain dominance in news via anticompetitive practices – self-preferencing in news competition drives traditional publishers out of business

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Sally Hubbard, “Fake News is A Real Antitrust Problem,” *CPI Antitrust Chronicle*, December 2017, pp. 3-4, https://www.competitionpolicyinternational.com/wp-content/uploads/2017/12/CPI-Hubbard.pdf.

IV. CASE STUDY: FACEBOOK INSTANT ARTICLES

A look at Facebook Instant Articles (“FBIA”) sheds light on the ways tech platforms can pull technological levers to disadvantage their publishing rivals in the contest for user eyeballs. In Facebook’s early days, publishers and Facebook made a bargain: Publishers would fuel Facebook’s platform with free high-quality content, and in return Facebook would provide publishers with user traffic. Over time, Facebook has adjusted its product design to keep more and more of that traffic for itself.

Facebook has implemented product changes that deter users from clicking away from its platform and onto publishers’ sites. In 2014, Facebook defaulted users to an in-app browser for clicking on external links, rather than sending users to an external browser. But the in-app browser is slow. On iOS, for example, Facebook does not use the fastest in-app browser that Apple makes available. In a test by The Capitol Forum, Facebook’s in-app browser on iOS loaded on average three seconds slower than regular Safari.14 A study by Google shows that 53 percent of mobile users abandon websites that take more than three seconds to load.15

As publishers grew frustrated by slow load times, Facebook presented FBIA as a purported solution. Facebook claims that Instant Articles are not prioritized in the news feed, but their faster load times increase engagement and thus bring prioritization. According to Facebook, users click on Instant Articles 20 percent more than other articles, and they share Instant Articles 30 percent more than mobile web articles on average.16

Prioritizing content that is either native to Facebook’s platform or that does not require clicks to publishers’ sites resembles conduct at issue in the European Commission’s Google Shopping decision. The EC determined that Google abused its dominance in search by prioritizing its own comparison shopping service in its search results, to the detriment of rival shopping services. The EC fined Google 2.4 billion euro and required Google to treat its competitors equally as it treats its own shopping services. Because Instant Articles are housed on Facebook’s platform, publishers that adopt the format lose the web traffic that supports their advertising revenue. The granular user data publishers collect via cookies on their sites will cede to whatever basic data Facebook chooses to provide. Publishers further cannot verify the accuracy of the data Facebook does provide them. Indeed, Facebook has reported several times in recent months that its metrics were wrong.17

Antitrust enforcers are beginning to understand that data confers competitive advantage. At a September 9, 2016, data ethics event on Data as Power, EC Commissioner Margethe Vestager stated that it is important to “keep a close eye on whether companies control unique data, which no one else can get hold of, and can use it to shut their rivals out of the market,” adding, “That could mean, for example, data that’s been collected through a monopoly.”

As for advertising, Facebook promises to give publishers 70 percent of ad revenue served up in Instant Articles through the Facebook Audience Network. But if publishers widely adopt the format and users grow accustomed to it, Facebook easily could change that split in its favor in the future. Once dependent on a dominant tech platform, publishers lack bargaining power to protest changes because they cannot credibly threaten to abandon the platform.

In contrast to the impact on legitimate news publishers, Facebook’s tactics to keep users on its platform do not financially impair fake news purveyors because fake news costs very little or nothing to produce. If a fake news article generates 100,000 “likes” on Facebook and only 50 users manage to venture off of Facebook to the fake news website, its creator has made a profit. In contrast, if 100,000 people “like” a New York Times article on Facebook but only 50 visit NYTimes.com, the New York Times has not recouped the money it paid to journalists to write and research the piece.

And because the New York Times article is not incendiary or outrageous, it may not lead to 100,000 “likes” on Facebook. With less engagement, Facebook will not make as much money from the New York Times article as it would from the article claiming the Pope had endorsed Donald Trump, and hence its algorithm will give the New York Times article lower priority.

FBIA is just one example of the ways that tech platform business models conflict with those of legitimate news publishers. Google has also been accused of “nativizing” content, which means taking publishers’ and other creators’ content and rendering it native to Google’s search pages. Getty Images has filed complaints in the EU accusing Google of nativizing Getty’s photos within its digital walls,18 an accusation Google denies. Both Facebook and Google give priority placement to nativized content in their search results and news feeds, respectively, lessoning consumers’ interactions with publishers’ websites.

#### Competition solves – creates an incentive to eliminate fake news, but anticompetitive practices insulate dominant firms from market signals

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Allen Grunes, “Is ‘Fake News’ A Competitive Problem,” *CPI Antitrust Chronicle*, December 2017, pp. 6-7, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3093547.

IV. FAKE NEWS AND MARKET POWER

But there is another side to the story, which is captured very well in a recent observation by Professor Yochai Benkler about the persistence of fake news on Facebook: “Facebook has become so central to how people communicate, and it has so much market power, that it’s essentially immune to market signals.”32

Market power here is not about price. It is about non-price effects. Economists and antitrust agencies recognize that market power can be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. As the 2010 Horizontal Merger Guidelines suggest, “Such non-price effects may coexist with price effects, or can arise in their absence.”33 In other words, there can be market power even when something is “free.” It can arise in dimensions such as quality. Leaving aside the shoppers who happily pay for the National Enquirer and similar tabloids, fake news can be thought of as news with zero – or even negative – quality.

There are both technical and economic reasons why fake news is a persistent problem. In an article in the The Atlantic called “Google and Facebook Failed Us,” staff writer Alexis Madrigal focuses on how the fake news problem continues to persist at both Google and Facebook and discusses some of the technical issues associated with allowing algorithms to be responsible for screening news.34 It appears that algorithms do better with more data and worse when something new pops up and there is little to go on. Madrigal illustrates with an example. Shortly after the recent Las Vegas shootings took place, a group called “Las Vegas Shooting/Massacre” appeared on Facebook purporting to be a source of investigative journalism:

The group is run by Jonathan Lee Riches, who gained notoriety by filing 3,000 frivolous lawsuits while serving a 10 year prison sentence after being convicted for stealing money by impersonating people whose bank credentials had been phished. Now, he calls himself an “investigative journalist” with Infowars, though there is no indication he’s been published on the site, and given that he also lists himself as a former male underwear model at Victoria’s Secret, a former nuclear scientist at Chernobyl, and a former bodyguard at Buckingham Palace, his work history may not be reliable.35

As Madrigal points out, the problems with surfacing this man’s group to Facebook users “is obvious to literally any human. But to Facebook’s algorithms, it’s just a fast-growing group with an engaged community.”36 He continues:

Imagine a newspaper posting unverified rumors about a shooter from a bunch of readers who had been known to perpetuate hoaxes. There would be hell to pay—and for good reason.37

There is a competitive dimension here. Competitive pressure acts as an external check on the distribution of fake news by the major traditional news outlets. If a major news organization repeatedly published deliberately false news reports or unverified rumors, there would be significant reputational damage which likely would also result in financial loss. Some number of consumers would likely shift to other competitively close alternatives. In this respect, a small but significant decrease in quality is conceptually similar to a small but significant increase in price.

But these competitive pressures do not seem to be constraining the major online news intermediaries. In this environment, “market signals” do not appear to be working. If you want to switch away from the dominant social media services, which is where about two-thirds of Americans are reportedly getting at least some of their news,38 where do you go? To be fair, it is not that the online social media and search giants do not care at all about information quality. They undoubtedly take steps both before and after the fact to prevent bad actors from gaming them. Without competitive pressure, however, the market is not forcing their hand. In antitrust terms, as Benkler says, this may be evidence of significant market power.

One would probably want to test the market power hypothesis by looking for other evidence. For example, one might look at the bargaining between online firms and traditional news organizations. One might look at the consumer response to repeated instances of exposure to fake news.

Assuming the market power hypothesis holds up (and I suspect it will), it is reasonable to conclude that there may be a competition problem. Fake news would be a competition problem if most consumers don’t want it but media markets provide it anyway. In that situation, a purveyor must have market power, at least to disseminate fake news repeatedly. Otherwise, most of its customers would leave. Technically, the firm would have the ability to reduce quality below the competitive level without losing so many sales that its conduct (the fake news) is unprofitable.

However, merely being in possession of market power is not an antitrust violation in the U.S. So the additional question needs to be asked whether the market power arose, was maintained, or was enhanced as a result of anticompetitive conduct such as a prior anticompetitive merger.

So is fake news an antitrust problem? Not to date, so far as we can tell. But it could be, and there we need to be vigilant.

Professors Emily Bell and Taylor Owen have suggested that “[U]niversal access to accurate information is at the heart of a well-functioning democracy, and that access is now shaped by the enormously powerful and largely unaccountable technology companies of Silicon Valley.”39 For better or worse, that seems to be a reasonable conclusion. One consequence may be that we need to think about online firms not only as technology companies but also as news and information media and do more careful scrutiny of their mergers and conduct because of their importance to the “marketplace of ideas.” This is an idea that Maurice Stucke and I developed in the context of traditional media mergers.40 Given the importance of data to the success of online advertising, we may need to think somewhat differently about mergers and conduct than we are accustomed to.

#### Misinformation outweighs extinction – guarantees infinite perpetual suffering

Di Minardi 20, The grim fate that could be ‘worse than extinction,’ BBC, October 15, , https://www.bbc.com/future/article/20201014-totalitarian-world-in-chains-artificial-intelligence

What would totalitarian governments of the past have looked like if they were never defeated? The Nazis operated with 20th Century technology and it still took a world war to stop them. How much more powerful – and permanent – could the Nazis have been if they had beat the US to the atomic bomb? Controlling the most advanced technology of the time could have solidified Nazi power and changed the course of history.

When we think of existential risks, events like nuclear war or asteroid impacts often come to mind. Yet there’s one future threat that is less well known – and while it doesn’t involve the extinction of our species, it could be just as bad.

It’s called the “world in chains” scenario, where, like the preceding thought experiment, a global totalitarian government uses a novel technology to lock a majority of the world into perpetual suffering. If it sounds grim, you’d be right. But is it likely? Researchers and philosophers are beginning to ponder how it might come about – and, more importantly, what we can do to avoid it.

Existential risks (x-risks) are disastrous because they lock humanity into a single fate, like the permanent collapse of civilisation or the extinction of our species. These catastrophes can have natural causes, like an asteroid impact or a supervolcano, or be human-made from sources like nuclear war or climate change. Allowing one to happen would be “an abject end to the human story" and would let down the hundreds of generations that came before us, says Haydn Belfield, academic project manager at the Centre for the Study of Existential Risk at the University of Cambridge.

Toby Ord, a senior research fellow at the Future of Humanity Institute (FHI) at Oxford University, believes that the odds of an existential catastrophe happening this century from natural causes are less than one in 2,000, because humans have survived for 2,000 centuries without one. However, when he adds the probability of human-made disasters, Ord believes the chances increase to a startling one in six. He refers to this century as “the precipice” because the risk of losing our future has never been so high.

Researchers at the Center on Long-Term Risk, a non-profit research institute in London, have expanded upon x-risks with the even-more-chilling prospect of suffering risks. These “s-risks” are defined as “suffering on an astronomical scale, vastly exceeding all suffering that has existed on Earth so far.” In these scenarios, life continues for billions of people, but the quality is so low and the outlook so bleak that dying out would be preferable. In short: a future with negative value is worse than one with no value at all.

This is where the “world in chains” scenario comes in. If a malevolent group or government suddenly gained world-dominating power through technology, and there was nothing to stand in its way, it could lead to an extended period of abject suffering and subjugation. A 2017 report on existential risks from the Global Priorities Project, in conjunction with FHI and the Ministry for Foreign Affairs of Finland, warned that “a long future under a particularly brutal global totalitarian state could arguably be worse than complete extinction”.

Singleton hypothesis

Though global totalitarianism is still a niche topic of study, researchers in the field of existential risk are increasingly turning their attention to its most likely cause: artificial intelligence.

In his “singleton hypothesis”, Nick Bostrom, director at Oxford’s FHI, has explained how a global government could form with AI or other powerful technologies – and why it might be impossible to overthrow. He writes that a world with “a single decision-making agency at the highest level” could occur if that agency “obtains a decisive lead through a technological breakthrough in artificial intelligence or molecular nanotechnology”. Once in charge, it would control advances in technology that prevent internal challenges, like surveillance or autonomous weapons, and, with this monopoly, remain perpetually stable.

If the singleton is totalitarian, life would be bleak. Even in the countries with the strictest regimes, news leaks in and out from other countries and people can escape. A global totalitarian rule would eliminate even these small seeds of hope. To be worse than extinction, “that would mean we feel absolutely no freedom, no privacy, no hope of escaping, no agency to control our lives at all", says Tucker Davey, a writer at the Future of Life Institute in Massachusetts, which focuses on existential risk research.

“In totalitarian regimes of the past, [there was] so much paranoia and psychological suffering because you just have no idea if you're going to get killed for saying the wrong thing,” he continues. “And now imagine that there's not even a question, every single thing you say is being reported and being analysed.”

“We may not yet have the technologies to do this,” Ord said in a recent interview, “but it looks like the kinds of technologies we’re developing make that easier and easier. And it seems plausible that this may become possible at some time in the next 100 years.”

AI and authoritarianism

Though life under a global totalitarian government is still an unlikely and far-future scenario, AI is already enabling authoritarianism in some countries and strengthening infrastructure that could be seized by an opportunistic despot in others.

“We've seen sort of a reckoning with the shift from very utopian visions of what technology might bring to much more sobering realities that are, in some respects, already quite dystopian,” says Elsa Kania, an adjunct senior fellow at the Center for New American Security, a bipartisan non-profit that develops national security and defence policies.

In the past, surveillance required hundreds of thousands of people – one in every 100 citizens in East Germany was an informant – but now it can be done by technology. In the United States, the National Security Agency (NSA) collected hundreds of millions of American call and text records before they stopped domestic surveillance in 2019, and there are an estimated four to six million CCTV cameras across the United Kingdom. Eighteen of the 20 most surveilled cities in the world are in China, but London is the third. The difference between them lies less in the tech that the countries employ and more in how they use it.

What if the definition of what is illegal in the US and the UK expanded to include criticising the government or practising certain religions? The infrastructure is already in place to enforce it, and AI – which the NSA has already begun experimenting with – would enable agencies to search through our data faster than ever before.

In addition to enhancing surveillance, AI also underpins the growth of online misinformation, which is another tool of the authoritarian. AI-powered deep fakes, which can spread fabricated political messages, and algorithmic micro-targeting on social media are making propaganda more persuasive. This undermines our epistemic security – the ability to determine what is true and act on it – that democracies depend on.

“Over the last few years, we've seen the rise of filter bubbles and people getting shunted by various algorithms into believing various conspiracy theories, or even if they’re not conspiracy theories, into believing only parts of the truth,” says Belfield. “You can imagine things getting much worse, especially with deep fakes and things like that, until it's increasingly harder for us to, as a society, decide these are the facts of the matter, this is what we have to do about it, and then take collective action.”

#### Independently, dark patterns ensure mass disinformation—That’s an existential threat—BUT the plan’s regulations solve without harming innovation.

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Even before a global pandemic hit, the Bulletin of Atomic Scientists announced that the Doomsday Clock had advanced for the first time ever to 100 seconds before midnight.

The Bulletin cited “information warfare” as a “threat multiplier” that is reducing trust and corrupting the information ecosystem needed for democratic debate. Now the World Health Organization is warning of an “infodemic” of widespread conspiracy theories about the coronavirus, and disinformation has already been evident in the lead-up to the 2020 presidential election. Despite a clear and present danger, it is evident that our institutions are not nearly ready—neither for foreign nor domestic disinformation campaigns.

While U.S. intelligence officials have repeatedly warned lawmakers that foreign interference in U.S. elections will continue, the giant platforms that have become the new media gatekeepers—Facebook/Instagram, Twitter, and Google/YouTube—have largely been left to choose their own paths. And though the platforms say they want to address election disinformation, their own rules are inconsistently applied and underenforced, leaving it to fact-checkers, journalists, and researchers to expose rule breaking as best they can. According to our research with NewsGuard, among outlets that repeatedly share false content, eight of the top 10 most engaged-with sites are running coronavirus stories.

Individual platforms allow disinformation campaigns to leverage “dark patterns,” or manipulative user interfaces, to deceive users. This opaque design makes it easy to like and share a planted story, but hard to verify a faked video.2 Disinformation campaigns thereby overwhelm the “signal” of actual news with “noise,” eroding the trust in news necessary for democracy to work. The tools of disinformation campaigners include:

Trojan horse outlets that deceive users about the source of disinformation by disguising themselves as independent journalism while eschewing its practices (for example, bylines, mastheads, verification, corrections, community service principles) and leveraging platform design to boost conspiracies. Meanwhile, real news generation atrophies because platforms have absorbed the revenue of local independent journalism.

Spending on personalized political propaganda—which is likely to top $1 billion in 2020, three times such spending in 2016—obscures the true sponsors of online ads from the public.3 The platforms each have different and weak procedures for labeling and how much targeting they allow for political ads. Both Google and Facebook’s ad libraries malfunctioned, failing to provide real disclosure in the days before the last U.K. election.

Networks of “amplifiers” flood the zone with disinformation. Fake accounts, influencers, and true believers game algorithmic recommendations to fill trending lists and search engines with visual memes or video.

Digital Astro-turf campaigns that look like organic grassroots movements use secret groups, encrypted messaging, and fringe sites linking to the main platforms to target vulnerable populations through disinformation and harassment.

Platform black box moderation that applies rules inconsistently and without transparency, create loopholes for cross-platform disinformation operations. The self-regulatory model of negotiations with civil society appears broken; civil rights groups working on an audit have protested the platforms’ lack of cooperation.

Too often, the only alternative proposed to today’s laissez-faire approach would increase government control over content. This false choice—between allowing platforms or government to act as censor—has hobbled the policy debate. A new approach should empower users. Our approach is rooted in an understanding that digital information platforms are our new media gatekeepers yet have none of the obligations developed over time for our old gatekeepers: obligations to minimize user manipulation, boost public interest journalism, and promote democratic debate.

The new digital media policy roadmap we layout would steer clear of vague rules that empower governments to define “good” or “bad” content and would instead focus on updating offline protections, fostering user choice, amplifying the signal of independent news, supporting civic information, and holding platforms accountable for shared, unambiguous, and transparent rules. This policy package—tailored with input from stakeholders and sufficiently agile to account for evolving technology—would close the loopholes that allow bad actors to engage in online information warfare using the largest platforms, and it would do so without restricting free expression or stymieing innovation.

#### Scenario 3 is privacy – dominant platforms’ control over data undermines user privacy

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Gregory Day and Abbey Stemler, “Infracompetitive Privacy,” *Iowa Law Review*, vol. 105, 2019, pp. 80-86, https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-1-Day-Stemler.pdf.

1. Harms from Collecting Information

Platforms collect data from individuals from an incomprehensible number of sources. Amazon, for instance, gathers data from all companies using its cloud storage service, Amazon Web Services (“AWS”), which drives some of the world’s largest platforms including Netflix, Airbnb, Adobe, and Slack.103 Similarly, Facebook harvests locational data even when users are not using the app so as to help advertisers target them.104

To avoid surveillance, some consumers expend significant resources from the purchasing of webcam covers, installing software and browser extensions such as tracker blockers and ad blockers to the building of a virtual private network, known as a “VPN.”105 It is, however, unlikely that these efforts can obstruct all monitoring.106 Users may even suffer indirect costs, especially related to employment opportunities—e.g., if a job requires Adobe or Slack, one will inevitably be surveilled.

Nevertheless, despite the recent spate of high-profile breaches, evidence suggests that most consumers have yet to spend additional time or resources to protect their privacy.107 This is partially because platforms bewilder consumers with complex privacy policies found in contracts of adhesion.108 Coupling this with the power of network effects, consumers lack a meaningfully secure alternative; after all, regardless of one’s dissatisfaction with Uber, few would prefer a rival ride-share app with robust privacy protections but no cars. Individuals are, likewise, unlikely to search with the privacy-bastion DuckDuckGo, a tiny competitor (with 0.36% of the market share) which is presumed to lack Google’s quality (with 76.06% of the market).109

2. Harms from Analyzing Information

A step beyond data harvesting is analyzing the resulting information for insights about users. Consider that platforms such as Snapchat employ mapping technology from one’s smartphone to advertise businesses located in a close vicinity to that individual.110 Users are even tracked in stores via Bluetooth technology to tailor offers within the store’s own mobile app.111 In fact, Uber received a patent on technology designed to predict when a user is intoxicated based on typos, walking speed, as well as whether the user’s phone is swaying or is being held at an odd angle.112

While observers might assume that these programs analyze anonymized data and thus, it is benign, recent reporting suggests otherwise.113 When platforms analyze general data to discover broad patterns and preferences, evidence suggests that users may experience deep unease and other psychological issues based on eroding privacy.114 Increased recognition of these “big brother” capabilities of platforms can alter behavior, again, at a cost.

3. Harms from Disseminating Information

The manner and scale in which platforms collect personal information raises the danger of unwanted dissemination, which is both common and costly. Over the last decade, the number of data breaches has risen sharply.115 From 2012 to 2017, Amazon, Facebook, Google, and Uber suffered a series of breaches impacting almost 100 million people.116 Even the Domino’s data breach exposed the personal information of over 100 million individuals worldwide.117 And since each victim of identity theft suffers an average loss of $1,000, the cumulative costs borne by consumers equate to billions of dollars each year.118

In fact, the prevalence of data breaches masks the ex ante costs incurred by consumers to guard against improper dissemination. Consider that a cottage industry of identity protection companies offers to prevent unwanted dissemination of data. Their services include the monitoring of the dark web, investigating of identity theft, and insuring against breaches.119 The cyber security market is, in turn, expected to eclipse $170 billion in revenue by 2022.120

Platforms may also pass their internal costs derived from appeasing hackers and regulators onto users. For example, in 2016, Uber paid hackers $100,000 in hush money to destroy the private information of over 57 million users.121 Similarly, in 2018, Amazon gave customers between $5 and $100 gift cards per complaint as an apology for exposing their email addresses.122 These numbers pale in comparisons, however, to the hundreds of millions of dollars platforms pay globally to regulatory bodies for data breaches.123

4. Harms from Manipulation Based on Information and Insights

In addition to direct outlays, a troubling aspect of data commercialization is the hidden dangers to decisional privacy.124 Buttressed by society’s poor understanding of the ways tech firms exploit data, consumers can unwittingly participate in experiments resulting in their augmented behavior.125 The Facebook Cambridge Analytica scandal of 2018 is an unfortunate example. Russian-American professor, Aleksandr Kogan, developed a personality quiz app in 2014.126 With it, he received permission from 270,000 Facebook users to mine their data for academic purposes.127 Unbeknownst to those users, Kogan gathered the personal data of their friends, including roughly 71 million Americans.128 Kogan then sold that personalized data to Cambridge Analytica, a political firm hired by the Trump Campaign.129 As stated by Marc Rotenberg, the President of the Electronic Privacy Information Center: “No one could have known that their friends were disclosing their personal data on their behalf. It’s entirely illogical . . . .”130 The uproar incited by this scandal prompted congressional inquiries and perhaps the future regulation of Facebook.131

As the public would soon learn, the sharing of data with app developers (one of the many sides of Facebook’s platform) was and is common practice.132 In fact, Facebook and other platforms have for years harvested data from users in surprising ways. For instance, Ars Technica reported that Facebook scraped call and text data from Android phones.133 Facebook has also confirmed that it collects data from non-Facebook users—a surprising admission to many, including the U.S. Congress.134

Moreover, developers may have little understanding of how data is captured and utilized. This ignorance is because machine learning fuels many of the algorithms that modulate consumer behavior. As Jon Kleinberg and Sendhil Mullainathan write:

We have, perhaps for the first time ever, built machines we do not understand. We programmed them, so we understand each of the individual steps. But a machine takes billions of these steps and produces behaviors . . . that are not evident from the architecture of the program we wrote. . . . [A]t some deep level we don’t even really understand how they’re producing the behavior we observe. This is the essence of their incomprehensibility.135

In important part, even though platform companies may exploit data to accrue market dominance, they have largely evaded antitrust scrutiny by giving away or selling their services at low costs.136 The next Part explains why privacy is omitted from antitrust’s framework, despite its potential link to anticompetitive conduct, as well as the reasons antitrust law should concern itself with the issues of data protection and privacy.

#### Competition solves – lack of consumer alternatives disincentivizes developing privacy measures

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Gregory Day and Abbey Stemler, “Infracompetitive Privacy,” *Iowa Law Review*, vol. 105, 2019, pp. 91-93, https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-1-Day-Stemler.pdf.

C. COMPETITION, PRIVACY, AND MARKET FAILURE

Privacy injuries should incur antitrust scrutiny in markets where the costs spent by consumers to prevent or remedy a privacy breach are greater than what would have occurred if not for the anticompetitive behavior. Key to our stance is that inadequately protected data can derive from a lack of competition, and that more competition would help alleviate this harm. To make this case, notice that privacy injuries constitute a form of market failure.167 If a tech company could generate $10 of revenue from exploiting data, creating $8 of costs for the company and $15 of costs borne to the public, the company is likely to do the deal—despite the net level of societal harm—because enough costs are externalized to make the transaction profitable (for the company, that is). We think that, instead of externalizing privacy costs, platforms would increase spending on data protection if sufficient market forces existed. This is because added competition would (1) punish the culprits of a data breach, (2) disclose information about data collection and privacy breaches, and (3) provide consumers with products designed to protect privacy.

1. Punishment

To begin, if technology markets were competitive, consumers could respond to a company’s data breach by giving their business to a rival firm, punishing the offender. Currently, without competing options, monopolists are more capable of surviving a privacy breach—although some consumers may quit the platform, a lack of competition enables the platform to retain users who would otherwise switch to a rival. This is why, for example, Facebook’s stock price rallied to pre-Cambridge Analytica levels soon after the scandal.168 Consumers may even harbor the belief that the few firms in a monopolized market are all effectively the same. This dynamic is akin to monopoly pricing in a concentrated market; even though consumers may detect that the monopolist’s prices are abnormally high, they lack a meaningful alternative, causing them to patronize the monopolist anyway. As a result, increasing competition would not only enable consumers to boycott firms that improperly protect data, but it would also create incentives for platforms to protect their users’ personal information before a breach occurs.

2. Information

A chief problem explaining the prevalence of infracompetitive privacy is the lack of consumer awareness for the issue. Consider that many costs derived from privacy harms are unseen. In contrast to how consumers tend to overreact to slight increases in retail prices—e.g., the act of driving across town to purchase nominally cheaper gasoline or purchasing a modestly cheaper, yet more inconvenient, airplane ticket—consumers seem to underestimate the harms levied on their decisional privacy or even accept the monetary costs of privacy breaches. This is perhaps because users enjoy obvious short-run benefits in the form of zero-priced services while cognitively disassociated from speculative long-term costs.169 Consumers could also base their decisions on incomplete information in the sense that their ability to make a rational choice is limited by inadequate market signals. Consumers might further ignore information about the costs of infracompetitive privacy given their inability to punish offending firms.170

In light of this market failure, a chief benefit of increased competition is information. Since most platforms already offer zero-price or low-price services, and thus cannot further reduce prices, heightened competition would compel firms to distinguish themselves using non-price signals in the form of enhanced privacy. As firms vie for users, they would likely disseminate information about the value of privacy and the costs of failing to protect one’s information in order to promote their services. In this sense, concentrated markets have enabled tech firms to ignore privacy concerns as few rivals exist to shed light on the problems borne from their treatment of personal information. Increased competition would therefore cause firms to not only improve the quality of their services, but also to advertise this fact to consumers, raising the attention paid by users to privacy matters.171

#### Privacy circumvention increases the risk of cascading data breaches

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Maurice Stucke, “Here Are All the Reasons It’s a Bad Idea to Let a Few Tech Companies Monopolize Our Data,” *Harvard Business Review*, 27 March 2018, <https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data>.

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

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

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

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

#### Breaches collapse society

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1. Risk of data breaches. A security breach of any of the digital monopolies could result in Exabytes of users’ most vulnerable information being publicly exposed (7). Besides the risk of irreparable damage to people’s reputation, private lives, and identity (as in, e.g., the “Ashley Madison” case (8)), such a breach could result in unprecedented damage to our economy (as in, e.g., the “Sony Pictures” case (9)) and our political standing (as in, e.g., “Wikileaks Cablegate” (10)). Importantly, a security collapse of that nature might only be the start of a series of follow-up breaches. A hack of Google’s Gmail, for example, could allow the perpetrators to obtain a user’s bank account password through the “forgot password” functionality, and ultimately lead to a collapse of businesses and industries (e.g. banking, taxation, weapon silos, etc.). Compared to what was deemed a “too big to fail” state when a handful of banks collapsed in 2008, such a crisis could be unparalleled. Although the digital monopolies employ talented security teams to prevent such hacks, the public has no guarantee that a skillfully deployed attack (e.g., by another nation-state, powerful underground organization, or simply a disgruntled employee) would not be successful. Even with the best efforts of the digital monopolies—which often heavily depend on the priorities of high-ranking leaders in the organization—societies should hence operate under the assumption that the data held by the digital monopolies could be leaked at any point in time.

#### Ensures cyberattacks go nuclear

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

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

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

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

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

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

### 1AC – Solvency

#### The United States federal government should implement light handed procompetitive regulations increasing prohibitions on anticompetitive conduct by dominant platforms.

#### The plan leads to light handed, pro-competitive regulation—that solves targeted platform harms but maintains incentives for innovation—avoids inefficient ex post remedies and burdensome structural changes

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(William and Howard, “Antitrust Enforcement, Regulation, and Digital Platforms,” 168 U. Penn. L. Rev. 1911)

Both authors come to the topic of this Article with experience in regulatory agencies and with practical understanding of the difficulties and potential drawbacks of regulation. We nonetheless find three main reasons why, despite the challenges in getting regulation right, limited regulation might have advantages over traditional antitrust adjudication in the context of large-scale industries with network effects. First, and at the broadest level, the adjudicative model for antitrust enforcement and doctrinal development has been met with well-founded criticism. This does not mean that regulation is the right alternative, but it does provide a good reason to ask whether under some circumstances a different approach might lead to better outcomes. Second, traditional antitrust remedies might not effectively address the competitive challenges of digital platform markets. Neither structural remedies like break-up or divestiture, nor the limited kinds of conduct remedies that antitrust courts and agencies have been willing or able to implement, can effectively reduce barriers to competition without diminishing network benefits for consumers. In contrast, an expert agency can potentially bring the experience and resources required to make more granular, detailed decisions about the costs and benefits of certain types of commercial behavior. Third, because of network effects, conduct that courts ordinarily judge under antitrust law’s general rule of reason might have different presumptive effects, and therefore be better governed by a more specific set of standards, in digital platform industries. An expert agency might be particularly suited to determine when “outer-boundary” theories of harm that courts rightly disfavor for general application—theories of harm like predation, refusals-to-deal, or acquisition of nascent competitors— should apply in specific contexts.

Below, we discuss why certain forms of what we call “light handed procompetitive” (LHPC) regulation could increase levels of competition in markets served by digital platforms while helping to clarify the platforms’ obligations with respect to interrelated policy objectives, notably privacy and data security. Key categories of LHPC regulation could include interconnection/interoperability requirements (such as access to application programming interfaces (APIs)), limits on discrimination, both user-side and third-party-side data portability rules, and perhaps additional restrictions on certain business practices subject to rule of reason analysis under general antitrust statutes. These types of regulations would limit the ability of dominant digital platforms to leverage their market power into related markets or insulate their installed base from competition. In so doing, they would preserve incentives for innovation by firms in related markets, increase the competitive impact of existing competitors, and reduce barriers to entry for nascent firms.

The regulation we propose is “light handed” in that it largely avoids the burdens and difficulties of a regime—such as that found in public utility regulation—that regulates access terms and revenues based on firms’ costs, which the regulatory agency must in turn track and monitor. Although our proposed regulatory scheme would require a dominant digital platform to provide a baseline level of access (interconnection/interoperability) that the regulator determines is necessary to promote actual and potential competition, we believe that this could avoid most of the information and oversight costs of full-blown cost-based regulation, for reasons we will discuss below.14 The primary regulation applied to price or non-price access terms would be a nondiscrimination condition, which would require a dominant digital platform to offer the same terms to all users. Such regulation would not, like traditional rate regulation, attempt to tie the level or terms of access to a platform’s underlying costs, to regulate the company’s terms of service to end users, or to limit the incumbent platform’s profits or lines of business. Instead of imposing monopoly controls, LHPC regulation aims to protect and promote competitive access to the marketplace as the means of governing firms’ behavior. In other words, its primary goal is to increase the viability and incentives of actual and potential competitors. As we will discuss, the Federal Communication Commission’s (FCC) successful use of similar sorts of requirements on various telecommunications providers provides one model for this type of regulation.15

There are several possible sources for digital platform regulation. Congress could enact new legislation that creates an entirely new regulatory agency for digital platforms or could give new statutory authority to an existing agency. Alternatively, the FTC could promulgate competition rules under authority that it arguably already has under the FTC Act of 1914. Several commentators have argued that the FTC could use its existing statutory authority under the FTC Act to issue broad, antitrust rules that apply generally, to all industries.16 A much more limited, and perhaps less controversial, manner in which the FTC could begin to use this authority would be to pass narrower rules that apply only to specific kinds of conduct and only to digital platform industries. Calls to regulate digital platforms involve several issues that do not centrally fall within the purview of antitrust, notably privacy and control over certain kinds of harmful content.17 To the extent there could be trade-offs among regulatory goals—for example between a platform’s interconnecting with rivals but limiting those rivals’ access to user data, or between providing nondiscriminatory access to thirdparties but blocking those that spread harmful content—there could be economies of scope to having a single agency address those issues, or at least mandating that agencies coordinate inter-related rulemaking.

#### Expert regulation is comparatively better for addressing nascent acquisition and discrimination—ex post adjudication takes too long and is too burdensome

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(William and Howard, “Antitrust Enforcement, Regulation, and Digital Platforms,” 168 U. Penn. L. Rev. 1911)

This last category of restrictions involves other forms of conduct that antitrust law recognizes as double-edged: they could increase or maintain monopoly power, but also create efficiencies that benefit consumers. Antitrust law applies rule of reason analysis to such behaviors by attempting to weigh the potentially negative effects of the behavior against the positive effects, then prohibiting the behavior only if the net effect is likely to be negative.86 Of course, any quantitative measure of the net effect of a practice is uncertain, and therefore standards of proof and evidentiary burdens play a large role in determining the actual outcomes of cases.

The general point we wish to make in this Section is that, where digital platform markets are prone to tip to durable monopoly, the presumptions and burdens that courts ordinarily apply under antitrust law’s general rule of reason might fail to prevent anticompetitive harms or to provide useful industry guidance. Such settings could be better governed by a more specific and definitive set of standards implemented through an agency better able to understand and account for relevant industry details. To the extent such regulation could lead to fewer errors of either over- or under-enforcement against digital platforms, it could be welfare enhancing compared to traditional antitrust adjudication. For example, regulation might prohibit certain conduct under specified conditions where it will be predictably harmful, establish stronger presumptions about the harms from particular conduct when undertaken by digital platforms, or implement stricter requirements for the review of specific business activities.

One area of activity where regulation might have advantages over adjudication is acquisition of nascent competitors. Several commentators have advocated stricter prohibitions against such deals on grounds that large firms might, through acquisitions, buy up the very start-ups that today look so insignificant as to escape merger review but would later prove to be serious competitors.87 It is beyond the scope of this article to address the emerging work on acquisitions of start-ups. We note, however, that the question of nascent acquisitions poses a serious challenge for antitrust enforcement. Generalist courts seem poorly suited to deciding, case-by-case, whether a particular firm that might today have little market presence or infrastructure might later emerge as a competitor to its buyer, especially if the nascent firm is currently more of a complement than competitor to the acquiring firm. The technical, economic, and industry factors that make competitive-effect determinations difficult in any merger case are particularly important in a technologically dynamic industry where one of the merging firms is new and evolving. Moreover, the alternative of waiting to see the results of a particular merger so that courts have a record on which to review the transaction creates very substantial incentive and evidentiary problems. A successful merger is one in which the parties integrate in such a way that creates commercial growth,88 and therefore it will be very difficult to distinguish commercial success due to the merger from the counterfactual of success that would have resulted had the parties remained separate. Additionally, the prospect of post consummation review of a merger, with retroactive remedies or prohibitions, could deter the very investment in integration that helps ensure a successful merger.89 These concerns lead us to suggest that the process and criteria through which antitrust law applies to acquisitions of nascent competitors by large industry players might better lend itself to guidance and administration through a regulatory entity as opposed to the generalist adjudicatory process. While we do not think banning such acquisitions is a good idea, rules that specify which transactions the agency will review, what criteria and presumptions it will apply in a particular industry, and what kind of evidence it will find relevant could provide more certainty for businesses and better protections for consumers.

# 2AC

## Innovation Adv

#### No link to our mechanism—only applies to dominant firms and avoids blunt overdeterrent proposals

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(William and Howard, “Antitrust Enforcement, Regulation, and Digital Platforms,” 168 U. Penn. L. Rev. 1911)

A number of commentators have advocated expanding competition enforcement through rulemaking. For example, Tim Wu advocates more regulation that he describes as “using industry-specific statutes, rulemakings, or other tools of the regulatory state to achieve the traditional competition goals associated with the antitrust laws.”50 Rohit Chopra contends that “[r]ulemaking would serve to advance clarity and certainty about what types of conduct constitute—or do not constitute—an ‘unfair method of competition.’”51 While the kind of regulation we suggest might fit within the frameworks of what other commentators have suggested, we propose something much more limited. We do not advocate the use of the entire toolkit of traditional utility regulation, nor do we suggest rulemaking for broader, general-purpose antitrust enforcement outside of particular contexts where agency expertise is most likely to have advantages over traditional adjudication. We focus on why regulation in the particular context of digital platforms has comparative advantages over adjudication. We focus on access rules, similar to those that regulators have used to promote competition in a variety of different industries.52 As we will discuss, the FCC has successfully used these types of regulations in various sectors of the telecommunications industry to deal with the same general sorts of competition issues that arise in digital markets.53

The kinds of regulation that one might consider for application to digital platforms include (1) interconnection and interoperability requirements and common standards, (2) limits on discrimination, (3) data portability requirements, (4) line-of-business restrictions, and (5) additional restrictions on certain business practices currently subject to rule of reason analysis under general antitrust statutes. We discuss each of these categories in more detail below. However, one issue that applies to all of the categories is worth discussing at the outset: whether the regulations should apply industrywide—namely, to all digital platforms—or only to dominant platforms. We think that in most cases it will only be necessary to apply these regulations to firms that the regulator determines are dominant. This means that a key part of the regulatory regime will be creating and applying standards to determine whether a firm is in fact a “dominant” digital provider. Note also that, in many cases, the obligations imposed on dominant digital providers will take the form of requiring the dominant provider to conform to various common standards, in order to reduce switching costs to users or to enable nondominant firms to interconnect or interoperate with dominant providers. In this case, although the standards will not be mandatory for non-dominant providers, those providers will nonetheless likely conform to the standards to take advantage of the protections offered by the regulation.

#### Pounders – A] FTC enforcement – current FTC approach creates a harsh environment

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(Michael G., “Be Prepared: Aggressive Antitrust Enforcement Is Back,” <https://www.bassberry.com/news/aggressive-antitrust-enforcement-is-back/>)

This summer has seen a flurry of bold antitrust announcements from the Biden administration. By issuing a sweeping executive order calling for numerous changes to antitrust enforcement and by naming progressive favorites and prominent Big Tech critics to head the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ), President Biden has signaled that federal antitrust policy is entering a new era.

The FTC has already begun carrying out its mandate to reshape antitrust policy. Under the leadership of new Chairwoman Lina Khan, the FTC has moved quickly to eliminate checks on its antitrust enforcement powers. A majority of the FTC’s commissioners have expressly disavowed the agency’s longstanding approaches to policing antitrust violations and have given the new chair unprecedented authority over investigations and rulemakings.

Collectively, the Biden administration and the FTC have sent a clear message to the business community: aggressive antitrust enforcement is back. Companies should expect to see an increase in antitrust investigations, stiffer penalties for violations, more burdensome merger reviews, and new rules targeting a range of industry practices. In this environment, effective antitrust counseling and compliance programs are more important than ever.

**B] M&A – new guidelines change antitrust principles, and influence the courts**

**Browdie et al. 22** – Megan Browdie is a partner with Cooley LLP; Jacqueline Grise is chair of Cooley's antitrust and competition practice group; Tanisha James is a partner with Cooley LLP; Howard Morse is a partner in and former chair of Cooley's Antitrust & Competition practice group; Rubin Waranch is an associate in Cooley's antitrust and competition practice

Megan Browdie, Jacqueline Grise, Tanisha James, Howard Morse, and Rubin Waranch, "US Antitrust Enforcers Take Next Steps to Strengthen Merger Enforcement," JD Supra, 2-2-2022, https://www.jdsupra.com/legalnews/us-antitrust-enforcers-take-next-steps-2227009/

To strengthen enforcement, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) are undertaking a review of the Horizontal Merger Guidelines, last revised by the Obama administration in 2010, and the Vertical Merger Guidelines, issued in 2020 by the Trump administration.

The Biden DOJ and FTC on January 18, 2022, jointly issued a request for information (RFI), soliciting public comment on revisions to “modernize” the analytical framework used to assess mergers. Comments are due March 21, after which the agencies have said they will publish proposed guidelines for further comment, with a goal of finalizing new guidelines before the end of 2022.

This process follows President Joe Biden’s July 2021 issuance of an executive order, which called on the antitrust agencies to evaluate whether the Horizontal and Vertical Merger Guidelines required revision.

In announcing the RFI, the DOJ and the FTC said the objective is to “strengthen enforcement against illegal mergers” and combat “mounting concerns” that “many industries across the economy are becoming more concentrated and less competitive.”

This joint effort is the latest example of the antitrust agencies’ efforts to aggressively enforce antitrust law, announce enforcement principles and influence the courts when they challenge mergers in court.

Role of the merger guidelines

Both sets of guidelines lay out how the antitrust agencies will approach merger enforcement. As the current Horizontal Merger Guidelines put it, the guidelines “outline the principal analytical techniques, practices, and the enforcement policy of the [DOJ] and [FTC] with respect to mergers and acquisitions.” Historically, they have been important in influencing merger case law, and federal courts have often cited the guidelines in ruling on merger challenges.

The current Horizontal Merger Guidelines were last published in 2010 jointly by the DOJ and the FTC. The current Vertical Merger Guidelines were published jointly in 2020, but the FTC withdrew from those guidelines in September 2021. While the DOJ did not withdraw at the same time, DOJ Assistant Attorney General Jonathan Kanter has said that “too much has been made of the purported divergence between the DOJ and the FTC on the treatment of vertical mergers.” He also said that the Antitrust Division “shares the FTC’s substantive concerns” that the guidelines overstate potential efficiencies and fail to identify important relevant theories of harm.

What might change?

The RFI seeks public comments on 15 categories of questions which, according to Kanter, are an attempt to “understand why so many industries have too few competitors, and to think carefully about how to ensure our merger enforcement tools are fit for purpose in the modern economy.”

Kanter and FTC Chair Lina Khan homed in on specific categories of interest in their public statements announcing the review. Kanter highlighted a desire to explore whether the “framing of horizontal versus vertical analysis” implicitly limits the agencies to analyzing transactions in a “two-dimensional view” that may not reflect complex markets. He also indicated the agencies will be looking at tools that may be used to assess potential harms from mergers aside from “market definition.”

Khan questioned whether the guidelines are “adequately attentive to the range of business strategies and incentives that might drive acquisitions,” including “data aggregation strategies” and “roll-up plays by private equity firms.” She also questioned whether the current guidelines take into account harm to competition in labor markets, which is an enforcement priority for the Biden administration.

Of particular interest, the agencies are focusing on aspects of what they have said are “unique aspects of digital markets,” highlighting characteristics such as zero-price products, multisided markets and data aggregation, while asking questions about the impact of network effects and interoperability.

The agencies will also be examining:

* The adequacy of the presumptions in the merger guidelines regarding unlawful transactions, suggesting they may strengthen presumptions based on concentration, which currently are really just a starting point for analysis.
* The need to develop a formalized process for divestitures and other remedies that are not currently addressed by the guidelines.
* The weight efficiencies should have on merger review, suggesting the DOJ and FTC are likely to downplay efficiencies.

The FTC’s Republican commissioners, Noah Phillips and Christine Wilson, issued a statement welcoming review and lauding the benefits of administrability, predictability and credibility that guidelines offer, but suggested skepticism, noting that some questions the agencies are raising “appear to be premised on debatable assumptions” and that “much of the legal authority cited … is nearly or more than half a century old.” They suggested that asking for examples of mergers that “made it more difficult for rivals to compete with the merged firm” may equate harm to competitors with harm to competition, which would conflict with the oft-cited mantra that antitrust law protects “competition, not competitors.”

Guidelines review follows 2021 procedural changes to merger review

The announcement that the agencies intend to revise the guidelines follows efforts over the past year to amp up the merger review process. Noteworthy developments to the merger review process over the past year include:

* “Temporary” suspension of early termination: Since February 2021, the antitrust enforcers have suspended granting early termination for transactions subject to Hart-Scott-Rodino Act (HSR) filings.
* Rescinded 1995 policy statement: In July 2021, the FTC rescinded a 1995 Clinton administration Policy Statement on Prior Approval and Prior Notice Provisions. The FTC is now requiring prior approval and prior notice provisions for mergers subject to consent decrees, though the scope of such approvals remains unclear.
* Warning letters following expiration of the HSR waiting period: The FTC began sending letters to merging companies in August 2021 warning that the agency’s decision not to issue second requests to investigate a transaction does not indicate approval and that consummation of the transaction would be at the parties’ “own risk.” These letters also indicate that the FTC’s investigation would continue, though few if any investigations have in fact continued after the transactions subject to such letters have been consummated.

Looking forward

The RFI and statements by the antitrust enforcers reflect a desire to update the merger guidelines to “accurately reflect modern market realities,” and to equip the DOJ and FTC to aggressively enforce antitrust law. Revisions to the guidelines are likely to alter merger review and lead to challenges on new theories of harm. How significant those changes will be, and whether courts would be willing to adopt substantial changes in merger case law, remains to be seen.

#### C] Court doctrine – NCAA decision expanded the scope

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

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

NCAA: a Unanimous Decision for a Divided Court

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

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

whether the challenged restraints had substantial anticompetitive effects;

procompetitive rationales; and

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

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

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

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

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

#### Type of innovation matters. Mergers displace disruptive innovation, key to all our impacts AND theirs.

Kamepalli 21 – Economics Ph.D. Student at Columbia University

Sai Krishna, Raghuram Rajan, University of Chicago Distinguished Service Professor of Finance, and Luigi Zingales, finance professor at the University of Chicago Booth School of Business, “Kill Zone,” Becker Friedman Institute for Economics Working Paper No. 2020-19, https://ssrn.com/abstract=3555915

The classic analysis of the effect of antitrust enforcement on incentives to innovate is Segal and Whinston (2007). In their model, where there are no network externalities, voluntary licensing agreements (and equally mergers) raise both parties’ payoffs and thus increase innovation. In this framework, Cabral (2018) introduces the distinction between radical innovation (competition *for* the market) and incremental innovation (competition *within* the market). He shows that antitrust restrictions on acquisitions (or technology transfers) can lead to lower incremental innovation but higher radical innovation. The negative impact of mergers on radical innovation, however, comes from an “opportunity cost” effect. By increasing the payoff of incremental innovation, mergers reduce the additional payoff of radical innovation. Callander and Matouschek (2020) reach a similar result by focusing on rent seeking. With incremental innovation, the entrant's product is closer to the incumbent’s business, and is more liable to be taken over when mergers are allowed (so that the incumbent can shut down a competitive threat). In our model we only have radical innovation. Nevertheless, mergers can reduce the incentive to innovate because of the impact they have on the difficulty of attracting customers away from the incumbent.

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

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

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

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

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

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

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

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

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

## Conduct Adv

No cards

## T – Per Se

#### We meet—aff creates ex ante rules that make conduct deemed anti-competitive per se illegal

Crane, Assistant Professor, Benjamin N. Cardozo School of Law, ‘07

(Daniel, “Rules Versus Standards in Antitrust Adjudication,” 64 Wash. & Lee L. Rev. 49)

The solution, though imperfect, is to use bright-line rules as immunizing devices for broad swaths of industrial behavior while preserving a role for standards in determining liability for conduct falling outside of the safe harbors created by the rules. For many categories of conduct, such an approach minimizes the cost of configuring the law because the rule itself supplies a conclusive answer of no liability or presents a safe harbor that defendants can elect in order to minimize the likelihood of litigation. For example, specifying that a firm cannot be held liable for tying unless it has at least a 50% market share in the tying market would provide a case-dispositive safe harbor that could reduce litigation costs substantially in a large number of tying cases, even though such costs would remain in cases where the defendant's market share exceeded 50%. While it would also save costs to specify prohibitory rules for cases falling outside the safe harbor (such as making tying per se unlawful if the defendant's tying product market share exceeds 50%), the generalization of such a rule would be vastly overbroad. Bright-line rules are most appropriate in antitrust when used as immunizing devices. Relatively few categories of conduct are unambiguously harmful and can be prohibited in equally categorical terms.

#### “Increase” requires preexistence

Ortega 07 – Judge, Oregon Appeals Court, Oregon Supreme Court

Darleen Ortega, Papas v. Or. Liquor Control Comm'n, 213 Ore. App. 369, Court of Appeals of Oregon, June 2007, LexisNexis

We begin with whether OLCC's interpretation of the rule, as developed and applied in this case, is consistent with the rule's text. Certainly, OLCC's understanding that the rule applies to "competitions" is consistent with the rule's use of the term "contest." See Webster's Third New Int'l Dictionary 492 (unabridged ed 2002) (defining the noun "contest" as a "competition"). However, by its terms, the rule refers and applies to specific types of drinking contests: as pertinent here, ones that involve "increase[d] consumption \* \* \* in increased quantities" of alcoholic beverages. OLCC's interpretation and application in this case fail to account for that qualification or to yield any pertinent point of reference in that regard; that is, nothing in OLCC's interpretation or application of the rule here identifies the consumption or quantities against which the required "increase" is to be, or was, measured. See Webster's at 1145 (defining the transitive verb "increase" as "to make greater in some respect (as in bulk, quantity, extent, value, or amount) : add to : enhance" and defining the adjective "increased" as "made or become greater"). Thus, OLCC's proposed interpretation--that mere competition between participants constitutes conduct violating the rule--is inconsistent with the latter, qualifying aspects of the rule.

#### Prohibitions are implemented via legal tests—the threshold of the test determines how much or how little conduct is prohibited

Mark S. Popofsky, Antitrust Partner at Ropes and Gray, Served as Senior Counsel to DOJ Antitrust Division, Adjunct Professor of Advanced Antitrust Law and Economics at Harvard Law School and the Georgetown University Law Center, 2016, Section 2 and the Rule of Reason: Report from the Front, CPI Antitrust Chronicle March 2016 (1)

Courts remain, in the words of one observer, mired in an “exclusionary conduct ‘definition’ war.”2 Applying Section 2’s broad prohibition on “monopolizing” conduct requires courts to select a governing legal test. Section 2 legal tests run the spectrum from rules of per se legality to rules of near per se illegality.3 Courts, nonetheless, largely apply two dominant paradigms. The first consists of legal tests based on bright-line rules or safe harbors. Familiar examples include the Brooke Group4 below-cost price test for analyzing predatory pricing claims and the Aspen/Trinko5 “profit sacrifice” test for refusals to deal. Developing bright-line rules for Section 2, proponents argue, promotes business certainty and reduces the risk of chilling otherwise procompetitive conduct. The second paradigm is rule of reason balancing. Arguably the default Section 2 legal test,6 courts and commentators have described Section 2’s rule of reason in various ways: as mandating a step-wise approach, as requiring a balancing of pro- and anticompetitive effects, or (to borrow from Section 1) a framework for generating the enquiry “meet for the case.”7 However the rule of reason is expressed, its champions contend, its flexibility and fact-intensive approach permits courts to identify anticompetitive conduct without the under-inclusion that is an admitted feature of safe harbors and other bright-line rules.

#### Business practices can be individual acts

Corradino 03 – Superior Court Judge for Connecticut.

G. Dolph Corradino, “TMK Associates v. Landmark Development et al,” Connecticut Superior Court, Judicial D. New London at New London, No. 562077, 21 August 2003, https://www.vitallaw.com/caselaw/tmk-associates-v-landmark-development-et-al/1362baf87c7d10008599b82a72d184c901.

They argue that “in order to successfully allege a violation of CUTPA, the plaintiff must allege more than a singular occurrence”; “there must be a pattern of unfair or deceptive trade practices”; “the plaintiff failed to plead more than a single act (of) unfair or deceptive business practices.” This argument was laid to rest in Johnson Electric Co. v. Salce Contracting Assoc., 72 Conn. App. 342 (2002). There, “the trial court held that, because the plaintiff did not prove that the defendant had engaged in a repeated course of misconduct, the plaintiff did not establish that the defendant violated CUTPA.” Id. page 349. The court disagreed, ruling that, ‘The trial court improperly declined relief to the plaintiff on the ground that it had alleged and proven only a single act of misconduct.” Id. page 353.

#### Precision—prohibition turns on whether something is anticompetitive or not

Light, Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania, ‘19

(Sandra, “The Law of the Corporation as Environmental Law,” 71 Stan. L. Rev. 137)

The more fact-intensive inquiry under the rule of reason tests “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are “those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices.”197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition.198 The rule of reason can also operate as a disincentive, even if no court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations.199

## T – Only Exemptions

#### CI—expand scope means making more conduct illegal than the squo

Kovacic et al. 03 – Professor at George Washington University Law School

William E. Kovacic, Theodore B. Olson, R. Hewitt Pate, Paul D. Clement, Jeffrey A. Lamken, Catherine G. O’Sullivan, Nancy C. Garrison, David Seidman, Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, Verizon Communs. Inc. v. Law Offices of Curtis v. Trinko, 2003 U.S. S. Ct. Briefs LEXIS 513, Supreme Court of the United States, May 2003, LexisNexis

Conversely, the 1996 Act does not expand the scope of the antitrust laws to outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws. Such an expansion of Sherman Act duties would "modify \* \* \* the applicability of \* \* \* the antitrust laws" in contravention of 47 U.S.C. 152 note. Violations of the duties imposed by the 1996 Act are just that--violations of the 1996 Act, subject to the sanctions and penalties imposed by that Act. They do not automatically amount to treble-damages antitrust claims. The courts of appeals are again in accord. Pet. App. 29a; Covad, 299 F.3d at 1283 ("We agree with Goldwasser that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations."); Goldwasser, 222 F.3d at 400 (It is "both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws."); Cavalier Tel. Co., 2003 WL 21153305, at \*11-\*12 (similar).

#### Arbitrary—the author thinks “scope” is meaningless

Sagers, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator, ‘21

(Christopher, Antitrust Question, email exchange with Anthony Trufanov, December 7, https://nudebateadt.blogspot.com/2021/12/antitrust-question.html)

To me, the problem is that this idea of the "scope" of antitrust has no established legal meaning and very little practical significance. It isn't really used in actual practice and it would rarely have any legal significance in an actual antitrust case. It was a convenient shorthand that I came up with for organizing the materials in that book, and it also had one theoretical value to me, but that's pretty much it. Most antitrust lawyers I've worked with understand it what I meant by it, but it doesn't have any precise meaning or doctrinal significance. I don't think the term was even really used before that book. I almost literally made it up.

## T – Private Sector

#### “Private sector” is anything that isn’t the government

Law Insider N.D.

“Private sector definition,” *Law Insider*, <https://www.lawinsider.com/dictionary/private-sector>.

Private sector means not of a Federal, State or Local government owned nor controlled enterprise.

#### “The” can include specifics

Random House N.D.

“The,” Unabridged Dictionary, <https://www.dictionary.com/browse/the>.

1. (used, especially before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an):

#### ‘By’ only requires anticompetitive practices resulting from private sector action.

Michigan Court of Appeals 10 (SAWYER, J. Opinion in DEQ. v. Worth Twp., 808 N.W.2d 260, 289 Mich. App. 414 (Ct. App. 2010). Google scholar caselaw. Date accessed 7/23/21).

Second, we look to the meaning of the phrase "by the municipality." This phrase is key because it answers plaintiffs' contention that MCL 324.3109(2) imposes responsibility for a discharge on a municipality without regard to the source of the discharge. That is, plaintiffs argue that any discharge of raw sewage within a municipality constitutes prima facie evidence of a violation by the municipality even if the municipality is not the source of the discharge. We disagree. The word "by" has many meanings. For its meaning as a nonlegal term, we look to a layman's dictionary rather than a legal one. Horace v. City of Pontiac, 456 Mich. 744, 756, 575 N.W.2d 762 (1998). We find these definitions from the Random House Webster's College Dictionary (1997) to be particularly helpful: "10. through the agency of" and "12. as a result or on the basis of[.]" Thus, MCL 324.3109(2) imposes responsibility on the municipality not when the violation merely occurs within the boundaries 264\*264 of the municipality, but when the violation occurs "through the agency of" the municipality or "as a result" of the municipality, that is to say, when it is the actions of the municipality that lead to the discharge.

## Taxes CP

#### Prohibitions can be conditional

FISCR 16, per curiam opinion for the US Foreign Intelligence Surveillance Court of Review, “In re Certified Question of Law,” 858 F.3d 591, Lexis

It is clear from the text of the pen register provisions in title 18, read as a whole, that Congress understood that some content information might be intercepted in the course of executing a valid pen register order. One of those provisions is 18 U.S.C. § 3121(c). The statute states:

[\*599] (c) Limitation. A government agency authorized to install and use a pen register or trap and trace device under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications.

18 U.S.C. § 3121(c).

That language requires the government to use "reasonably available" technology to avoid recording content information. But the prohibition is conditional, requiring the government to use such restricting technology only if it is "reasonably available." Thus, by requiring the use of "technology reasonably available" to restrict recording and decoding of intercepted information to dialing information, Congress recognized that such technology might not be available or might not achieve the objective with perfect accuracy.

#### Corporations don’t bear the brunt of taxes---they don’t care.

Kellen Yent 21, Senior Tax Associate at PriceWaterCooper, 9-28-21, “A Response to "A New Corporate Tax,” SSRN, https://ssrn.com/abstract=3910848

Corporate tax policy has had many, often concurrent, policy justifications over the decades, from distributive justice to market stimulation and regulation. Furthermore, there are major political justifications for this a tax, which makes the finding of this exact goal difficult.1 The US Corporate Income Tax (CIT) is not the only tax policy with indeterminate justification, but the addition of such polarized public views on the topic frustrates this endeavor greatly. Brauner rightly points out that the CIT is one of the more popular taxes, politically speaking. 2 Indeed, around 52% of Americans believe that the corporate tax rate should be increased.3 This indicates that around half of the American populace believe that corporations should be paying their fair share, whatever that may be. What qualifies as a fair share, however, is hard to quantify, especially given concerns that such a tax may not actually [be] felt by corporations. Put another way, the incidence of the CIT is not clearly known, and this statement is acknowledged by both critics and proponents of the CIT, even though both will stress this fact differently in order to make it fit their view point. 4 It has been proposed by Avi-Yonah that the corporate tax should be modified to look more like the original CIT that was adopted in 1909. This would mean a steeper progressive rate system and the grand aim of disincentivizing monopolistic behavior.5 This paper seeks to reject this particular modification of the CIT. Though the deterrence of monopolistic behavior is admirable, it may be done better through more direct means and regulatory action. Furthermore, this paper will investigate the other myriad of justifications proposed for the CIT, and then discuss which justifications coincide with the policy aim of taxing wealthy corporate ownership. Taking the view that the actual, correct policy aim of the CIT is to tax corporate shareholders (i.e. the wealthy owners of the corporation), this paper will seek to evaluate all iterations of the CIT (as is and as proposed herein) by such standard.6 Thus the modifications proposed by AviYonah in order to tax monopolies are close to this correct purpose of the CIT, but are a bit too indirect and do not capture all corporate profit. Moreover, this paper will not try to propose a new type of corporate tax; the goal of this paper is to merely discern the best aspects and justifications for the CIT in hopes that it may shed some light on current corporate tax policy and debate.

I. What are the aims of the CIT?

There have been many aims, both suggested and officially stated by economists and academics, for the CIT. However, public opinion on the CIT is the single most important policy driver, as close to half of the adults in the US in 2017 agree that the corporate tax rate should be raised.7 This suggests that most people are in favor of a high (or at least higher) US corporate tax rate in order to make sure large corporations are paying their fair share to the IRS. What is so interesting about this general public insistence of increasing the CIT is the fact that most economists are not actually sure who actually bears the burden of this tax.8 This fact is important, because, as stated at the outset, this paper will evaluate all justifications, policy aims, and reforms to the CIT against the accepted aim that the CIT’s purpose is to tax wealthy stakeholders in corporations. Gravelle suggest it is not easy to understand who bears the incidence, even with sophisticated modeling; the burden of the tax may fall together on corporate shareholders, the corporate workers, and even the consumers. 9 This indeterminacy of the incidence leads to a further indeterminacy of how the CIT actually functions, let alone how the CIT should function.

Avi-Yonah proposes that the CIT should revert back to its original purpose from when it was proposed in 1909, which was the limitation and regulation of corporate behavior and, in a narrower sense, monopolistic tendencies. 10 This is in contrast with what Avi-Yonah calls the “traditional aim,” which is the indirect taxation of rich shareholders (i.e. the aim in which this paper has chosen to evaluate all other justifications and modifications of the CIT). 11 The current CIT provides a tax when income is earned through the corporation (i.e. the shareholders), and not just when those shareholders earn a dividend.12 The current CIT therefore maintains the idea that the income inside the corporation cannot just be held passively by rich shareholders and deferred until it is earned to them through a distribution of dividends, but that it will be taxed as earned to the corporation (i.e. the controllers of the corporation). Taxation on earnings realized is one of the main pillars of US taxation, and can be best exemplified through I.R.C. §1001 (gain on amounts realized). 13 Avi-Yonah, however, suggests that because of the incidence problem mentioned above, there are better ways to target those wealthy shareholders, thus mitigating the incidence issue.14 In his view, the corporate tax was instituted in the early 20th century in order to regulate monopolistic behavior and the accumulation of wealth, by incentivizing corporations to engage in antimonopolistic behavior. 15 Avi-Yonah proposes a completely new corporate tax with such antitrust incentives in mind: the new tax base will be large corporations, the shareholders will be taxed on a mark to market basis, and there will be a tax on the distribution of dividends.16 Importantly, the tax will be highly progressive so as to restrain such large, mega-corporations corporations from forming (and incentivize them to break up). Avi-Yonah states:

I would suggest that the effective tax rate on normal corporate profits…be zero. On super-normal returns, since the main concern is monopolies and quasi-monopolies, the tax should be progressive, with a very high tax rate (e.g., 80%) for profits above a very high threshold (e.g., $10 billion). In between, there should be a series of graduated tax rates, similar to the individual rate schedule before 1980.17

This rate structure would allow very little tax to be paid by the normal/small corporations, thus effectively eliminating corporate tax on that end of the profits spectrum. However, the highly progressive structure captures those massive corporations (such as Big Tech, Big Pharma, etc.) in such a high tax rate that there is little incentive to get so big (or stay so big). Furthermore, under this structure, only the corporations with “super-normal returns” (rents) will be targeted by such a policy, as it is those major corporations who have super-normal returns. This means that anything that is not a return on capital (i.e. normal return) should be taxed. Though Avi-Yonah’s modification to the CIT would still target wealthy stakeholders, it would only target those wealthy stakeholders of monopolies or near monopolies (or those large enough to generate rents). This means that a wealthy shareholder of a medium to small sized corporation with just returns on capital will go untaxed on corporate profits, thus going against this paper’s accepted justification for the CIT: to tax all wealthy shareholders.

The fact that Avi-Yonah’s new corporate will give effectively zero corporate tax on those smaller corporations, or those who only have normal returns on capital, is not inadmissible. Interestingly, some critics of the current CIT would agree with this part of his proposal, and would go further to suggest a total elimination of the CIT or a replacement with something more direct, in the hopes of curbing the aforementioned incidence problems. 18 Entin argues that the incidence of the CIT falls on labor to a large extent.19 He suggests that the classical modeling of incidence misses the allocation of burden falling onto labor, which suppresses investment, productivity, and wages. He also takes issue with how the traditional models use “super-normal” returns to apportion incidence between labor and capital, suggesting that these models include portions that should not be attributed to such “supernormal” returns and which are actually highly sensitive to tax.20 In light of this data, it may be questioned whether a tax on “super-normal” returns is proper for the CIT.

## Common Law CP

No cards

## Neolib K

#### Only alt to competition policy is total state planning – that’s disastrous and sabotages tech progress – we can embrace competition policy without subjecting the whole economy to deregulation

Coniglio, antitrust attorney in the Washington, DC office of Sidley Austin LLP, ‘20

(Joseph V., “Economizing the Totalitarian Temptation: A Risk-Averse Liberal Realism for Political Economy and Competition Policy in a Post-Neoliberal Society,” 59 Santa Clara L. Rev. 703)

The implication of the foregoing is that the most pressing task for competition policymakers may not involve a rethinking of first principles. The principles of neoliberal competition policy may have ultimately been proven justified by an unprecedented period of economic growth, technological progress and reductions in poverty, and should presumably remain operative as long as they remain the best framework for bringing about these ends. Neither, as we have suggested, must the capitalist entrepreneur be lost in the process. The totalitarian temptation to submit to general state control of the economy-whether it be in the form of communism from below or fascism from above should be resisted so as to preserve and build upon the great prosperity Western Civilization has managed to achieve.

This statement will no doubt be highly unsatisfactory to many critics of neoliberalism who seek more fundamental and revolutionary changes. Surely, they suggest, there must be some principled basis for critiquing the neoliberal status quo with which so many are frustrated. Indeed, there very well may be, and none of the arguments in this article should be understood to the contrary. The goal of this article has been limited to a tailored defense of neoliberal principles only as they relate to competition policy, broadly understood. It does not suggest that neoliberal monetary, trade, and fiscal policies are also sound-let alone a neoliberal social order, where all the core institutions within society are organized according to the neoliberal principles of wealthmaximization, empiricism, and the rest.129 This is to say that even if neoliberalism is a sound theory as applied to the area of competition policy, neoliberal monetary policy, for example, may be problematic and a just target for contemporary critics. Similarly, claiming that competition policy should be enforced using a consumer welfare standard does not mean that all the organs of law and civil society should be oriented to maximize wealth or consumer welfare, even if this economic inquiry is nonetheless informative. 30 It is well known that several prominent neoliberals have expanded the neoliberal policy apparatus beyond the regulation of market capitalism with which antitrust is concerned to domains typically understood to be beyond a purely utilitarian purview.' 3 ' However, whatever the merits of these broader neoliberal policy programs, the competition policy baby, so to speak, should not be thrown out with the bathwater.

Consider the charge that neoliberal policies have increased wealth inequality in the United States. Some commentators attempt to link this increased inequality with a decline in competition'3 2 and, by implication, consumer welfare competition policy. Notwithstanding the interest such theories appeared to have garnered from highly distinguished economists and policymakers, such as Nobel Laureate Joe Stiglitz,133 one might alternatively consider whether increasing wealth inequality and the resultant social strife are far more a result of policies in other areas, such as monetary policy. 134 At the same time as Chicago School antitrust policy took root, the American economy began to undergo sustained expansions in the money supply and reductions in interest rates that, at least in theory, disproportionately reward the owners of financial assets, who are more likely to be wealthy. 135

#### Market-based mechanisms solve sustainability – lets us price-in negative externalities

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Mark Budolfson, “Arguments for Well-Regulated Capitalism, and Implications for Global Ethics, Food, Environment, Climate Change, and Beyond,” *Ethics and International Affairs*, vol. 35, no. 1, 2021, pp. 89-92, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/96F422D04E171EECDEF77312266AE9DD/S0892679421000083a.pdf/arguments-for-well-regulated-capitalism-and-implications-for-global-ethics-food-environment-climate-change-and-beyond.pdf.

Applications to Food, Environment, and Climate Change

Let us turn to a concrete example. It is often claimed that we need less capitalism, less growth, and less globalization if we are to successfully address such challenges as climate change, population growth, air and water pollution, feeding the world, ensuring sustainable development for the world’s poorest people, and other interrelated challenges at the environmental nexus.22

However, if the argument for well-regulated capitalism is sound, then these claims are wrong. Just because the aforementioned challenges may require pervasive changes throughout the economy does not mean that they require large changes to the basic structure of the economy such as a move away from capitalism.

Climate change—like many large-scale environmental harms—is the perfect example to illustrate why large environmental challenges that require pervasive changes to the economy need not require large changes to the economy’s basic structure. The key point is that in that an unregulated marketplace polluters do not pay the true cost to society of their pollution, which incentivizes too much pollution; the best solution for society in the case of climate change and many other large environmental challenges is simply to use markets to regulate the relevant pollution by putting an appropriate price on emissions (reflecting the cost to society), so that people and firms have to pay the true cost of their emissions. This could be accomplished by putting a simple tax on emissions, or by instituting a more complicated market-based system.23

In more detail, the problem of climate change arises because humans do not have to pay the cost of the harms from greenhouse gas (GHG) emissions when they engage in emitting activities. As a result of not having to pay the true cost of these activities, we make decisions that lead to too many emissions, and a worse outcome than we could achieve if we behaved differently, which would require pervasive changes throughout the economy. But according to mainstream economics, the best solution to this problem is a textbook example of well-regulated capitalism that applies the theory of externalities to achieve pervasive changes across the economy at the least cost to society: We should tax24 GHG emissions at a rate equal to the harm they inflict if emitted, because this will (to a first approximation) create the right incentives to cause all of the pervasive changes throughout every aspect of the economy in the way that best achieves the optimal level of GHG emissions for society.25 And because one ton of GHG emissions does the same harm regardless of where it is emitted on the earth, there is just a single price that we should use as a tax on all emissions regardless of where they occur.

Many economists, including Nobel laureate William Nordhaus, argue that pricing the externality in this simple way is not only necessary to solving climate change but also essentially sufficient.26 Other economists argue that investments in public goods like basic knowledge and infrastructure might also be necessary, as well as measures to address equity and justice (such as investing the revenues from a carbon tax in a progressive way, having different carbon prices in different regions that collectively lead to the same globally optimal reductions that could be achieved with a single uniform global price, or even putting additional weight on co-benefits from air pollution reductions via climate policy in places where minorities have historically been unjustly saddled with disproportionately high exposure to pollutants). These additional measures would be taken on the grounds that climate policy will be enacted in a “nonideal”/“second-best” context in which background distortions, inequity, and injustice make them necessary to achieve the best outcome.27 But these measures are all part and parcel to well-regulated capitalism.

Furthermore, getting rid of capitalism would involve harm to the world’s poorest and most vulnerable people that could exceed the harm that is at stake for the world in connection with climate change and other environmental harms. Evidence for this claim is provided by taking the quantitative magnitude of health, wellbeing, and justice gains due to capitalism, according to the argument for premise 1 above, projecting trends into the future, and comparing these gains to the quantitative magnitude of health, wellbeing, and justice losses at issue in connection with climate change and other environmental harms, as provided by leading estimates.28 Again, according to the argument for well-regulated capitalism, the essence of our situation is that humanity is better off with our current flawed forms of capitalism than we would be without capitalism; however, we are not as well off as we could be if we properly regulated the externalities that are causing environmental harms, so there is no argument in favor of the status quo. Instead, we should properly regulate externalities, and thus move toward well-regulated capitalism, which would yield the optimal trade-off for humanity between the benefits of capitalism and the costs of pollution and other ills.

Viewed through the lens of the argument for well-regulated capitalism, other environmental challenges have a similar structure, such as food-systems challenges (including feeding the world without destroying the environment), air and water pollution, ensuring sustainable development for the world’s poorest, and other interrelated challenges at the environmental nexus. These problems are more complicated than climate change because they each involve multiple externalities and multiple background distortions, where the magnitude of those is sometimes highly location dependent, and issues of equity and justice are exceedingly complex. But the basic mechanisms for the best solutions are the same according to proponents of the argument for well-regulated capitalism, and indeed the best responses all require capitalism in order to work well and avoid a cure that is worse than the disease.

As a point of optimism in connection with these often-discouraging challenges, the relationship between the wealth of a society and environmental degradation often has an inverted U shape: As society initially gets wealthier, environmental degradation increases, until a point of peak degradation, after which the environment improves as society becomes rich enough to invest more and more in environmental quality rather than in basic needs. In the richest nations of the world, the peak of degradation arguably happened in the mid- to late twentieth century, and can be seen in measures of, for example, air and water pollution.29 In some emerging economies like China, there is hope that the peak has been reached and environmental degradation will now decline as society becomes richer and richer. For other developing nations, the peak has not been reached yet. Moreover, different forms of degradation (such as industrial air pollution and agricultural water pollution) might peak at different points within a nation. Putting this together, there is reason to hope that environmental challenges will reach a peak in our lifetime, and if we can meet them with well-regulated capitalism, they will begin to progressively improve over time in line with the end of extreme poverty for the entire world. Capitalism has brought these problems to a head because it has caused the world to get richer so quickly. But according to the argument for well-regulated capitalism, this is a good problem to have, as it is a symptom of a global society that is on the cusp of growing its way out of poverty and out of widespread environmental degradation. According to this argument, we should want to grow our way out of both of these problems as quickly as possible, rather than keep both problems around indefinitely by moving away from capitalism.30

## FTC Tradeoff DA

#### Fiat solves – new authority comes with new funding authorization

Bannan is policy counsel at New America’s Open Technology Institute, focusing on platform accountability and privacy, and Gambhir, New America's Open Technology Institute, ‘21

(Christine and Raj, “Does Data Privacy Need its Own Agency?” <https://d1y8sb8igg2f8e.cloudfront.net/documents/Does_Data_Privacy_Need_its_Own_Agency.pdf>)

Proposals delegating privacy law enforcement to the FTC generally bolster an existing bureau or establish a new bureau within the agency. Senator Wyden’s Mind Your Own Business Act of 2019 would create a new 50-person Bureau of Technology within the FTC and add 125 employees to the Bureau of Consumer Protection—100 of whom would do privacy enforcement work.102 This would bring the total number of FTC employees doing privacy enforcement work up to about 190. While the Wyden bill does not provide figures for how much adding 175 new employees would cost, former FTC Chairman Joseph Simons estimated that a $50 million budget increase from Congress would enable the FTC to hire 160 new staff.103 Under this proposal, the number of employees working on privacy would more than triple. However, it would still only be about one-tenth the size of the Eshoo-Lofgren DPA proposal.

#### No link-uq—tech already a priority for resources

Marguerite Reardon, FTC Chair Lina Khan outlines antitrust priorities, September 23, 2021, <https://www.cnet.com/news/ftc-chair-lina-khan-outlines-antitrust-priorities/>

She also suggested "targeting root causes rather than looking at one-off effects" when it comes to analyzing mergers. She said it's important to assess how business models or conflicts of interest may result in antitrust harms. Among other key principles, she said the agency needs to be "forward-looking" and to act more quickly to mitigate harm. This includes paying close attention to "next-generation technologies, innovations, and nascent industries across sectors."

Khan outlined three specific policy priorities:

Addressing "rampant consolidation." Khan said it's important to focus resources and scrutiny on dominant firms, where a lack of competition makes unlawful conduct more likely. This will include revising merger guidelines in conjunction with the DOJ to deter mergers that the agency and DOJ are likely to challenge.

Going after "dominant intermediaries" or "gatekeepers." Khan wrote, "Business models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse."

#### Squo litigation model horribly costly

Chopra, Commissioner, Federal Trade Commission, and Khan, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, ‘20

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

The current approach to antitrust also makes enforcement highly costly and protracted. In 2012, the American Bar Association (ABA) published the report of a task force that sought to “study ways to control the costs of antitrust litigation and enforcement.”9 The task force, the authors explained, was “a response to concerns” about both “the costs imposed on businesses by the American system of antitrust enforcement” and “the length of time required to resolve antitrust issues both in litigation and in enforcement proceedings.”10 Out-of-control costs undermine effective antitrust enforcement by agencies and private litigants, but may advantage actors who profit from anticompetitive practices and can treat litigation as a routine cost of business.

Professor Michael Baye and Former Commissioner Joshua Wright have noted that generalist judges may be ill-equipped to independently analyze and assess evidence presented by economic experts.11 Because determining the legality of most conduct now involves complex economic analysis, courts have effectively “delegate[d] both factfinding and rulemaking to courtroom economists,” making courtroom economics “not just inevitable but often dispositive.”12 In fact, paid expert testimony now is often “the ‘whole game’ in an antitrust dispute.”13

Paid experts are a major expense. Some experts charge over $1,300 an hour, earning more than senior partners at major law firms.14 Over the last decade, expenditures on expert costs by public enforcers have ballooned.15 In a system that incentivizes firms to spend top dollar on economists who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.16

Another component of the burden is that antitrust trials are extremely slow and prolonged.17 The Supreme Court has criticized antitrust cases for involving “interminable litigation”18 and the “inevitably costly and protracted discovery phase,”19 yielding an antitrust system that is “hopelessly beyond effective judicial supervision.”20 That it can easily take a decade to bring an antitrust case to full judgment means that by the time a judge orders a remedy, market circumstances are likely to have outpaced it.21 The same 2012 ABA report suggested that lengthy, costly litigation may be contributing to reduced government-enforcement efforts over time relative to the expansion of the US economy.22

#### Shifting to regulatory model frees up resources

Chopra, Commissioner, Federal Trade Commission, and Khan, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, ‘20

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

Second, establishing rules could help relieve antitrust enforcement of steep costs and prolonged trials. Identifying ex ante what types of conduct constitute “unfair method[s] of competition” would obviate the need to establish the same exclusively through ex post, case-by-case adjudication. Targeting conduct through rulemaking, rather than adjudication, would likely lessen the burden of expert fees or protracted litigation, potentially saving significant resources on a present-value basis.47

Moreover, establishing a rule through APA rulemaking can be faster than litigating multiple cases on a similar subject matter. For taxpayers and market participants, the present value of net benefits through the promulgation of a clear rule that reduces the need for litigation is higher than pursuing multiple, protracted matters through litigation. At the same time, rulemaking is not so fast that it surprises market participants. Establishing a rule through participatory rulemaking can often be far more efficient. This is particularly important in the context of declining government enforcement relative to economic activity, as documented by the ABA.48

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## Innovation DA

#### Empirically proven to not hurt firms

Dagen 10 – Special Counsel to the Director, Bureau of Competition, Federal Trade Commission.

Richard Dagen, August 2010, “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT,” Boston University Law Review, http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

Using Section 5 to relax the reliance requirement in the standard-setting context would not create significant disincentives to participate in standard setting. The standard-setting process typically involves most of the affected parties. Thus, conduct giving rise to equitable estoppel may cost a firm nearly all of its expected return. As a result, patent holders account for this possibility whether or not the FTC steps in. The decision whether to participate in standard-setting activities should not be materially affected by Section 5 enforcement. It seems even more unlikely that ex ante incentives to engage in R&D would be materially affected by the prospect that broader reliance interests are protected by the Commission than by the patent law.238 Laches, too, has several significant drawbacks as a private remedy in the SSO context. Laches does not prevent collection of future damages: once the lawsuit is filed, damages start to accrue.239 This limitation typically would not result in consumer harm as firms can switch to competing products because the typical patent does not confer market power.240 In the standard-setting context, however, market-wide lock-in is far more likely and thus switching is not readily available. Therefore, consumer harm is much more likely. Moreover, because those implementing the standard cannot easily stop infringing when given notice, the requirement of “economic harm” will be harder to establish.241 Section 5 could incorporate laches principles and reduce consumer harm with little risk to innovation.242

#### Won’t chill procompetitive conduct

Dagen 10 – Special Counsel to the Director, Bureau of Competition, Federal Trade Commission.

Richard Dagen, August 2010, “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT,” Boston University Law Review, http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

Section 5 can play and has played a central role in gap filling and upholding the spirit of the antitrust laws. This is particularly true where the conduct at issue does not involve transactional necessities or core competitive values and where the conduct is already condemned under external norms. Under these circumstances, the FTC can craft a clear standard, and there is little risk of chilling procompetitive conduct. The Section 5 cases discussed in this article also easily fit within the limiting principles suggested in recent speeches by FTC officials as well as recent cases.298 The scope for Section 5 discussed here is not meant to set an outer boundary or universal standard for Section 5. Rather, the discussion here centers around what one might call the low-hanging fruit that the Sherman Act does not grab. Notably, since 1992, the FTC has issued numerous complaints and consent agreements based on Section 5 as a gap-filling statute. During the period between Dell and N-Data, there has been little uproar in the antitrust or business community. Some will answer that those were only consent agreements. But antitrust counseling takes into account consent agreements. And of course, Dell and N-Data themselves were consent agreements. Indeed, many fear that antitrust and other substantive law is made primarily by consent. So to denigrate the pure Section 5 actions between Dell and N-Data as consent agreements would be disingenuous. The hostility toward Section 5 is often phrased in terms of the horrible effects on innovation from vague standards.299 But Section 2 is subject to this same criticism,300 as are equitable estoppel and other patent defenses. In short, that claim can be, and likely has been, made with respect to any private or public action that could potentially diminish the incentive to innovate. In the ranking of potential harms to innovation, Section 5 should likely be relatively low. The acceptance of the post-1980s FTC consent agreements is more likely due to the fact that the underlying conduct has not involved transactional necessities or core competition components. For this same reason, these consent agreements would have stood a far better chance in the courts of appeals than the litigated cases of the 1980s. The post-1980s consent agreements are based on sound economic principles and avoid the pitfalls of prior cases. The sky did not fall, and Section 2 and Section 5 have peacefully coexisted.

#### Next three years far worse---businesses already perceive legal uncertainty.

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Amir E, “Looking Forward: Advance Preparation in a Dynamic Legal & Business Landscape,” National Law Review, https://www.natlawreview.com/article/looking-forward-advance-preparation-dynamic-legal-business-landscape

Not only is the market still reeling from supply chain and labor woes, but businesses also face uncertain legal landscapes. Gregory Neppl, a partner and antitrust specialist in Foley & Lardner’s Washington, D.C. office, addressed significant policy and regulatory changes under the Biden Administration. Neppl explained that the Administration, now staffed with more progressives than the Trump Administration, has called for vigorous antitrust enforcement by the DOJ and FTC. This heightened interest in antitrust enforcement may even result in a transition from the traditional “consumer welfare” focus of the Chicago School to the more progressive New Brandeis School, which emphasizes the importance of public welfare and environmental, social, and governance issues. Neppl expects the next three years to be full of surprises as the government’s interest in vigorous antitrust enforcement is pursued.

#### Future legislation likely.

**Reinhart 2-7** --- [Skadden, Arps, Slate, Meagher & Flom LLP](https://www.jdsupra.com/profile/skadden_arps_slate_meagher_flom_docs/)

Tara, 2-7-2022, "Biden’s Broad Mandate Has Altered the Antitrust Landscape, Making Merger Clearance Process Less Predictable," JD Supra, https://www.jdsupra.com/legalnews/biden-s-broad-mandate-has-altered-the-1446913/

Antitrust Legislation May Pass in the Upcoming Congressional Session

Many Republicans are critical of the Khan FTC’s aggressive approach, calling out the Democrats for unilaterally making significant substantive changes by amending procedures. Nevertheless, the potential for antitrust legislation to pass this session is real, because Democrats in Congress enjoy Republican support to rein in the power of Big Tech.

Numerous bills have been introduced in the House and the Senate, but the most likely to advance is the Platform Competition and Opportunity Act, with the House version introduced in June 2021 and the Senate version in November 2021. The measure would prevent technology platforms valued at more than $600 million from acquiring existing or nascent competitors worth more than $50 million. The prohibition would also apply to acquirers with more than 50,000 monthly users, or that are considered to be critical trading partners, defined as owning or controlling an online platform or having the ability to prevent a business user from accessing its own customers or tools it needs to serve its customers.

#### Regs drive clarity and predictability

Chopra, Commissioner, Federal Trade Commission, and Khan, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, ‘20

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

First, rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable.43 The APA requires agencies engaging in rulemaking to provide the public with adequate notice of a proposed rule. The notice must include the substance of the rule, the legal authority under which the agency has proposed the rule, and the date the rule will come into effect.44 An agency must publish the final rule in the Federal Register at least thirty days before the rule becomes effective.45 These procedural requirements promote clear rules and provide clear notice. As the Supreme Court has stated, a “fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”46 Clear rules also help deliver consistent enforcement and predictable results. Reducing ambiguity about what the law is will enable market participants to channel their resources and behavior more productively and will allow market entrants and entrepreneurs to compete on more of a level playing field.

#### We’ll beat China now unless we prop up big tech instead of ensuring market dynamism

Carl Benedikt Frey, is Oxford Martin Citi Fellow and Future of Work Director at the Oxford Martin School at Oxford University and the author of The Technology Trap: Capital, Labor, and Power in the Age of Automation, and Michael Osborne is Professor of Machine Learning at the University of Oxford, a Fellow at the Oxford Martin School, and Co-Founder of Mind Foundry, 2020, China Won’t Win the Race for AI Dominance, Foreign Affairs

DYNAMISM VERSUS STABILITY

Artificial intelligence is not yet a mature technology, and continued progress will require radical innovation on multiple fronts. Breakthroughs will happen the way they usually do: through serendipity and recombination, as inventors and entrepreneurs interact and exchange ideas. China’s strong state and collectivist structure have significant advantages in swiftly building infrastructure or mounting a coherent response to a pandemic. But radical innovation is a different matter, and historically, the most innovative societies have always been those that allowed people to pursue controversial ideas. As the eminent economic historian Joel Mokyr has argued, that is why the Industrial Revolution happened in the West rather than in China in the first place.

China’s efforts to restrict the flow of ideas on the Internet and elsewhere are likely to hold back innovation. Since September 2019, China and Huawei have been proposing radical changes to the Internet infrastructure that underpins networks worldwide. If implemented, the changes would likely splinter the Internet and further reduce Chinese citizens’ exposure to new ideas from outside the country. The initiative underlines Beijing’s preference for maintaining the political status quo, even if that means slower innovation and less dynamism.

That said, the United States is not destined to win the race for supremacy in artificial intelligence. China could still change its trajectory, and new immigration restrictions imposed by the administration of U.S. President Donald Trump could stifle innovation in the United States. Research shows that immigration has been a key driver of American innovation over the past 130 years. The Trump administration’s alleged plans to restrict H-1B visas is particularly worrying in this regard. But while Trump might hold on to power for another term, Xi Jinping could rule indefinitely.

Under Xi, the Chinese Communist Party has stepped up efforts to penetrate private-sector businesses and consolidate political power. A surveillance state with a censored Internet, together with a social credit system that promotes conformity and obedience, seems unlikely to foster creativity: innovation is about breaking the rules, not abiding by them. Indeed, a recent study published in the Proceedings of the National Academy of Sciences found that positive attitudes toward conformism and obedience predict less disruptive innovation.

Japan failed to overtake the United States, even without heavy restrictions on the flow of ideas and an authoritarian regime that promotes obedience. Hence, the United States has critical advantages that should enable it to remain the world’s leader in artificial intelligence. If it cedes that position to China, the reason will likely be that Washington has tried to emulate the Chinese model by propping up national champions rather than embracing the competition and dynamism that have made the United States the world’s technological front-runner for more than a century.

#### They’re a net NEGATIVE, even assuming ex-ante innovation.

**Cunningham 20** --- Professor at London Business School.

Colleen, 4-19-2020, "Killer Acquisitions," Journal of Political Economy, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3241707

Because killer acquisitions may motivate ex-ante innovation, the overall effect of such acquisitions on social welfare remains unclear. However, we think it unlikely that this acquisition channel, which generates significant ex-post inefficiencies resulting from the protection of market power, is the most effective way to motivate ex-ante innovation. In particular, this is because our analysis emphasizes the positive reinforcement loop of competition: Because killer acquisitions are less likely to occur when incumbents face significant existing competition, raising the level of existing competition not only has the well-known immediate benefits for social welfare, but it also deters incumbents from engaging in killer acquisitions of future competitors, thus increasing future competition.

#### Nascent acquisition distorts competition, hinders innovation

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

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

All of the major platforms started out in someone’s garage. They were all tiny companies with smart and resourceful owners, a good idea, intellectual-property rights, and significant but undeveloped growth potential. And yet, an all-too common phenomenon today is that one of the dominant platforms acquires a young startup before it has a chance to emerge as a viable competitor.391 Indeed, many startup entrepreneurs today are not motivated nearly as much by the prospect of developing a new business as by the opportunity to sell out to a major platform at a high price, even if their business will be shut down as a result.392 Capital markets reflect this phenomenon. It is easier to get capital for a new firm that is highly likely to be acquired than for a firm with a technology that is promising on its own terms.393

This situation has produced an unhealthy equilibrium. New entry is important in any market, particularly one in which technology moves fast. Something must be done to make it more likely that startups will develop into viable independent competitors rather than disappear into one of the large digital platforms. One possibility is the antitrust merger laws. However, given that the acquired firms are often very small and do not sell competing products, this may require new legislation.

#### The cements sustained loss of business dynamism—antitrust key

Wessel, senior fellow in economic studies at the Brookings Institution and director of the Hutchins Center on Fiscal and Monetary Policy, ‘18

(David, “Is Lack of Competition Strangling the U.S. Economy?” March-April, https://hbr.org/2018/03/is-lack-of-competition-strangling-the-u-s-economy)

High and rising profits in an increasingly concentrated market are typically a sign of lessening competition and increased market power by dominant firms. Today, profits are up in industries in which a shrinking number of players have a growing share of the business. Recent research suggests that the average markup — the difference between the prices firms charge and products’ marginal cost — is rising in American business, and rising fastest for the most profitable firms. Using data for all publicly traded U.S. firms from 1950 to 2014, Jan De Loecker of Princeton and Jan Eeckhout of University College London found that markups rose from about 18% in 1980 to 67% in 2014. That’s good for shareholders, of course, but it’s not so good for consumers or the overall economy.

Investment.

Another signal of declining competitive pressure is firms’ ability to increase profits without much investment; in competitive markets, companies are driven to invest more to stay ahead of their rivals. Business investment across the economy has perked up lately, but it is not as robust as one might expect given the surge in profits, the extraordinarily low-cost of equity and debt, and the amount of cash on corporate balance sheets. Measured against GDP, corporate after-tax profits are almost double what they were 25 years ago — and higher than at any time since World War II — yet business investment as a share of GDP is up only 13% over the same period. “Investment is weak relative to profitability and valuation,” NYU’s Thomas Philippon and German Gutierrez concluded in a 2017 analysis built on the historical relationship between investment and the ratio of the market value of a company’s debt and equity to the replacement cost of its assets.

Business dynamism.

In a healthy economy, companies continually are born, fail, expand, and contract, while new jobs are created and others are destroyed. A slowdown in business dynamism means that entrenched firms have less to fear from upstarts; as a result, the economy suffers as innovation slows and job growth stalls. In the U.S., the rate of birth of new firms (as a percentage of all firms) fell from above 13% in the late 1980s to around 8% in 2015, according to the most recent official data. The number of jobs created by businesses less than a year old dropped from a peak of 4.7 million in the late 1990s to 3 million in 2015.

John Haltiwanger, a University of Maryland economist, notes that the decline in dynamism in the U.S. originated in the retail sector in the 1980s and 1990s. But even as the number of retailers starting up and dying off plunged, the industry became more productive. This was dubbed “the Walmart effect,” because of the impact of the giant retailer not only on the efficiency of its industry but on the entire U.S. economy. Lately, though, declining dynamism has spread to the tech sector. That’s more worrisome, Haltiwanger says, because it portends slower productivity growth.

#### Big tech has no *incentive* to innovate—only new firms solve

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

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

The dominant tech companies certainly have the digital assets, capital, and other resources necessary to push innovation forward. But what innovation? The companies’ fiduciary responsibility is to their shareholders, not something broader. In a March 2020 speech, the U.S. deputy attorney general cited economic research that “an incumbent’s incentive to innovate is lessened because the resulting innovation replaces existing profitable sales … innovations are more likely to come not from a monopolist, but from an outsider without existing sales to replace.”53

The experience with the 20th century's dominant tech company, AT&T, graphically illustrates this point. Innovation under corporate control is innovation for corporate benefit. This is not evil, simply an exercise in fiduciary reality. To have America’s competition with China controlled by limited fiduciary interests, however, is not necessarily in the overall national interest. Beyond the risk of the dominant companies making innovation decisions based on self-interest is the nature of the global economy itself. The argument that Big Tech is the alternative to China only works if these same companies are not in alliances with China. As the dominant companies increasingly view themselves as international players, the pressure builds for them to have a “China strategy” that, intentionally or not, accrues to the benefit of China.54 Google has announced an AI center in China.55 Amazon is the second largest cloud service provider in China, after Alibaba.56 Apple, of course, famously builds its hardware in China. These are not untoward acts; however, when the United States builds its plan for competing with China around companies doing business in China, such reality becomes relevant. “Big companies are what are investing in technologies like AI the most,” Google CEO Sundar Pichai told CNN. “As a company we now invest sometimes thinking 5 to 10 years ahead without necessarily worrying about short term profits,” he said. Such investments are, indeed, important, but “thinking 5 to 10 years ahead” is not unique to large companies; it is what innovators and venture capitalists do as a matter of course.57 The challenge for those innovators and their investors is that while capital can buy creativity, intelligence, and computing power, they are disadvantaged when the data they need is being hoarded by the dominant companies.

Big Tech’s bottleneck on the data necessary for AI is not in the national interest. The dominant companies cite their data hoards as a critical asset for the United States and a reason why government policy should be hands-off. If that data is a critical national asset, however, why should only a handful of companies be allowed to control that asset to the detriment of smaller, innovative companies?

#### Our comparative advantage is disruptive innovation not bigness

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The centralized control of China creates an antientrepreneurial force. While the Chinese culture has historically been quite entrepreneurial, the Chinese government’s current control of the population works against that tradition. Because hierarchical operations have little room for creativity, a popular Chinese expression is: “The more you try, the more you fail.” The “more you try” to think creatively outside the hierarchy-dictated orthodoxy, the greater the personal risks, a China-based digital consultant explained to me. The attitude of Thomas Edison’s “I have not failed 10,000 times, I’ve successfully found 10,000 ways that won’t work” does not find a home in the top-down environment of China.36

We need to take advantage of the American entrepreneurial spirit. The freedom to try and fail and to try again is as American as baseball. The beacon of opportunity this represents to the world is a national asset. But we need to have the digital tools to take advantage of those opportunities.

If America is going to out-innovate China, then American innovators need access to the essential capital asset of the 21st century: data. The large digital companies are wildly powerful and profitable not only because they have siphoned great amounts of personal data from consumers, but also because they then assume the role of gatekeeper to block access to that data. “Even well-intentioned gatekeepers slow innovation,” Amazon founder and CEO Jeff Bezos wrote in his 2011 letter to shareholders.37 He was describing the benefits of openness in the fledgling Amazon Web Services, yet it is an important message if America is to out-innovate China. Competition with China is advanced by picking the lock of gatekeepers and opening the flow of digital assets to competition-driven innovation in the U.S.

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