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### 1AC – Russia Adv

#### A negotiated settlement on Ukraine will eventually be hammered out – long term sanctions are key to make it sustainable.

**Lieven 3-9** --- Senior research fellow on Russia and Europe at the Quincy Institute for Responsible Statecraft.

Anatol, 3-9-2022, "How to get to a place of peace for Ukraine," Responsible Statecraft, https://responsiblestatecraft.org/2022/03/03/how-to-get-to-a-place-of-peace-for-ukraine/

The course of the war so far has already clarified certain things, in a way that helps to lay the basis for peace. On the one hand, the courage and unity of Ukrainian resistance has already won a great victory for Ukraine. If the Kremlin’s plan was to impose on Ukraine a Russian puppet government, then — assuming that the Kremlin is still capable of recognizing basic reality — this plan has already failed.

The Ukrainians have in fact achieved what the Finns achieved by their heroic resistance against Soviet invasion. The Finns convinced Stalin that it would be far too difficult to impose a Communist government on Finland. The Ukrainians have convinced sensible members of the Russian establishment — and hopefully, Putin himself — that Russia cannot dominate the whole of Ukraine. The fierce resistance of the Ukrainians should also convince Russia of the utter folly of breaking an agreement and attacking Ukraine again.

For it is now obvious that any such pro-Russian authorities imposed by Moscow in Ukraine would lack all support and legitimacy, and could never maintain any kind of stable rule. To keep them in place would require the permanent presence of Russian forces, permanent Russian casualties and permanent ferocious repression. In short, a Russian forever war. Moreover, such Russian hopes depended on being able to seize Ukrainian cities easily, with few civilian losses. If Russia has to storm these cities amidst huge destruction and loss of life, how can it possibly then appeal for the support of their populations?

On the other hand, while the West has quite rightly imposed very harsh economic sanctions on Russia in response to its criminal invasion, the United States, NATO and every NATO government have stated officially and repeatedly that they will never send their armed forces to defend Ukraine. In practice, therefore, neither Ukraine nor the West would sacrifice anything concrete by a Ukrainian treaty of neutrality, and it would be utterly wrong to ask Ukrainians to die for an empty fiction.

On the ground, the Russian army has quickly failed to achieve its main objectives in the north and east, necessitating fierce, costly and horribly destructive battles to capture Ukrainian cities. Russian forces appear to be inadequate in terms of numbers for the tasks they have been set. The Ukrainian capital, Kiev, has three million people — a huge military challenge if it is strongly defended.

The Russians are putting themselves in a position to attack Kiev, but have not yet done so. This raises the possibility that for the moment at least Moscow’s intention is to put pressure on the Ukrainian government, rather than destroy it. All of these factors create a strong incentive for the Russian government to agree to a compromise peace, if this allows them to withdraw with the appearance of partial success.

However, in the south the Russian army based in Crimea has advanced much further. It seems to have linked up by land with the Donbas, and to be making progress towards capturing the whole of Ukraine’s Black Sea coast. The Russians also seem to be driving the Ukrainian forces from the whole of the provinces of Donetsk and Lugansk (up to now, the separatist republics have only occupied part of those provinces). If Russian forces establish themselves strongly in these areas it will be exceptionally difficult for Ukraine ever to drive them out again by military means.

So even if the regime of President Putin eventually falls as a result of its monstrous and criminal gamble in Ukraine, it will still be necessary to negotiate the terms of Russian withdrawal with whatever Russia government succeeds to power, and that government will insist on certain compromises. It is very unlikely indeed that Russia will ever simply withdraw unconditionally from all the Ukrainian territory it has occupied since 2014, in the way that both the Soviet Union and the United States withdrew from Afghanistan. Russia’s stake in Ukraine and the Russian minority in parts of Ukraine is far too deep for that, and will be shared to a greater or lesser extent by all Russian governments (as it was shared by the Yeltsin government of the 1990s).

The basic terms of any peace agreement could be the following. Russian forces should withdraw completely from all the areas of Ukraine that they have occupied since the invasion began. Ukraine for its part could to sign a treaty of neutrality loosely modeled on the Finnish-Soviet Treaty of 1948 and the treaty by which Western and Soviet forces withdrew from Austria in 1954. These treaties ensured the internal sovereignty of these countries. It should be noted that while neither country was a member of NATO (or, during the cold war, the EU), both were recognized as fully part of the West due to their success as market democracies, which their neutral status did nothing to impede. This would allow Ukraine to achieve its key objectives as well as the safety and prosperity of its people. A compromise along these lines would be a success for Ukraine.

For Russia, the exclusion of possible future NATO membership remains crucial to any peace agreement. As William Burns, present Director of the CIA and U.S. ambassador to Russia, memoed Secretary of State Condoleezza Rice from Moscow in 2008:

“Ukrainian entry into NATO is the brightest of all redlines for the Russian elite (not just Putin). In more than two and a half years of conversations with key Russian players, from knuckle draggers in the dark recesses of the Kremlin to Putin’s sharpest liberal critics, I have yet to find anyone who view Ukraine in NATO as anything other than a direct challenge to Russian interests…” (William J. Burns, [The Back Channel](https://www.amazon.com/s?k=the+back+channel+william+burns&i=stripbooks&crid=2BRJQODBUK1BX&sprefix=Burns+back+%2Cstripbooks%2C127&ref=nb_sb_ss_ts-doa-p_1_11): American Diplomacy in a Disordered World)

As part of this treaty, Russia would have to guarantee the sovereignty and territorial integrity of Ukraine. However, even liberal members of the Russian establishment insist that as a matter of realism, it must be recognized that Russia cannot hand back Crimea (re-annexed by Russia in 2014) and the Donbas separatist republics (recognized as independent by Moscow on the eve of war) to Ukraine. At best, Russia might agree to reopen the Minsk II negotiations on a confederal relationship between these republics and Ukraine. In the opinion of Alexey Gromyko, Director of the Institute of Europe at the Russian Academy of Sciences:

“Russian troops will be withdrawn as soon as a political settlement reached according to the basic Russian conditions: the recognition of Crimea as a part of Russia (otherwise the security threat for Crimea will be perennial as well as a threat to the water supply), the recognition of the two Donbas republics in their full administrative borders (or some other kind of de facto settlement without the official recognition of the republics by Kiev), limitations on the Ukrainian military (primarily no strike systems, which should be defined), a status of military neutrality akin to the Austrian precedent under legally binding international guarantees…For the West to touch the issue of Russian sovereignty over Crimea is a dead end. If such a linkage is established that would show that either the US does not understand not Putin’s but Russian attitudes to the peninsular and the sentiments of people who live there, or that it does it on purpose to leave the new sanctions for long with unpredictable consequences ”

In other words, to insist on the return of Crimea to Ukraine as part of any peace settlement would very likely only prolong the war and make peace permanently impossible, under any future Russian government. However, as [suggested](https://www.politico.com/news/magazine/2022/01/10/how-to-get-what-we-want-from-putin-526859)by Thomas Graham, Senior Director for Russia at the National Security Council from 2004 to 2007, any change in the international status of these and other disputed territories in Europe must be confirmed democratically by local referenda under international supervision. The West can also demand separately that as part of the price of Western support for an agreement Russia should recognize the independence of Kosovo and allow the United Nations to do so.

The West should incentivize Russia to agree to such a treaty and withdraw its forces by promising that if Moscow does this, we will lift all the sanctions imposed on Russia. These sanctions have been passed in retaliation for the Russian invasion, not to change the regime in Moscow (however much we may hope that the Russian people themselves may do this).

To pursue the agenda of regime change at the cost of innumerable Ukrainian lives would be deeply immoral, and would recall some of the worst aspects of U.S. behavior during the cold war. As for Russia, it is likely to stick to the terms of such a peace agreement because it is in its interest to do so — and because the West must state categorically that any major violation will bring the automatic re-introduction of full economic sanctions against Russia.

#### BUT, stablecoins will upend global finance – US institutions need to stay in the lead.

**Catalini & Massari 21** --- \*Chief Economist of the Diem Association, and the Theodore T. Miller Professor at the MIT Sloan School of Management.\*\*Partner at DavisPolk, Global Advisory Board of the Women in Law Empowerment Forum and has been a visiting lecturer at Berkeley Law School since 2017.

Christian & Jai, 8-10-2021, "Stablecoins and the Future of Money," Harvard Business Review, https://hbr.org/2021/08/stablecoins-and-the-future-of-money

Last week, U.S. Securities and Exchange Commission Chair Gary Gensler made [a strong statement](https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03): It’s time to regulate cryptocurrency markets. He is not the only regulator who believes this. Jerome Powell, chair of the Federal Reserve, issued an [urgent call](https://www.reuters.com/business/feds-powell-says-stablecoins-need-appropriate-regulatory-framework-2021-07-14/) for regulation of stablecoins — cryptocurrencies that are pegged to a reference asset such as the U.S. dollar — and Federal Reserve Governor Lael Brainard signaled that the case for the Federal Reserve [exploring a central bank digital currency](https://www.federalreserve.gov/newsevents/speech/brainard20210524a.htm) (CBDC) in response to stablecoins seems to be getting stronger.

Regulators typically only pay this level of attention to systemically important segments of the financial system, such as banks and money market funds. These statements add to a growing body of evidence that unlike cryptocurrencies like Bitcoin and Ethereum — which widely fluctuate in value — stablecoins have the potential to play an important (if yet to be defined) role in the future of global finance. They could even become a backbone for payments and financial services.

To state the obvious, this means that major changes might be afoot for central banks, regulators, and the financial sector. These changes could bring a host of benefits, but also new and very real risks.

To economists, the benefits of stablecoins include lower-cost, safe, real-time, and more competitive payments compared to what consumers and businesses experience today. They could rapidly make it cheaper for businesses to accept payments and easier for governments to run conditional cash transfer programs (including sending stimulus money). They could connect unbanked or underbanked segments of the population to the financial system. But without robust legal and economic frameworks, there’s a real risk stablecoins would be anything but stable. They could [collapse](https://mitpress.mit.edu/books/exchange-rate-regimes-modern-era) like an [unsound currency board,](https://mitpress.mit.edu/books/exchange-rate-regimes-modern-era) “break the buck” like money market funds in 2008, or spiral into [worthlessness](https://www.bloomberg.com/opinion/articles/2021-06-17/titanium-got-crushed). They could replicate the turmoil of the [“wildcat” banks](https://www.federalreserve.gov/newsevents/speech/brainard20210524a.htm) of the 19th century.

While the pros and cons of stablecoins may be debatable, their rise isn’t. More than [$113 billion](https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03) in coins have already been issued. The question is what should be done about them — and who should be responsible for doing it. Responses range from arguing that [the current system is fine](https://www.project-syndicate.org/commentary/stablecoins-pose-threats-to-financial-markets-by-barry-eichengreen-2021-07), to accelerating [research](https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210714~d99198ea23.en.html) into CBDCs, to emphasizing that stablecoins may be a natural evolution of the [combination of public and private money](https://www.federalreserve.gov/newsevents/speech/quarles20210628a.htm) that we have relied on for centuries. While it is hard to defend a system where 15% of U.S. adults in the bottom 40% of the income distribution are unbanked and where low-income account holders — particularly Black and Hispanic customers — pay more than $12 a month for [basic access to the financial system](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3893937), it is also clear that new technology can bring new risks.

Making major changes to how money works is complex, but governments do not have to tackle this all at once. In fact, such an approach is unlikely to succeed. The public sector, both in the United States and elsewhere in the world, has not been particularly successful in deploying digital services. (China is the exception here: it has already cleared over [$5.3 billion in transactions](https://www.bloomberg.com/news/articles/2021-07-16/china-s-digital-yuan-trial-reaches-5-3-billion-in-transactions) through its digital renminbi.) But there are also risks with private sector involvement, especially as stablecoins move beyond cryptocurrency trading and [decentralized finance](https://www.theregreview.org/2021/05/10/massari-catalini-defi-disintermediation-regulatory-path-ahead/) (DeFi). Any solution would need to address [consumer protection, financial stability, and financial crime](https://home.treasury.gov/news/press-releases/sm1223) prevention. These are the same concerns we always face in the provision of money.

So how should central banks and regulators respond? There are three simple ways we could “upgrade” money that play to the strength of both the public and private sector. They’re different but not mutually exclusive, and each presents significant opportunities for existing financial institutions, as well as fintech and crypto entrants. These opportunities will continue to drive partnerships between established and new players, but also will result in more fierce competition.

Upgrading Money

Modern money is a combination of public and private money. Public money includes central banks-issued cash and digital claims against central banks. Private money includes deposit claims against commercial banks. While the public sector protects the stability of money, [up to 95% of money in developed economies is private](https://www.bis.org/review/r210702j.htm).

Stablecoins are a form of private money. This is not a new concept — the idea of separating monetary and credit functions traces back [80 years](https://faculty.chicagobooth.edu/amir.sufi/research/MonetaryReform_1939.pdf). By lowering the [cost of digital verification](https://cacm.acm.org/magazines/2020/7/245703-some-simple-economics-of-the-blockchain/fulltext), blockchain technology can expand the role of both the public and private sector in the provision of money. While the public sector could attempt to connect with consumers and businesses directly, the private sector is likely to be more efficient in meeting the public’s needs and increasing choice.

Succeeding in this transformation will require the right balance between the public and private sectors. Countries that overemphasize the public approach will likely end up falling short in speed to market, competition, and innovation. They will also be unable to nurture the fintech players of the future. The history of the Internet is instructive — countries that harnessed the technology’s [“powerful commercial engine”](https://press.princeton.edu/books/hardcover/9780691167367/how-the-internet-became-commercial) came out ahead — and the history of financial markets is too: Countries without robust regulatory frameworks may see under-reserved “[wildcat stablecoins](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3888752)” and a race to the bottom on consumer protection.

Consistent with the history of modern money, there is high option value in allowing for [experimentation between competing approaches](https://avc.com/2021/07/stablecoins-vs-cbdcs/). Public and private experiments are strong complements here, not substitutes. Technology-neutral regulation that follows a [“same risks, same rules”](https://www.finma.ch/en/news/2019/09/20190911-mm-stable-coins/) approach can lift quality standards and encourage competition between safe solutions.

Different solutions will present different challenges in terms of how they may accelerate the unbundling of payments, credit, and financial services. While such unbundling is eventually inevitable, we’re already starting to see how different approaches might play out. By deploying the digital renminbi, China is the first country to make a bold statement about the future of global payments and the type of data the government should have access to. It is now on other countries, particularly the United States in its role as keeper of the world’s reserve currency, to develop their own thesis of what that future should look like, and what role they play.

#### Absent US lead, that shift will render sanctions ineffective.

**Berman et. al 19** --- The Center for a New American Security (CNAS) launched its Task Force on the Future of U.S. Sanctions, consisting of former senior U.S. officials, corporate representatives, and academic and nonprofit experts.

Paula Dobriansky (Co-Chair), Sue Eckert, Kimberly Ann Elliot, David Goldwyn, Peter Harrell (Principal Co-Author), Theodore Kassinger, George Lopez, Richard Nephew, Stephen Rademaker, Frederick Reynolds, Elizabeth Rosenberg (Principal Co-Author), Daleep Singh, Julianne Smith, Adam Szubin (Co-Chair), Juan Zarate, and Rachel Ziemba, “Maintaining America’s Coercive Economic Strength,” CNAS, https://www.jstor.org/stable/pdf/resrep20420.pdf?refreqid=excelsior%3Aa8ea9f57659f04e7ae5ac2a87a7f4c27&ab\_segments=&origin=

Foreign entities and individuals have long sought to evade American sanctions by keeping transactions outside of U.S. jurisdiction and conducting transactions through currencies other than the dollar. Foreign political leaders have complained about the U.S. dollar’s dominance since its early days as the unrivaled global currency. It was in the 1960s that then-French Finance Minister Valéry Giscard d’Estaing coined the phrase “exorbitant privilege” while French President Charles de Gaulle complained about dollar dominance and withdrew France’s U.S. dollar reserves in gold and repatriated them to France. Despite these periodic complaints, however, the dollar remains dominant by most measures: it accounts for roughly 60 percent of global sovereign reserves, approximately 40 percent of crossborder payments, and likely over half of total global debt.

In addition to dollar dominance, U.S. financial institutions and the U.S. branches of foreign financial institutions play an outsize role in the global financial system. As a result, foreign banks are generally loath to risk their access to the U.S. financial system, even if only a small share of their business is denominated in dollars or directly touches the United States.

The twin dominance of the dollar and the U.S. financial system reflects the numerous advantages the U.S. dollar and financial system offer companies around the world that engage in global trade and finance. These include liquidity, stability, convertibility, and ease of use. However, the last several years have seen a substantial increase in foreign government initiatives to develop payment channels and other financial networks that do not touch the United States. Russia, for example, has established a financial messaging system that it bills as an alternative to the Belgium-based, globally dominant payment messaging system Society for Worldwide Interbank Financial Telecommunication (SWIFT), seeking participation by non-Russian companies in its new payment system. China is also investing in establishing cross-border payments systems and in increasing the role of the renminbi in international trade. In one example, China launched a renminbi-denominated crude contract in 2017 to broaden use of its currency for this crucial economic input. The European Union has also announced the development of a special purpose vehicle (SPV) to allow payments related to trade with Iran despite U.S. sanctions.

All of these initiatives will face substantial challenges in achieving scale, primarily because at present they offer inferior alternatives to a broadly accepted and stable financial architecture and there is no overwhelming economic demand (as opposed to political demand) for their development. The renminbi has been the currency of only about 2 percent of total global trade in recent years, despite China’s stated interest in internationalizing the currency for certain purposes. The European Union is finding that few, if any, large European companies want to use its SPV if doing so will expose them to U.S. sanctions. Where small European companies do manage to maintain limited economic activity with Iran, they already have banking relationships or netting arrangements and have no meaningful incentive to switch to the SPV.

But despite the challenges these efforts face, U.S. policymakers should monitor the progress of such financial initiatives and should not underestimate the potential risks, particularly over the longer term. China’s rapid expansion of its Belt and Road Initiative and its recent move toward paying for some oil imports in renminbi could help the country accelerate international adoption of its currency. Sustained political and economic investments by European states and other governments in developing alternative payment channels or regional currency trading blocks that do not depend on the dollar may succeed in the long term. In a world of secondary sanctions, the real question is whether third-country companies and banks, in India for example, can divorce themselves from the dollar and dependence on the U.S. financial system so that they will be inclined to participate in these alternatives—and many will be reluctant to do so. But ultimately, alternatives to the dollar or U.S.- dominated cross-border payments system do not need to displace the dollar to begin undermining U.S. coercive economic leverage. Rather, they need only to reach a significant enough scale that smaller and mid-size economies that tend to be targets of U.S. sanctions, such as Iran and North Korea, can conduct sufficient trade using alternatives to blunt the impact of such sanctions.

Finally, rapidly moving technological changes are likely to affect the strength and utility of U.S. sanctions in the coming years.

Several technological developments have the potential to enhance sanctions enforcement efforts. For example, the rapid expansion of publicly available satellite imaging capabilities over the past five years has already facilitated improved tracking of Iranian oil shipments and detection of illicit North Korean imports of oil and exports of coal and other natural resources regulated by U.N. sanctions. Additionally, banks are able to use new software to better integrate financial data and public, non-financial data relevant to customers or transaction patters. New, sophisticated analytic tools, such as artificial intelligence and machine learning, are beginning to make it easier for banks and other large companies to identify and stop suspicious financial patterns linked to money laundering and sanctions evasion.

These analytic tools are also being deployed to create greater publicly available information about the front companies that sanctioned actors use and to improve reporting of types of evasion that both government enforcement officials and private sector companies should watch. The nonprofit research group Center for Advanced Defense Studies (C4ADS), for example, has applied analytic tools to scour public corporate records databases and integrate them with other sources of public information to identify and publish reports on North Korean sanctions evasion techniques as well as networks that have helped sanctioned entities continue to do business. Further advances in technology will strengthen these analytical tools, particularly if government officials are able to break down current barriers to information sharing by the private sector, among both banks inside the United States and those in the United States and foreign jurisdictions.

Other technological changes, however, have the potential to facilitate sanctions evasion. Some of the potential evasion techniques are essentially modern-day versions of tried-and-true criminal tactics. North Korea has long engaged in counterfeiting, drug running, and other criminal activities as a way of raising revenue for its dictatorial regime and it has smuggled bulk cash to evade sanctions. Today, North Korea is engaging in cyberattacks to steal cryptocurrencies as well as traditional fiat currencies. It is also using cryptocurrencies to evade sanctions. The uneven nature and sometimes very loose regulation of cryptocurrencies will likely continue to make them attractive to sanctioned actors. For now, however, there is a limit to the scale of their use by sanctions evaders. The volatility of most cryptocurrencies and the challenge and expense involved in anonymously converting them into hard assets or goods may limit the overall scale of cryptocurrency utility in sanctions evasion absent a dramatic expansion in their overall use.

Over the longer term, however, the bigger risk may be technological changes that alter the global financial architecture in ways that have more systemic impacts on U.S. sanctions. For example, over the last several decades the United States has derived significant coercive economic leverage from the primary role that U.S. financial institutions play in clearing global financial transactions. As recent criminal indictments of North Korean entities trying to access the U.S. financial system have shown, it is difficult to engage in trade—even trade that does not involve a U.S. party or U.S. origin goods— without touching the U.S. financial system. Should blockchain-based clearing mechanisms or other new technologies emerge at a scale that can allow transactions to avoid touching U.S. institutions or currency, the United States may find that unilateral financial sanctions lose some of their bite. As a consequence, U.S. sanctions policymakers have a strong interest in ensuring that the United States and U.S. companies lead the development of such new technologies as a way of retaining leverage over the global financial system even if traditional dollar clearing becomes less dominant.

#### *Amex* undermined enforcement against nascent acquisitions

Salop, Professor of Economics & Law, Georgetown University Law Center and Senior Consultant, Charles River Associates, ‘21

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

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

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

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

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

#### Fintech’s disruptive startups have been squashed by large financial institutions, undermining transformative innovation.

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.

Rory Van, 2018, "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021

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

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

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

B. Private Sector Institutional Dynamics

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

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

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

Ii. The Competition Shortcomings

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

A. Entry Barriers

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

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

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

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

Loo 18 – Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project.

Rory Van, 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>

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.

#### New trends confirm fintech innovation is structurally declining.

**Goodier 2-21** --- Analyst for Private Banker International.

Michael, 2-21-2022, "Fintech innovation among private banking industry companies has dropped off in the last year," Private Banker International, https://www.privatebankerinternational.com/dashboards/fintech-innovation-private-banking/

Research and innovation in fintech in the private banking sector has declined in the last year.

The most recent figures show that the number of fintech related patent applications in the industry stood at 56 in the three months ending December – down from 589 over the same period in 2020.

Figures for patent grants related to fintech followed a similar pattern to filings – shrinking from 173 in the three months ending December 2020 to 80 in 2021.

Chart, line chart

Description automatically generated

The figures are compiled by GlobalData, who track patent filings and grants from official offices around the world. Using textual analysis, as well as official patent classifications, these patents are grouped into key thematic areas, and linked to key companies across various industries.

Fintech innovation in private banking is one of the key areas tracked by GlobalData. It has been identified as being a key disruptive force facing companies in the coming years, and is one of the areas that companies investing resources in now are expected to reap rewards from.

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

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

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

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

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

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

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

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

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

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

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

#### Amex decision itself is key – creates insurmountable barriers to FinTech innovation through steering.

**Klein 18** --- Senior fellow in Economic Studies at the Brookings Institution, focused on financial technology and regulation; payments; macroeconomics; and infrastructure finance and policy. Prior to joining Brookings in 2016, he directed the Bipartisan Policy Center’s Financial Regulatory Reform Initiative.

Aaron, 6-25-2018, "Why the Supreme Court’s decision in Ohio v. AmEx will fatten the wealthy’s wallet (at the expense of the middle class)," Brookings, https://www.brookings.edu/research/ohio-v-amex/

At issue before the court was whether or not the merchant could charge customers different prices depending on how they choose to pay. American Express has written into merchant agreements prohibitions against charging customers who use AmEx more, even though it costs merchants more to process AmEx cards. Merchants can choose not to accept AmEx, and many do, but for those that choose to take AmEx— requiring merchants to charge the same price means that customers who use cheaper forms of payment are in effect subsidizing AmEx card holders. While it is only a few percentage points of each transaction, this subsidy adds up.

Fees charged to merchants can be more profitable to credit card companies and banks than interest payments on the card itself. American Express reported nearly [$5 billion in profits](https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/robertharrow/2016/02/11/whos-paying-for-your-credit-card-rewards/&refURL=&referrer=#3a91bfa1a444) on these interchange fees in one quarter alone. That same quarter AmEx reported just under $2 billion in earnings on interest payments by card holders. People who pay their credit card bill on time can be extremely profitable customers, as long as they charge a lot.

People who pay their credit card bill on time can be extremely profitable customers, as long as they charge a lot.

Here is where the reverse Robin Hood kicks in. Credit card companies share some of this bounty with you: rewards. Rewards come in all flavors: frequent flier miles, hotel points, and cash back. The competition for rewards has become fierce. Some companies now offer ‘first opportunity to purchase’ for select concerts, and ‘unique private experiences’ that are not even for sale, such as a [private tennis lesson from Andre Agassi](https://www.realclearinvestigations.com/articles/2018/05/14/how_everybody_pays_for_credit_card_high-flyers.html?mobile_redirect=false).

Take a wealthy family that charges $80,000 a year in credit cards, earning 1.5 percent cash back. That comes out to a nice $1,200 check, which is not subject to federal or state income tax since it is considered a rebate and not income. For this family that is probably equal to a $2,000 a year raise in their pre-tax earnings. That is equal to almost two weeks of total earnings for the median American family who earns $60,000 a year (which would be $1,150 per week). That’s right, a wealthy family may earn in credit card cash rewards the same value as a two-week paid vacation for the average American household.

Lower income households systematically do not use or have access to elite payment mechanisms. Payment usage is inversely related to perks. The poorest tend to use cash, followed by prepaid cards, and then debit cards. Even if they use credit cards, the higher rewards cards are reserved for wealthier customers. Those rewards aren’t free. If merchants are not allowed to change the price despite different payment costs, the end result is that they are paid for out of the totality of the system. This point was understood by Justice Sotomayor who pondered the [question from the bench](https://www.wsj.com/articles/supreme-court-grills-both-sides-in-states-challenge-of-american-express-1519689044): “If I go to a cash register and the merchant says to me, ‘I’ll give you a 1 percent discount today if you don’t use AmEx, I sit there and think to myself, ‘Do I need the airplane rewards or the train rewards, or do I want the 1 percent?’

The inefficiencies of the current payment system cry out for new financial technological solutions. FinTech thrives on disrupting inefficient systems. Card based payment systems are inefficient in both critical aspects: the pricing is too high for the merchant, and the process for the customer is too slow (especially with the new ‘Chip Cards’ that are even slower than swiping). The inability for new entrants to innovate is a factor in considering the monopolistic power of a market, which is part of what the Supreme Court was considering.

FinTech will have a difficult time breaking into the market when existing payment systems are able to provide substantial benefits to wealthier consumers. If merchants are unable to price discriminate on payment form, then the existing subsidy to the rich will continue and they will not be incentivized to change their card usage. Why give up those rewards to use a new FinTech system that offers you less?

Hence, many major FinTech payment systems like ApplePay are focusing on first tackling the inefficiencies of the speed and convenience of the swipe or chip system. ApplePay is really a new method of using the same old credit cards, just with your phone instead of plastic. In fact, Apple’s profit is an additional 50 basis points (1/2 of 1 percent) of payment processing fee, a reason why some merchants are hesitant to accept ApplePay. FinTech and innovation will likely be hampered for years as a result of this decision that reaffirms the status quo of significant rewards and incentives for big spenders.

#### Sustained economic pressure key to hollow out Russian military.

**Smith 3-7** --- Former Bloomberg Opinion columnist. He was an assistant professor of finance at Stony Brook University

Noah, 3-7-22, "How are the Big Sanctions hurting Russia so far? Noahpinion, https://noahpinion.substack.com/p/how-are-the-big-sanctions-hurting?s=r

The Russian defense industry

A weak ruble and bank cutoffs make it harder to buy imported components and machines for defense manufacturing. For example, precision-guided weapons, vehicle electronics, and communications equipment all need computer chips (semiconductors) to function. There was already a global chip shortage before the war, and now there are signs that Russian manufacturers are having trouble getting their hands on what they need:

Now, as Alperovitch notes, this isn’t just about the weak ruble or bank cutoffs — it’s also about export controls. He mentions the U.S.’ Foreign Direct Product Rule, but many other chip companies, including [South Korea’s Samsung](https://mobile.twitter.com/carlquintanilla/status/1499885650388172800) and Taiwan’s vaunted TSMC, are [also halting sales to Russia](https://www.washingtonpost.com/technology/2022/02/25/ukraine-russia-chips-sanctions-tsmc/). Protocol did [a report on Russian dependence on foreign chips](https://www.protocol.com/newsletters/protocol-enterprise/russia-ukraine-chips-shields-up?rebelltitem=8#rebelltitem8) last year, and found that European and U.S. companies sell them a lot of microprocessors, while their memory chip imports come mostly from South Korea and the U.S. That’s all done now.

This will hit Russian defense manufacturing immediately. Over the longer term, there will also be the problem that the machines Russians use to make their tanks and planes and rocket launchers and transport trucks will need spare parts as they wear out, and these will be in short supply.

And on top of all that, financial sanctions make it difficult for both the state and defense companies to actually pay their employees! Companies — including state-run ones — generally rely on a lot of overnight loans to make payroll and other payments. Now, with Russian banks in the process of being crippled by asset price plunges and lack of access to the Western financial system, companies may simply be unable to get the cash needed to keep the lights on. This was the upshot of a thread by political scientist Olga Chyzh, and folks who’ve worked in the region seem to agree:

(Note that failure to get paid salary on time will even make it hard for ordinary Russians to buy Russian-made goods at their local stores.)

What this all means is that the Russian military hardware that the Ukrainians are destroying is not going to be easy to replace. The website Oryx maintains [a meticulously curated list of visually confirmed equipment losses](https://www.oryxspioenkop.com/2022/02/attack-on-europe-documenting-equipment.html), and the toll so far is pretty stunning — 845 Russian vehicles lost in the first 11 days of combat, including 130 tanks. And the true numbers are likely to be significantly higher, given that many losses don’t get clear visual confirmation. Already the Russians are starting to supplement their military vehicles with [regular old pickup trucks](https://mobile.twitter.com/UAWeapons/status/1500564066246574081/photo/1). With the Russian defense industry crippled by sanctions, we might be looking at a severely weakened Russian army for a decade or more.

(And also remember that if Russian consumers are having a hard time getting their hands on medicines, Russian soldiers may also be running out, especially with their supply trucks being constantly blown up by the Ukrainians. That could mean more soldiers out of the fight due to illness or wound infection.)

#### Absent that, they’ll escalate flashpoints.

Fabian 19 – Research Fellow, CSBA and Senior Strategic Analyst, Office of the Deputy Asst. SECDEF for Strategy and Force Development

Billy Fabian, Center for Strategic and Budgetary Assessments, Jan van Tol, Senior Fellow at CSBA, Jacob Cohn, Research Fellow at CSBA, and Gillian Evans, Senior Analyst at CSBA, STRENGTHENING THE DEFENSE OF NATO’S EASTERN FRONTIER, 2019, https://csbaonline.org/uploads/documents/Stengthening\_the\_Defense\_of\_NATOs\_Eastern\_Frontier\_WEB\_1.pdf

The Russian government seeks to revise the regional and international order to regain its traditional sphere of influence along its periphery, preserve and expand its geographic strategic depth, and reestablish its great power status.17 Russia perceives Europe’s current security architecture as having been established during a period of uncharacteristic Russian weakness and, therefore, tilted unfairly in favor of Western political objectives. As part of its efforts to secure its revisionist aims, Russia’s political leadership seeks to reshape the geopolitical order on the European continent to be more amenable to Russia’s national interests. Moreover, Russia’s national security strategy since the end of the Cold War has, at least implicitly, identified both the United States and the NATO Alliance as key threats to Russia’s national security.18 To weaken NATO, the Russian government seeks to undermine the political cohesion of the Alliance such that it is more difficult for NATO to muster a potent, unified response to Russian activities in Europe that challenge the status quo. Although there is little evidence to suggest that Russia actively seeks direct military confrontation with NATO states, plausible paths to conflict exist. The Russian government prefers to achieve its revisionist goals through sub-conventional methods of conflict, including “gray zone” activities and political warfare campaigns intended to undermine NATO’s cohesion and political will while remaining below Alliance thresholds for a conventional military response.19 Russia’s aggressive actions at the sub-conventional level, however, violate long-standing norms and threaten the sovereignty and territorial integrity of NATO member states. As a result, Russian gray zone actions are likely to exacerbate existing tensions on the continent and cause points of friction with NATO that have the potential to devolve into crisis and even conflict. The potential for conflict between NATO and Russia is most acute in the Baltic region. The proximity of NATO member territory to Russia and Belarus, the geographically isolated position of Kaliningrad, and the presence of sizeable Russian ethnic minorities within the Baltic states create a volatile situation ripe for crisis and miscalculation.20 Although Russia likely does not desire to incorporate the Baltic states or eastern Poland into the Russian Federation, under certain conditions it could view the seizure of territory belonging to NATO states as necessary or advantageous. The Russian government could perceive that NATO is attempting to isolate Kaliningrad and determine that it must launch a military attack into Alliance territory to re-establish its ground lines of communication with its exclave. Or, the Russian leadership could use rising tensions between ethnic Russian minorities and the governments of one or more the Baltic states to escalate a crisis as a means of undermining NATO unity and the credibility of collective defense. In this example, the Russian leadership might execute a limited military incursion into NATO member territory to seize a border region with a large ethnic Russian population to create the crisis that could divide NATO. The Baltic region is also where the Alliance is most vulnerable to Russian aggression.21 The combination of Russia’s local military superiority, geography that favors Russia, and Russian A2/AD capabilities that form an umbrella over the region increase the potential for Russia to prevail in a conventional conflict against NATO. As a result, the Russian government could determine that its best option during a significant crisis in the Baltic region is to risk a conventional attack on one or more of the Baltic states or even Poland because it believes it could quickly achieve its objectives and keep the conflict short and limited.22 Challenges to Deterrence and Defense in the Baltic Region NATO faces significant strategic and operational challenges that undermine the credibility of its ability to deter and, if necessary, defeat Russian aggression in the Baltic region.23 Although NATO’s aggregate military power far exceeds that of Russia, a viable theory of victory exists for Russia to prevail in a limited conflict by exploiting its time-distance advantage to seize Alliance territory in the Baltic region before the Alliance could effectively respond.24 A Russian ability to achieve a military fait accompli in the Baltic region would present NATO with a choice between embarking on a difficult, uncertain, and potentially escalatory counteroffensive to liberate allied territory or accepting defeat. Russia’s “Theory of Victory”25 If Russia were to attack one or more of the Baltic states or Poland, regional geography would favor Russia. The vast majority of NATO’s military power resides in Western Europe and, more critically, in the United States. On the other hand, a significant portion of Russia’s military power, including its most capable and best-equipped forces, is based in its Western Military District, which abuts NATO member territory.26 Most of Russia’s plausible territorial objectives, like the establishment of a land bridge to its Kaliningrad exclave through Lithuania and possibly Poland, or the annexation of portions of Baltic states that have majority ethnic Russian populations, are both limited in scope and proximate to the bulk of Russian combat power. The Baltic republics are only connected to the rest of NATO by the Baltic Sea and a narrow land corridor through northeastern Poland and southern Lithuania, often called the Suwalki Gap, which is flanked on either side by Belarus and Kaliningrad.27 As a result, the Baltic republics are vulnerable to being geographically isolated by even a limited Russian attack to seize the Suwalki Gap (see Figure 1). In a Russia-initiated conflict, the Russian military could leverage its local overmatch to seize territory rapidly and with little prior warning in one or more of the Baltic states or eastern Poland. The activities of Russian special operations forces might precede an attack with the aim of sowing disinformation, creating confusion, obscuring Moscow’s intent, and complicating NATO decision-making.28 These special operations forces could also facilitate the advance of Russian conventional forces by gathering intelligence, screening force movements, and seizing key bridges and choke points. Critically, Russia’s A2/AD capabilities could degrade and even cripple NATO’s efforts to respond quickly enough or with sufficient force to deny Russia from achieving its objectives. After an initial seizure of NATO member territory, Russian forces could establish a formidable defensive posture, backed by their area-denial capabilities, which would pose a difficult military problem for the Alliance to overcome. As NATO would attempt to mobilize and concentrate the massive combat power necessary to roll back Russian gains, Russia could use a variety of political, diplomatic, economic, informational, and military tools to seek an end to the conflict on favorable terms. The Russian government could combine offers to negotiate a cessation of hostilities with threats to further escalate the conflict, including to the nuclear level, in order to prevent NATO from reaching a consensus on the best path forward.29 Should some NATO members balk at the costs and risks associated with a major counteroffensive, the Alliance could risk losing a conflict with Russia politically before it even attempts to win it militarily. Should the Alliance summon the political will necessary to launch a military campaign to reverse Russia’s territorial gains, its counteroffensive would be difficult, uncertain, and potentially highly escalatory.30 The Central Importance of Time Time is central to the Russian theory of victory. Russia’s advantage in the local correlation of forces, proximity to its military objectives, and ability to act first could enable it to execute a rapid land grab in the Baltic region before NATO could effectively respond.31 Russia’s capacity to then consolidate its initial gains and establish a formidable defensive posture would pose a difficult military challenge for NATO. The long delay required for NATO to organize a ground counteroffensive after an initial Russian seizure of territory could provide the time needed for Russia to convert its military gains into a political victory. Russia’s A2/AD capabilities would increase its time-distance advantages in at least three critical ways. First, Russian A2/AD capabilities in Kaliningrad, Belarus, and the Western Military District and would greatly reduce the ability of U.S. and allied initial response forces to gain access to the region, operate in forward areas, and contest a Russian attack in the opening stage of a conflict. Second, should Russian forces consolidate their territorial gains and assume a defensive posture, Russian A2/AD capabilities would create a much more difficult military problem for NATO to overcome. Third, these A2/AD capabilities could disrupt the deployment of additional NATO forces to Europe and their transit across the continent into the Baltic region, further extending the delay between an initial Russian attack and the start of a major NATO ground counteroffensive. This longer delay would give Russia additional time to consolidate its military gains into a political victory. NATO initiatives to strengthen the Alliance’s ability to deter and defend against Russian aggression in the Baltic region should seek to reduce Russia’s time-distance and correlation of forces advantages. These initiatives should include changes to its military posture that would improve its ability to immediately contest a Russian offensive and shorten the time required for the Alliance to bring additional forces to bear. Operational Challenges Posed by Russia’s A2/AD Complex Russia’s A2/AD capabilities located in Kaliningrad, its Western Military District, and Belarus form a protective umbrella that covers much of Poland and the Baltic states. In the opening days and weeks of a conflict with NATO, these threats would create a highly contested environment that would impede the ability of U.S. and allied forces to project power into the region, to gain and maintain air superiority and information dominance in the conflict area, and, consequently, to contest a Russian invasion.32 Although NATO could likely overcome Russia’s A2/AD capabilities, the time needed to do so could give Russia ample time to achieve its military objectives. A2/AD capabilities located in Kaliningrad present the most significant challenge to U.S. and NATO operations. Geographically, Kaliningrad is a Russian exclave within NATO member territory. This enables A2/AD capabilities located there to form a forward salient guarding the air, sea, and land approaches to the Baltic states, Belarus, and Russia. More specifically, this creates three key operational problems for NATO forces. First, it extends the depth of the battlespace that Russia could affect with its A2/AD capabilities, especially with its coastal defense cruise missiles, long-range surface-to-air missile (SAM) systems, and shortrange ballistic missiles (SRBM). Second, Kaliningrad alters the geometry of the battlefield by projecting a bulge of A2/AD capabilities into NATO’s defensive perimeter that would inhibit the freedom of movement of NATO military forces between northern and central Europe, providing Russia with opportunities to launch multi-axis attacks on any such forces in the Baltic region. Third, Kaliningrad’s A2/AD capabilities form an outer defensive layer that NATO forces would have to suppress before the Alliance could use the preponderance of its air forces, which are non-stealth systems, to interdict Russian ground forces and provide support to friendly forces. Four components of Russia’s A2/AD complex present the most significant challenges for U.S. and NATO operations: long-range precision fires; integrated air defense systems (IADS); offensive and defensive capabilities in space, cyberspace, and the electromagnetic spectrum; and massed artillery. Russia’s Long-Range Precision Fires Since the end of the Cold War, U.S. forces have projected power into theaters and operated from bases close to conflict zones without significant interference from adversaries. Russia, however, possesses increasingly sophisticated and robust precision strike capabilities able to attack targets across the European theater, threaten Atlantic sea lines of communications (SLOCs), and even attack the U.S. homeland. In a conflict in Europe, Russian air-, ground-, surface-, and subsurface-launched long-range fires could attack U.S. and allied command, control, and communications (C3) nodes; interdict ground deployment and sustainment networks; threaten SLOCs and deny maritime freedom of maneuver; strike air bases to suppress sortie generation and attrite aircraft on the ground; and attrite NATO ground forces before they could directly engage Russian forces. Russia possesses a large and diverse inventory of precision strike weapon systems.33 This inventory includes multiple SRBM variants such as the 9K720 Iskander-M weapon system.34 The Iskander-M’s mobility allows it to relocate quickly to a new concealed location after firing, making it particularly difficult to interdict. By 2020, Russian armed forces are expected to field ten Iskander-M brigades with the combined capacity to launch approximately 480 missiles, assuming each launcher has a single missile reload. Russia has announced it will deploy Iskander-M launchers to its “missile brigade of the Western Military District,” which is likely Russia’s 152nd Missile Brigade in Kaliningrad.35 This would place ballistic and cruise missiles launched by the Iskander-M well within range of potential targets located throughout Poland and most of the Baltic states. Furthermore, its large number of 4th generation, multirole fighters can carry various loadouts of air-to-surface weapons including land attack cruise missiles (LACM). In a conflict, Russia could use these SRBMs and LACMs to strike critical nodes like bridges and rail junctions, air bases, marshaling areas, and major force concentrations in Poland and the Baltic states to disrupt and delay force flow and sustainment, make forward air bases untenable, and inflict attrition on NATO ground forces before they can reach the battle area. Russia’s anti-access systems include longer-range ballistic and cruise missiles that it could use to attack NATO seaports of debarkation, air bases, and key C3 nodes. Russia continues to expand and upgrade this inventory by developing and deploying one or more battalions of ground-launched cruise missiles (GLCM) (believed to be 9M729 [SSC-8] missiles integrated with mobile Iskander-K launch vehicles).36 It is also increasing its inventory of Kh-101 air-launched cruise missiles (ALCM) and 3M14 Kalibr LACMs.37 The new Kh-47M2 Kinzhal hypersonic air-launched ballistic missile, which has a purported range of 2,000 km and can be carried by modified MIG-31BM supersonic aircraft, can hold much of continental Europe at risk without the launching aircraft leaving Russian airspace.38 Submarine and bomber aircraft equipped with long-range cruise missiles extend the range of Russian long-range fires into the Atlantic and as far as the continental United States. As a result, there are no truly secure “rear” areas in Europe (see Figure 2) Russia does have some significant limitations in its ability to strike over long ranges and with great precision. To cite one example, Russia lacks sufficient long-range, persistent ISR capabilities to support large-scale dynamic targeting operations at longer ranges. Integrated Air Defenses The ability to gain and maintain air superiority rapidly and then use the resulting freedom of maneuver to bring massed airpower to bear has been a central aspect of U.S. military operations since the end of the Cold War. Russia’s air defense doctrine favors creating overlapping, multilayered coverage zones that enable its forces to simultaneously engage a large number of air and missile threats.39 The U.S. Department of Defense notes that Russia’s IADS encompass more than surface-to-air missile launchers; they include efforts to “jam aircraft navigation, communications, target acquisition systems, and precision weapons guidance systems,” all of which have been a priority of recent Russian military modernization efforts.40 Russia remains a leader in developing state-of-the-art radars, surface-to-air missiles, electronic warfare systems, and other air defense capabilities. Russian IADS modernization programs have prioritized improving the range and guidance of its surface-to-air missile systems, as well as enhancing their capacity to operate in contested electromagnetic spectrum (EMS) environments.41 Russia has created a layered IADS along NATO’s eastern frontier that would pose a significant challenge to U.S. and allied air operations (see Figure 3). In a conflict, Russian IADS would likely force large, non-stealth aircraft such as the E-3 Airborne Warning and Command and Control (AWACS) aircraft and the E-8 Joint Surveillance and Target Attack Radar System (JSTARS) to operate from standoff distances that exceed the effective range of their sensors. Russia’s long-range strategic SAMs would create a highly lethal operating environment for 4th generation fighters and could force NATO non-stealth aircraft to use long-range air-to-surface weapons that are larger and more expensive than short-range direct attack munitions. These limitations could reduce NATO’s ability to provide air support to its ground forces engaged against Russian forces during the early days of a conflict Neutralizing the threat from Russia’s IADS by relying on standoff attacks would take an extended period of time and require thousands of expensive long-range munitions such as the Joint Air-to-Surface Standoff Missile (JASSM). This approach could consume a substantial portion, if not all, of NATO’s current inventory of advanced, long-range weapons. Even after the threat from Russia’s strategic SAMs has been degraded, the threat from its surviving short- and medium-range defense systems would remain.42 As a result, the allocation of a significant share of aircraft sorties would be required for suppression of enemy air defense (SEAD) missions, thereby reducing sorties allocated to interdict Russian ground forces, attack other critical targets, and support U.S. and allied ground forces. More importantly, if NATO attempts to suppress Russia’s IADS with air power alone before moving its ground forces forward to counter a Russian ground invasion, the time required to do so would advantage Russia—perhaps decisively so. Russia’s Electronic Warfare, Cyber, and Counter-Space Capabilities Maintaining information dominance has been an essential element of the U.S. military’s post-Cold War operations. Superior command, control, communications, intelligence, surveillance, and reconnaissance (C3ISR) capabilities have enabled U.S. forces to possess greater situational awareness than their adversaries, act on that situational awareness quicker, and synchronize their operations more effectively across time and space. Having observed the effectiveness of the U.S. military’s information systems in operations in the Middle East and other theaters, Russia has invested heavily in counter-C3ISR capabilities in order to contest U.S. information dominance and to disrupt U.S. find, fix, track, target, engage, and assess (F2T2EA) kill chains. Russian counter-C3ISR capabilities in the EMS include jammers to interfere with radars and radios, decoys that create false targets for sensors, laser dazzlers to blind electro-optical and infrared (EO/IR) sensors, and camouflage that obscures potential targets to reduce their probability of detection.43 The vulnerability of U.S. and allied C3ISR forces to these countermeasures is compounded by the increasing range at which they may be forced to operate due to Russia’s area-denial capabilities. These distances could require NATO forces to use higher-power active sensors and countermeasures that would further increase their detectability and vulnerability to attacks.44 Russia has also fielded capabilities to contest space and exploit perceived vulnerabilities in U.S. and NATO space architectures.45 U.S. space capabilities are not concealed, often hosted in unprotected commercial and military satellites, and concentrated in a limited number of platforms, many of which could not be quickly replaced if damaged or compromised.46 The Russian military, on the other hand, has viable terrestrial and airborne alternatives to spacebased systems that can support operations near the Russian homeland. As a result, it is less dependent on space systems as a whole, and it would face less risk if it were to use kinetic and non-kinetic anti-satellite (ASAT) weapons during a conflict since the consequences would fall disproportionately on U.S. and NATO space systems.47 Finally, the Russian military could use cyber tools to disrupt and corrupt the NATO information flows by targeting digital data information networks that store, process, and disseminate data.48 Although the adaptation and integration of information technologies enhance the capabilities of U.S. and NATO forces, they also increase the size of their potential cybersecurity target set and create new vulnerabilities that Russia could seek to exploit.49 DoD’s Defense Science Board has warned that “major powers have a significant and growing ability to hold U.S. critical infrastructure at risk via cyberattack and an increasing potential to use cyber tools to thwart U.S. military responses.”50 Evidence suggests that the Russian government may be conducting cyber reconnaissance to collect data that would support operational planning for cyberattacks on U.S. or allied critical infrastructure in the event of a conflict with Russia.51 The U.S. Transportation Command and key civilian communications networks that support U.S. military deployment activities are especially vulnerable to Russian cyberattacks. Russia could take advantages of these vulnerabilities to non-kinetically disrupt key rail and port operations in the United States, delaying the arrival of vital U.S. reinforcements to Europe. Russia’s Massed Conventional Artillery Massed conventional artillery, which serves as the decisive arm of the Russian Army, may represent its greatest conventional threat to NATO ground forces.52 Unlike the U.S. military, which employs its indirect fires to allow its maneuver forces to close with and destroy enemy forces, Russia employs its maneuver forces to enable its indirect fires. As operations in Ukraine have shown, Russia uses its maneuver forces to drive adversary formations into positions of disadvantage where they can be destroyed by massed conventional artillery fire.53 Russian ground formations at all echelons include robust indirect fires that often out-range their U.S. and NATO equivalents.54 Russian motor rifle and tank regiments, brigades, and divisions place a greater emphasis on indirect fires relative to equivalent Western units. For instance, a Russian motor rifle brigade often includes two self-propelled artillery battalions and a rocket artillery battalion, whereas its rough U.S. equivalent, an ABCT, only contains one self-propelled artillery battalion.55 In a conflict with NATO, the maneuver units in a Russian main effort would likely be supported by an equal or greater number of artillery units. Russian artillery is capable of firing advanced area effects munitions including cluster munitions and thermobaric rounds, as well as artillery-delivered mines. Artillery units also possess organic ISR capabilities that include ubiquitous unmanned aerial systems and tactical signals intelligence.56 As a result, U.S. and NATO ground forces could be “out-ranged and out-gunned” by Russian forces, offsetting the traditional superiority of U.S. and allied maneuver forces.57 This could provide Russia a decisive advantage in close combat, particularly since the traditional advantage of Allied airpower could be greatly reduced, at least initially, by Russian IADS. Consequences of the Eroding Credibility of NATO Deterrence and Defense Collectively, these threats erode the credibility of NATO’s ability to deter and defend against Russia aggression, including aggression at the sub-conventional level in areas covered by Russian area-denial systems. Should this erosion continue, Russia may become less wary of conducting gray zone operations against Poland and the Baltic states. Even if Russian leadership believes such actions could escalate, they may not be deterred from undertaking them if they are confident Russian forces could quickly prevail in a short and limited conventional engagement against NATO. The consequences of losing even a limited war with Russia on the European continent could prove fatal for the Alliance’s cohesion. A Russian fait accompli, especially in the face of an unsuccessful NATO military response, could reorder Europe geopolitically and greatly reduce the credibility of U.S. security commitments to its allies and friends in Europe and other regions, including in the Indo-Pacific. A Russian victory would also demonstrate NATO’s inability to defend its frontline states, which might incentivize both NATO member and nonmember European states to tilt more toward Russia’s political orbit. Moreover, although any conflict between nuclear-armed states carries with it the serious risks of nuclear escalation, this risk would likely be intensified should NATO undertake a massive conventional campaign to undo what Russia has accomplished. Russia’s asymmetric advantage in low-yield nuclear weapons and ambiguous doctrine surrounding their use in conventional conflicts could create the potential for miscalculation.58 The far better option would be to ensure that NATO has the capability and capacity to prevent Russia from achieving a fait accompli by a force of arms in the Baltic region in the first place. Strengthening Deterrence and Defense in Europe These challenges and threats are not insurmountable. To strengthen deterrence and defense against Russian aggression, NATO should adopt a strategy that focuses on blunting Russian aggression at the outset of conflict. This strategy could enhance deterrence by presenting a formidable defensive posture that would be difficult to overcome, demonstrating to Russia that any attack on NATO states would not be quick or painless and would likely not succeed. The prospect of a difficult, uncertain, and potentially prolonged conflict could create enough uncertainty in Russia’s decision calculus to undermine its confidence that it could realize its theory of victory. This strategy could convince Moscow that even when it feels compelled to act, de-escalation and negotiation are a better option than gambling on a risky and costly war. If deterrence did fail, this strategy would strengthen NATO’s ability to defend against and ultimately defeat Russian aggression. At a minimum, it would raise the costs of Russian aggression, buy time for reinforcements to arrive, and put the Alliance in a more favorable position for an eventual counteroffensive to undo Russia’s temporary gains. Furthermore, it could reinforce Alliance resolve by increasing confidence among member states that NATO’s forces would ultimately prevail if Russia initiated a conflict.

#### AND, efficacy key to deter future Russian risk taking

**O'Hanlon & Victor 22** --- \*Senior fellow and director of research in Foreign Policy at the Brookings Institution. \*\*Nonresident Senior Fellow - [Foreign Policy](https://www.brookings.edu/program/foreign-policy/), [Global Economy and Development](https://www.brookings.edu/program/global-economy-and-development/), [Energy Security and Climate Initiative](https://www.brookings.edu/project/energy-security-and-climate-initiative/).

Michael E. & David G, 1-26-2022, "If Russia invades, sanction its oil and gas," Brookings, https://www.brookings.edu/blog/order-from-chaos/2022/01/26/if-russia-invades-sanction-its-oil-and-gas/

Resident Joe Biden has taken quite the beating for saying at a January 19 press conference that the United States and its allies might be divided over a [“minor” Russian “incursion”](https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/19/remarks-by-president-biden-in-press-conference-6/) into Ukraine. But Biden has nonetheless gotten two big things right in his thinking about how to deter Vladimir Putin from attacking his smaller neighbor. First, the U.S. military will not enter any war that might ensue. Ukraine, while important, is not a treaty ally — and we will not risk war with nuclear-armed Russia to protect it. Second, the magnitude of the U.S. and allied response to any Russian aggression must be proportionate.

What’s missing, however, is a bolder plan for what will happen to Russia if Putin tries to gobble up significant parts of Ukraine. There must be no business as usual between the West and his nation. Our most powerful weapon is to sanction energy exports that provide Russia the money it needs to finance mischief abroad. Yet the Biden administration and Europe, alike, have deliberately excluded oil and gas trade from threatened sanctions. That is a mistake. Ignoring how Russia makes money from energy weakens our deterrence against Putin, as he considers what to do with the 100,000 Russian troops currently menacing Ukraine’s borders.

Putin, seeing that the West lacks both a plan and the stomach to cut its [dependence](https://www.brookings.edu/blog/order-from-chaos/2022/01/18/energy-trilemma-causes-a-headache-for-germanys-new-leaders/) on Russian energy supplies anytime soon, thinks he has a strong hand to play.

Over the short term, there are worries that an invasion could cause a shutoff of Russian gas that flows across Ukraine to Western customers — especially those in places like Austria and Slovakia that don’t have enough other sources of fuel. Whether that happens depends on how the crisis unfolds. If Russia doesn’t invade, the gas keeps flowing because Ukraine, like Russia, needs the money; Ukraine also needs the gas for its own heating as well. A successful blitzkrieg, if truly possible, could in principle have the same effect, with Russian forces quickly securing compressors and valves and keeping the Ukrainian gas transit system open. But a messy, lingering invasion — perhaps with insurgent groups blowing up assets — would spell bigger trouble.

How bizarre, and counterproductive, would it be for Western governments to be encouraging Ukraine’s general resistance to Russia’s potential aggression while simultaneously asking Ukraine to protect the pipelines carrying Russian gas to the West. Even more ironic, yet necessary, is that European governments and the Biden administration are scrambling to shore up as many extra supplies of fossil natural gas as possible for a wartime contingency, [including from Russia](https://www.pbs.org/newshour/world/u-s-official-urges-russia-to-send-more-gas-to-europe-quickly), and [rewarding companies](https://www.reuters.com/business/energy/us-waive-sanctions-firm-ceo-behind-russias-nord-stream-2-pipeline-source-2021-05-19/) that build new gas pipelines. Some European governments are so fearful of public backlash to rising energy costs that they are [subsidizing energy, including gas](https://www.bloomberg.com/news/articles/2022-01-16/europe-s-energy-crisis-how-governments-are-trying-to-curb-soaring-bills). All these expedient actions run directly contrary to what Europe and the United States profess as their long-term interest in cutting dependence on fossil fuels to [address climate change](https://newrepublic.com/article/164984/biden-ukraine-gas-methane). And Moscow is watching. It knows that Western dreams of shaking any dependence on gas for alternatives like renewable power will take a long time to bear fruit and, so far, aren’t that credible in a crisis.

The West needs to do its utmost to reverse the direction of energy leverage. Ultimately, Russia needs European markets more than Europe needs Russian gas. After all, Russia supplies [more than 40%](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_imports_of_energy_products_-_recent_developments#Main_suppliers_of_natural_gas_and_petroleum_oils_to_the_EU) of the European Union’s natural gas imports. But Russia depends on energy exports for [nearly 60%](https://www.imf.org/en/Publications/CR/Issues/2021/02/08/Russian-Federation-2020-Article-IV-Consultation-Press-Release-Staff-Report-50068) of all the goods and services the country sells abroad.

The United States and, most of all, its EU partners must begin immediate and more muscular sanctions if Russia invades — focused on energy exports and earnings. It will be hard to have a quick impact, of course, because Russia already has a grip on European gas supplies and is one of the world’s lowest-cost oil producers. [Existing Russian tax and energy policy](https://www.eia.gov/international/analysis/country/RUS) is already designed to lessen dependence on Western technology, but it can only have so much impact in the face of unified Western sanctions. A smart sanctions policy would include a credible, expedited schedule for phasing down imports and phasing out access to Western technology. It would also include antitrust actions against Russian abuse of gas markets. When those markets are tight, as they are today, Russia can withhold supplies and underutilize the pipelines it already has to drive up prices — higher prices aren’t just bad for consumers, they fuel the foreign adventures of the Russian state.

More specifically, a new Western energy policy in response to a Russian attack on Ukraine should include a) subsidies to non-Russian suppliers, with bigger subsidies for greener alternatives; b) antitrust enforcement to force open the market to new suppliers and pare back the Russian role; and c) an active innovation program, building on what the EU already has, to develop alternatives to conventional gas so that buyers will, in time, have those options.

Vladimir Putin has [said](https://www.nytimes.com/2021/12/30/us/politics/biden-putin-ukraine-call.html) that, if the West imposes new sanctions on Russia over a crisis in Ukraine, it will lead to a rupture in relations. We need to call his bluff — and up the ante. If Russia attacks a sovereign country in Europe again, and especially if it is even more aggressive than in the past, there can be no business as usual in energy economics.

Ukraine is important to us but not vital, which is why it [should not be a NATO ally](https://www.usatoday.com/story/opinion/2022/01/17/russia-us-nato-ukraine-solutions/9185092002/?gnt-cfr=1) but why the crisis in Ukraine must redouble the focus on what’s needed for the long term — which is less dependence on Russian gas and more pressure on Russian suppliers so they generate smaller incomes and fewer resources that the Russian state can deploy for mischief. Moscow must learn that escalation in Ukraine will darken its economic prognosis for the 2020s and beyond. Right now, that lesson hasn’t been delivered.

#### They’ll expand in Eastern Mediterranean and Middle East – forces great power draw in

Grygiel 19 – PhD, associate professor of politics at The Catholic University of America, Senior Fellow at the Center for European Policy Analysis and on the faculty of SAIS-Johns Hopkins University, National Security Visiting Fellow at the Hoover Institution

Jakub, “Russia’s Return To The Middle East,” Hoover Institution, Issue 1924, December 12, 2019, <https://www.hoover.org/research/russias-return-middle-east>

The reinsertion of Russia into the Eastern Mediterranean and the Middle East is one of the big stories of the past decade. Although Russia’s recueillement after 1991 resulted in its effective disappearance from the Middle East, her presence in the region is of course not a new reality in history. Tsars and Soviet leaders pushed their military might and political influence into the region for the last three centuries, clashing with various great powers, from the Ottoman sultanate to the British empire and the United States. But the speed at which the current Russian advance has occurred is surprising and troubling. Moscow has inserted an enormous level of instability and unpredictability to the already murky local power dynamics.

For the United States, a destabilizing Russian presence in the region is deeply unhelpful. As the competition with China ramps up and the problems in Europe augment, the U.S. will naturally have to prioritize those regions. The Middle East will simply not get as much American attention as it did over the past twenty years. It is therefore in the U.S. interest to prevent a degeneration of the already tenuous regional order that would require a sizeable commitment of American resources and attention. But Moscow is working in the exact opposite direction of the United States here – and the U.S. should limit Russia’s ability to create more tribulations.

Russia returned to the Middle East because the U.S. left a window of opportunity for her. Putin was emboldened by the lofty but empty rhetoric of the Obama administration. In 2011, President Obama had loudly proclaimed that Assad had to “step aside” in Syria. In 2012, he added that Assad had crossed a “red line” by using chemical weapons. The bold words, however, were never matched by an equally bold policy. Russia had for many years supported Assad, and in fact, his regime was the last quasi-ally of Moscow in this region; calling for Assad’s removal without following up with serious actions was a cost-free invitation to Putin to shore up the Syrian dictator.

Moreover, the Obama administration sought to weaken Assad on the cheap, by arming groups such the Kurdish People’s Protection Units (YPG). This created deep and lasting tensions between the U.S. and Turkey as Ankara considers this particular Kurdish entity too close to the Kurdistan Workers’ Party (PKK), a terrorist organization that has battled Turkish forces since the early 1980s. The resulting strain in U.S.-Turkish relations further enticed Russia to return to the region, forcing Erdogan to accept Putin’s influence in Damascus and to seek some sort of understanding with Moscow. Erdogan, in fact, embarked on an astounding change in posture. Early on, in 2013-2014, Erdogan supported the idea of removing Assad from power while Putin protected the Syrian dictator. In November 2015, in a period of great tensions between the two countries, a Turkish F-16 shot down a Russia SU-24, killing its pilot. Half a year later, however, after Russia imposed various sanctions on Turkey, Erdogan apologized to Moscow for the shooting and began a tilt in favor of Russia, to the point of acquiring Russian anti-air missile systems (S-400) and incurring sanctions from Washington. Over the course of five years, Putin managed not only to retain the Syrian government as an outpost of Russian influence in the region, but also to push a key NATO member, Turkey, to realign in a more sympathetic posture toward Moscow.

This swift Russian projection of power to Syria – and extension of influence to the wider Eastern Mediterranean region – is anomalous but not surprising. It is anomalous for two broad reasons. The first is that land powers such as Russia usually expand in concentric circles, gradually advancing mile after mile. Seapowers do not have the need of controlling contiguous real estate and expand by hopping from one outpost to another. As Nicholas Spykman observed, “a land power thinks in terms of continuous surfaces surrounding a central point of control, while a sea power thinks in terms of points and connecting lines dominating an immense territory.”1 Russia in Syria has jumped to the southern side of Turkey, effectively creating two fronts for this NATO member.

The second reason why this Russian advance is anomalous is that it is a distant projection of power, at the outer limits of sustainability for the Russian military. The 2016 deployment of the smoke belching Admiral Kuznetsov aircraft carrier (and its string of plane accidents) in the Eastern Mediterranean is a symptom of the serious limitations of the Russian military. Russian military presence in Syria is still relatively small, measuring in the low thousands. It is doubtful that Moscow can afford a much larger persistent presence, even though this theater has offered a valuable combat experience to the Russian military forces (by some accounts, for instance, two-thirds of the tactical air force rotated through the Syrian battlefield in the past four years). In brief, Russia here has projected military force farther than it can establish political control.

Both anomalies, however, are puzzling only if we think that Russia’s objectives are analogous to ours: to instill order and maintain effective political control in a state or a region. But Russia is not interested in these goals. Moscow is not eager to rebuild Syria or to ameliorate the humanitarian disaster caused by Assad and the Islamist terrorist groups – but it merely seeks bases from which it can exercise some influence over the Eastern Mediterranean. Moreover, Putin’s approach is to destabilize a region, creating a problem to which he can then offer a solution. This is a time-tested strategy that Russia has employed since its rise in the early 18th century: sowing instability in order to be able then to reorder the area according to its interests. Thus, Russia has presented itself to European leaders as a staunch defender of Christians against the depredations of Islamist terrorists and, to the more secular politicians in Western Europe, as a force to limit the flow of refugees – while at the same time doing little to fight ISIS and aiding Assad in his gruesome suppression of the opposition.

The outcome of Russia’s return to the region is unknown, of course. But so far Putin has achieved two goals. First, Russia has maximized its strategic possibilities by inserting itself into a cauldron of great power competition. Second, the war in Syria is seen by Russian public opinion as a good war, with low casualties and a dramatic improvement in Russia’s image as a world-class great power. More than 70% of Russians support policies that are deemed to enhance the international status of their country. Russia nourishes vast imperial ambitions, matched by Putin’s personal aspirations of proto-tsarist grandeur. It is unlikely, therefore, that Putin will withdraw from the Middle East on his own, as was the hope of many in the Obama administration.

How, then, can Russia be pushed back from the Middle East? How can it be induced to stop destabilizing the region? The answer may be in Ukraine.

Now, as in the past, Russia has three main frontiers and lines of expansion. The Eastern frontier in Asia is currently dormant because China is too powerful and Moscow has no means to oppose it, choosing to accept Beijing’s economic predominance in exchange for Russian security hegemony. The second front is the European or Western one, perhaps the most examined and important because this is where a lot of bloody clashes have occurred since the 17th century. Russia’s westward push has met here the greatest opponents, from Poland and Sweden in the 17th century, to Prussia and Austria in the 18th and 19th centuries, and the Atlantic alliance in the second half of the 20th century. And it is the front that has attracted the most attention in the past decade, since Putin has used military force to oppose the westward leaning posture of two countries: Georgia in 2008 and Ukraine in 2014. Russia’s wars against these two states were clear attempts to oppose the West, seen as encroaching upon states that Moscow deems part of its own empire or hegemony. And these conflicts have achieved the most important strategic objective pursued by Moscow: the effective end of Western enlargement.

But these military operations against Georgia and Ukraine are also part of Russia’s efforts to extend influence toward her Southern frontier. This is the third vector of Russian expansion, toward the Black Sea, the Eastern Mediterranean and the Middle East. It is a turbulent frontier that is constantly fluctuating, with constantly changing and often ambiguous alignments.

Ukraine, in particular, is Russia’s door to Europe but also to the Black Sea and thus, farther out, to the Mediterranean and the Middle East. Without Ukraine, Russia is an Asian power, left to face China on a lengthy steppe frontier. With Ukraine, Russia is an empire that forces itself into Europe’s power dynamics. Paris and Berlin, not to mention capitals closer to Russia, will have to take Russia seriously (albeit responding with strategies that are often very different; Paris, for instance, seeks a rapprochement with Moscow while Warsaw arms and pursues stronger bilateral relations with the U.S.) in the moment Moscow has a foot in Ukraine.

In the past three centuries, Russia’s control over Crimea and the mouths of the Don and Dnieper signaled a conflict with the Ottoman power to the south, as Muscovite forces moved to project influence over the Black Sea and the push their way to the Bosphorus. As a Prussian military leader of the tsarist army said after taking over a key fortress near Crimea in the early 18th century, Russia’s presence there was a “splinter in the enemy’s foot.”2 Such a description continues to be applicable. In the moment Russia solidifies its presence on the shores of the Black Sea, Turkey, and any other great power situated in the Middle East has to deal with Moscow. To put it differently, over the past few years, after Russia’s wars in Ukraine and Georgia, and then with her military deployment in Syria, Turkey realized that Russia is not a land power locked in the distant Muscovite core, but a Black Sea potentate that had to be taken into account. The current problems in the U.S.-Turkey relationship are, therefore, caused by Erdogan’s Islamic authoritarian ways as much as by Russia’s move into the Middle East which has forced Ankara to seek a friendly modus vivendi with Moscow.

From this, it follows that to check Russia’s ability to insert herself into Middle Eastern dynamics and to further disrupt an already volatile region, the U.S. and its allies should strengthen Ukrainian geopolitical independence and weaken Russia’s hold over Crimea and eastern Ukraine. A strong independent Ukraine limits Russian destabilizing southward push. To avoid a highly unpredictable and costly great power competition in the Middle East – a situation that would distract the United States from its more pressing Pacific and European challenges – it is thus best to consider how to push Russia out of it. And the path to that goal runs through Ukraine.

#### AND, failure of effective sanctions destroys international legal order.

**Shapiro 3-1** --- Charles F. Southward Professor of Law and Professor of Philosophy at Yale Law School.

Scott, 3-1-2022, "Putin Can’t Destroy the International Order by Himself," Lawfare, https://www.lawfareblog.com/putin-cant-destroy-international-order-himself

But while the invasion ordered by Russian President Vladimir Putin is in direct violation of the most fundamental principle of the international legal order—the prohibition on the use of force—it’s too early to write the obituary of the postwar international system. These commentators are making a mistake not just about international law. They are making a mistake about law in general. If they understood how law really works, they would see that Putin’s invasion is not enough, on its own, to destroy the world order. Indeed, depending on how states respond, the invasion has the potential to reaffirm the very legal rules he has violated.

The main function of the law, as the philosopher H.L.A. Hart has argued, is to guide conduct. The law tells us what we may or may not do. But legal institutions don’t naively assume that we will obey its demands. It has contingency plans. Domestic law sets out detailed procedures for responding to its failure to guide conduct successfully. That’s why we have police, courts, lawyers, wardens and parole officers. Public law even provides for the punishment and impeachment of public officials who break the law. As James Madison famously observed: “If Men were angels, no government would be necessary.”

While domestic law does a good job at policing legal violations, it is not foolproof—especially in the area of public law. The House of Representatives impeached President Trump twice for high crimes and misdemeanors. Trump was not removed from office because the Republicans in the Senate refused to convict their party leader despite the strong evidence of wrongdoing. But we don’t declare American domestic law a failure as a consequence.

Like domestic law, international law makes demands of sovereign states. And like domestic law, international law has a Plan B for when Plan A fails. As we detailed in our book, [The Internationalists](http://theinternationalistsbook.com/index.html), for hundreds of years, Plan B was war. War was the legally permissible way that states had for righting legal wrongs done to them. The legal right of conquest was designed to compensate the victorious victim. But thanks to the [Kellogg-Briand Pact of 1928](https://history.state.gov/milestones/1921-1936/kellogg) and the [U.N. Charter of 1945,](https://www.un.org/en/about-us/un-charter) war is no longer a legitimate way for states to enforce international law—though states subject to aggression, like Ukraine today, are allowed to defend themselves under Article 51 of the charter. International law now provides for other ways for states to respond to violations—including through the use of economic sanctions. And just as with domestic legal systems, these mechanisms do not always prevent abuses, and they do not always adequately punish abuses.

All this means that commentators should look not just at Putin’s decision to break the law but also at the response of other states to it. And here we have reason to think the law is much more robust than declarations of its demise would suggest. States have responded to Putin’s invasion of Ukraine and his decision earlier this week to formally recognize the independence of two breakaway regions of Ukraine not merely with condemnation but with widespread and robust action. On Monday, after Moscow recognized the two separatist regions of Ukraine and authorized the deployment of  Russian troops to them, the U.N. Security Council held an [emergency meeting](https://www.nytimes.com/live/2022/02/21/world/ukraine-russia-putin-biden) at which the United States and allied nations condemned the actions as a clear violation of international law.

Russia’s flimsy—and clearly meritless—legal justifications were rightly dismissed at the emergency meeting. States have affirmed that, in the absence of Security Council authorization, a change in borders of a state or recognition of independence of part of an existing sovereign state requires that state’s freely given consent—something clearly not present here. Likewise the Kremlin’s claim that rebel leaders have [asked](https://www.theweek.in/wire-updates/international/2022/02/24/fgn8-ukraine-rebels-russia-ld-help.html) for Russian military help to fend off Ukranian “aggression” has been rightfully treated as meritless. Even if true, such a request would not give Russian forces legal authority to invade another state and try to topple its government.

Referencing the principles in Article 2(4) of the U.N. Charter, U.S. Ambassador Linda Thomas-Greenfield [declared](https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-emergency-meeting-on-ukraine/) that “Russia’s clear attack on Ukraine’s sovereignty and territorial integrity is unprovoked.” She continued, “It is an attack on Ukraine’s status as a UN Member State, it violates a basic principle of international law, and it defies our Charter.”

Other countries joined the condemnation. The Estonian Parliament, for example, [condemned](https://twitter.com/EerikNKross/status/1496588903259779075) “the violation of the fundamental principles of the United Nations by the Russian Federation.” It continued, “Using threat of force the Russian Federation is brutally violating the sovereignty of Ukraine, and by using force, undermining its territorial sovereignty.”  Turkey issued a [statement](https://twitter.com/MFATurkiye/status/1496810350032871431/photo/1) that the attack “is a grave violation of international law and poses a serious threat to the security of our region and the world.” A flood of [states](https://twitter.com/Alonso_GD/status/1496831583822938118) from around the world have echoed these condemnations.

And, perhaps more importantly, states are matching words with action. In response to Russia’s illegal recognition and occupation of the breakaway regions of Ukraine, the United States and Europe released a first tranche of sanctions. Now, in response to the more wide-scale attack, Biden [announced](https://www.cnn.com/2022/02/24/politics/joe-biden-ukraine-russia-sanctions/index.html) new sanctions that will “impose severe cost on the Russian economy, both immediately and over time.” The [European Union](https://apnews.com/article/russia-ukraine-business-asia-europe-united-nations-8744320842fca825ae4e4ccae5acbe34) and [Canada](https://www.cnn.com/europe/live-news/ukraine-russia-news-02-24-22-intl/index.html) have announced similar plans. European Union leaders are reportedly considering removing Russia from SWIFT, an act that would make it nearly impossible for financial institutions to send money in or out of Russia. Even before this latest set of announcements, Russia’s stock market and currency had [cratered](https://www.wsj.com/articles/russias-ruble-stocks-crater-as-invasion-of-ukraine-draws-sanctions-11645715129) in the face of the promised measures, forcing Russia’s central bank to tap its $600 billion-plus reserve chest to staunch the slide.

Some analysts have [asked](https://www.npr.org/2022/02/24/1082749756/additional-global-sanctions-will-be-a-blow-to-putin-sen-klobuchar-says), if sanctions didn’t stop Putin from invading Ukraine, then what difference do they make at this point? The same question, of course, can be asked of any punishment. “Why punish the murderer? The victim is already dead!” The answer is obvious: We punish to condemn behavior and deter similar behavior in the future. The case for sanctions here is even stronger. As long as Russia occupies the country or it is governed by a puppet regime installed by Putin, that violation continues. The continued response to the continued violation makes clear that the legal principles involved are ones that the world stands behind. A forceful response, therefore, would have the effect of reaffirming the legal prohibition.

It is worth noting, moreover, that the widespread condemnation has been so unified and swift in part because such blatant violations of the prohibition against aggressive war have been extraordinarily rare. Since World War II, the number of interstate wars prohibited by the charter has diminished drastically. That, too, is a sign of the system’s strength. The legal rules prohibiting states from resorting to force against one another are so strong and generally so effective that they are often taken for granted.

Events like this should remind us that the current international legal system grounded in peace, not war, is a relatively recent invention, and it takes work to keep it healthy. It should cause us, too, to reflect on actions the United States and its allies have taken in recent decades that have weakened the very legal system they are now championing—the second Iraq War and the [ever-growing](https://www.washingtonpost.com/outlook/2019/10/22/turkey-is-violating-international-law-it-took-lessons-us/) [expansion](https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/) of the self-defense exception chief among them.

The real test will be what happens in the longer term. Putin is likely planning to put in place a puppet government that will “consent” to his many illegal actions. He is almost certainly counting on the coalition that has responded to the current crisis to fray over time as costs mount. That is a real and serious danger. Plans should be made now to hold the alliance together as long as necessary—for years, and perhaps decades. That means planning now for alternative energy sources for Europe, shoring up protections for countries in the region that may be vulnerable, and forming a mechanism for considering additional steps as needed.

The Russian invasion of Ukraine is a blow to the international legal order—and it’s likely to lead to terrible destruction and loss of life. But it will succeed in undermining the system that has enabled unprecedented decline in interstate wars only if the rest of the world lets it. A healthy legal system responds aggressively and resolutely to assaults on it. If the response is broad, robust, and sustained, then the modern legal order will not weaken. It will strengthen.

#### Strong rules-based legal order key to avert extinction.

Carlsson 8 – former Head of the UN Committee on Rwanda & PM of Sweden.

Chaired by Ingvar Carlsson, Restoring International Law: Legal, Political and Human Dimensions, Chairman’s Report on the High-level Expert Group Meeting, 2008, http://www.interactioncouncil.org/sites/default/files/Chairman's\_Report-International%20Law.pdf)

The challenges that humankind is now facing as a result of the global economic development, climate change and the growing world population are unprecedented. The need for a rule-based international society has never been greater. It is equally clear that to settle differences among States in today’s world by unilateral use of force would have disastrous effects, yes even threaten human survival on earth. Past experience shows that differences that occur among states simply must be resolved by peaceful means as prescribed by the Charter of the United Nations. The need for a rule-based international society has been affirmed by the General Assembly of the United Nations in no uncertain terms. In the Summit Resolution (A/RES/60/1, para. 134) the member states of the Organisation reaffirmed their commitment to the purposes and principles of the UN Charter and international law and to an international order based on the rule of law and international law. Indeed, they clearly stated that such an order “is essential for peaceful coexistence and cooperation among states”. In this 2008 High-level Expert Group meeting held on 19 June 2008 in Hamburg, Germany, the InterAction Council asked how international law could be restored. Particular focus was given to the legal, political and human dimensions. A. International law International law has long been a foundation of state sovereignty just as state sovereignty is one of the fundamental elements of international law. It is expressly referred to among the principles of the Charter of the United Nations. The sovereign equality of all states is in a sense a precondition for world governance. However, the way in which international law has developed over the years has caused a basic shift in the way sovereignty has to be understood in contemporary society. In essence, sovereignty must now be exercised in the interest not of a sovereign but of the citizens and those who reside in the territory of the sovereign state. This applies in particular to observance of human rights standards and the principles of a society under the rule of law. The globalisation and increasing interdependence among states also means that sovereignty must be exercised by entering into **binding legal obligations** and often through membership in international organisations (sometimes referred to as “pooled sovereignty”). The Charter of the United Nations regulates when state sovereignty has to yield as a consequence of decisions by the Security Council in the interest of the maintenance of international peace and security. Over the years, an increasingly comprehensive system of international norms has been developed that imposes binding legal obligations on a range of international actors. In addition, institutions and processes to monitor compliance and address violations of international legal obligations have been established. In many fields the system works well and is more or less taken for granted. In reality, states make great efforts to comply with their international obligations. Seen in this perspective there has been a very positive development towards a rules-based international society. In particular it should be noted that, contrary to what some suggest, the legitimacy of the UN Charter is actually consistently upheld in the rhetoric of all States and the behavior of most. This progress in the building and strengthening of international law and international legal institutions should be commended and supported. However, in certain areas that are central to state sovereignty the situation is more problematic. In recent years, we have seen a tendency among powerful states to act on their own, disregarding their obligations laid down in the UN Charter and other relevant international law. In some quarters there has also been a trend towards an approach that classifies international law as a disposable tool of diplomacy, meaning that its system of rules is merely one of many considerations to be taken into account by governments when deciding what strategy is most likely to advance the national interest in the particular situation at hand. This development is dangerous and entails a serious risk that the world community will lapse back into the society where, ultimately, conflicts were resolved by unilateral use of force – in other words the kind of society that in the past caused major conflicts and human suffering. Such behaviour defeats the purposes and principles of the United Nations and puts the world at risk.

### 1AC – Plan

#### The United States federal government should prohibit platform practices that fail under rule of reason without imposing heightened burdens on plaintiffs.

### 1AC – TTC Adv

#### European DMA draft has passed – BUT there’s still a negotiation process about the scope of enforcement – that will determine its impact on Big Tech.

**Swabey 3-29** --- Editor-in-chief of Tech Monitor. He is an experienced editor, researcher, and presenter, whose work examines the technology-led transformation of business and society for an audience of senior executives and policy makers.

Pete, 3-29-2022, "Digital Markets Act: EU agrees new antitrust rules for the digital economy," Tech Monitor, <https://techmonitor.ai/policy/digital-economy/digital-markets-act-eu-agrees-antitrust-rules-digital-economy>

When the DMA becomes law later this year, there will be a process of negotiation about which products and services fall within the scope of the DMA and how they can be made compliant, says Shier.

One question to be resolved is how the regulation, which is generic across product categories, will be applied in each specific circumstance. “How those generic rules apply for different companies, and how far they’re adapted, is going to be a question” of debate and negotiation, says Burnside.

Shier argues that applying generic rules without tailoring them to individual circumstances could have unintended consequences. Android and iOS are both smartphone operating systems, he observes, but they have substantially different business models. An intervention that promotes competition on one platform may harm it on the other.

How the regulations will be implemented under the new agreed formula is also not yet clear, says Burnside. “One thing that’s important to me is the question of whether the Commission is going to apply the regulation alone, or jointly with the national competition authorities of member states,” he says. “The advantage of national competition authorities having parallel power is that they bring lots of additional resource. The risk is of fragmentation and inconsistent decisions.”

“It’s also important which arm of European Commission is going to be applying the DMA, whether it’s going to be DG Comp [Directorate-General for Competition] or DG Connect,” he says. “The big advantage of DG Comp owning it is consistent application with existing competition law, because competition law will continue to apply. But DG COM hasn’t really had any experience of running ex ante regulation. DG Connect has that experience, in particular from running telecoms regulation.”

#### At their worst, the proposed DMA could drastically prosecute US tech platforms as a vehicle for protectionist antitrust.

**Broadbent 20** --- Senior Adviser (Non-resident), Scholl Chair in International Business.

11-10-2020, "The Digital Services Act, the Digital Markets Act, and the New Competition Tool," No Publication, https://www.csis.org/analysis/digital-services-act-digital-markets-act-and-new-competition-tool

The documents discussed here, both official and leaked, lead observers to conclude that the European Commission is well on its way to embracing a decidedly anti-United States regulatory assault against large online digital platforms. Recognizing that there is a debate in the United States over the ability of antitrust law to moderate the behavior of ascendant companies in the digital economy, Europe, for its part, seems to be set on rushing to enact a raft of measures despite little empirical evidence that the new regime of tech regulation will be effective in achieving Europe’s objective of engendering “tech sovereignty.” Ex ante regulations are unusual, require labor-intensive enforcement, and are “[poorly fitted](https://ecipe.org/publications/ex-ante/) for sectors that are rapidly evolving.” As such, the DSA package poses a real threat of suppressing innovation in Europe.

The digital economy, in which large actors often compete against each other as much as they lead and assert their own business models, has nurtured powerfully effective forces of competition. These firms are fundamentally transforming how individuals pursue personal goals and interests and how business is done globally. From what can be observed, the new digital ecosystem is enabling and nurturing innovation in Europe, allowing European entrepreneurs and businesses to grow and prosper as they improve the lives of EU consumers.

Since 2010, [Amazon](https://www.google.com/url?q=https://www.aboutamazon.eu/map/investing-in-europe&source=gmail-imap&ust=1604669658000000&usg=AOvVaw2cXvYn8R8lRwbQWXW9ti3t) has invested €55 billion ($64 billion) in Europe, hired 115,000 permanent employees, and supported 200,000 jobs by allowing independent businesses to sell on Amazon Marketplace. Additionally, 990,000 companies and creative businesses have built their businesses with Amazon Marketplace, Amazon Web Services, and Kindle Direct Publishing. In January 2020, [Facebook](https://about.fb.com/news/2020/01/european-economic-impact-report/) estimated that around 25 million businesses in Europe—mostly small ones—use Facebook services each month and that Facebook apps helped European businesses generate roughly €208 billion ($244 billion) in sales and create 3.1 million jobs in 2019. The apps also helped European businesses generate €40 billion ($47 billion) of export sales outside the European Union. In 2019, estimated billings and sales facilitated by the [Apple App Store ecosystem](https://www.google.com/url?q=https://www.apple.com/newsroom/pdfs/app-store-study-2019.pdf&source=gmail-imap&ust=1604669658000000&usg=AOvVaw1mvU_vYYo9NsDqzQw9l2ML) in Europe were $51 billion. In May 2020, [Microsoft announced](https://www.google.com/url?q=https://news.microsoft.com/europe/2020/05/08/microsoft-announces-1-5-billion-investment-plan-to-accelerate-digital-transformation-in-italy-including-its-first-cloud-datacenter-region/&source=gmail-imap&ust=1604669658000000&usg=AOvVaw2r-W_qPy4DKthTrL_-WFQe) it is investing $1.5 billion in Italy, including plans to build a regional set of data centers there. This investment could generate more than 10,000 jobs and over $9 billion in direct and indirect economic benefits. Additionally, Microsoft [intends](https://www.google.com/url?q=https://news.microsoft.com/europe/2020/05/05/microsoft-announces-a-1-billion-digital-transformation-plan-for-poland-including-access-to-local-cloud-services-with-first-datacenter-region/&source=gmail-imap&ust=1604669658000000&usg=AOvVaw3u1fFpCzKI7obyN-PFH_bt) to create new digital training programs for local businesses (focusing on SMEs), offering Microsoft’s cloud services to roughly 500,000 companies and startups. It will also add new locations in the “Polish Digital Valley,” Greece, and Austria, where Microsoft has committed to training roughly 120,000 Austrians by 2024. This envisioned cloud services region is expected to generate up to $2.1 billion in new revenue in Austria over the next four years.

LoPs underpin a dynamic digital ecosystem that is supporting the success of many diverse businesses in Europe. Disassembling this ecosystem with the proposed DSA and DMA package threatens to have the unintended effect of dampening healthy job creation and harming Europe’s ability to achieve its “tech sovereignty” goals of ramping up innovation, entrepreneurship, and global competitiveness in the digital economy.

Restraining only U.S. online platforms in Europe effectively raises barriers to entry for U.S. exporters, even as it shields EU industry incumbents with import substitution and other protections borrowed from industrial policy. In the face of a comprehensive political decision to target five U.S. companies, it can be expected that the U.S. Congress and administration will be concerned that not only are U.S. companies being marked for stricter regulation, but they are also being restrained while Chinese companies such as Alibaba, WeChat, and Tencent will apparently be free to pursue their business objectives in Europe.

Under the new competition policy being contemplated in the DMA, the Commission seems intent on moving dramatically away from widely accepted antitrust enforcement principles, in which accused firms are afforded due process and the opportunity to offer evidence in defense of an allegation of dominant behavior. Targeting a specific group of companies identified by their size and success in the European market seems a violation of normal judicial protections. The effect would be to nullify corporate rights, including the legal precept that a law or regulation should address a specific behavior, not an individual or an arbitrarily defined group of companies. By eliminating due process for even a subset of practices, the Commission emboldens other countries that have a history of using competition law to discriminate in ways that favor domestic firms.

Moreover, there is a huge risk that a WTO-violating regulatory assault on large U.S. online platforms would add another major issue to the distressingly long list of intractable transatlantic trade disputes that includes the Boeing–Airbus rivalry, digital services taxes, U.S. national security tariffs on steel and aluminum, and the EU courts’ invalidation of the Privacy Shield framework for data flows. Such an assault would further complicate the seriously ailing, $7 trillion transatlantic economic relationship.

Of course, it is difficult to offer solid conclusions until the Commission publishes its DSA and DMA package proposal and submits draft legislation to the European Parliament and the member states. But we expect that, by then, many elements of the regulatory framework and legislation will be essentially locked in without the Commission having fully considered their impact on innovation and economic opportunities for SMEs in Europe. Our goal in this paper is to discuss how ambitious the Commission aspires to be in its regulatory reach—and how unprecedented and counterproductive these policies could prove to be.

#### Global protectionist antitrust is the final nail in the coffin of free trade.

Murray 19 – Chief Growth Officer, CheckAlt; Judicial Law Clerk, US Bankruptcy Courts

Allison Murray, JD, Loyola Law School, Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?, 42 Loy. L.A. Int'l & Comp. L. Rev. 117 (2019), Available at: <https://digitalcommons.lmu.edu/ilr/vol42/iss1/3>

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents.1 They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The “our country first, world trade after” mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized.2

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders’ best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law.3 So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States (“U.S.”), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally.4 To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes.5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions that could counteract that progress.6 Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization (“WTO”), “once formal trade barriers come down, other issues become more important.”7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

This paper explores how the near-term enforcement of antitrust and competition laws may be either the last hope for preserving aims toward a free global economy or the final nail in free trade’s coffin. We will begin by examining the background of antitrust and competition laws, explaining the goals and economic theories at the heart of the laws, including the myriad of criticisms. Next, we will take a general view of the prevalence of competition laws in the world market, revealing the differences in underlying theory and enforcement by the top three players on the international trade stage. This paper will finish with the subject most at the center of the recent rise of protectionist rhetoric: the perception of unfair enforcement of antitrust laws among the United States, the European Union, and China.

**Guarantees global wars.**

**Palen 17** – Historian at the University of Exeter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Europe’s the key determinant---antitrust standards are inevitably modeled.

**Bradford 20** --- Henry L. Moses Professor of Law and International Organization, Columbia Law School.

“The Chicago School’s Limited Influence on International Antitrust,” Columbia, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3516&context=faculty\_scholarship

The European Union's adoption of high standards also creates pressure for other countries to emulate its policies. Bradford ([2012](https://onlinelibrary.wiley.com/doi/10.1111/jels.12239#jels12239-bib-0002)) terms this phenomenon the “Brussels Effect.” Briefly put, if E.U. citizens prefer strict competition, food safety, environmental, data protection, or other rules, E.U. regulators can require all firms—both foreign and domestic—to comply with these heightened standards as a condition for access to the E.U. market. Few firms can afford to forego selling goods and services to over 500 million relatively wealthy consumers in Europe. As a result, firms typically adhere to E.U. rules. Furthermore, due to scale economies and other benefits of uniform production, these firms often end up adopting the E.U. standard across their global conduct or production, leading to a de facto Brussels Effect. And once these firms have adjusted their global conduct to E.U. rules, they have the incentive to lobby for their own governments to adopt these same rules in their home markets (Bradford [2012](https://onlinelibrary.wiley.com/doi/10.1111/jels.12239#jels12239-bib-0002); Vogel [1995](https://onlinelibrary.wiley.com/doi/10.1111/jels.12239#jels12239-bib-0062)). Replication of E.U. laws domestically levels the playing field for export-oriented companies vis-à-vis their domestically oriented producers who do not export to the European Union and hence do not need to incur the costs of complying with E.U. rules otherwise. This foreign corporate advocacy for E.U.-style competition laws often converts the de facto Brussels Effect into a de jure Brussels Effect and explains why E.U. laws are adopted by foreign jurisdictions.

In these instances, other jurisdictions have little to gain by adopting less stringent competition rules compared to the European Union. Their lenient rules would only be superseded by the E.U. rules, making them obsolete regulators in the enforcement process. For example, if the European Union prohibits an international merger, the merger is banned worldwide; it is irrelevant if the other jurisdictions clear the same merger. In this sense, “the most stringent regulator wins” often in the competition law domain, further illustrating why deviating from the European Union brings few gains for other jurisdictions.  
There is an additional, distinct advantage in aligning one's domestic competition rules with those of the world's dominant regulator. If a non-E.U. country's competition rules mirror those of the European Union, it can simply follow the European Union's lead in evaluating anticompetitive conduct and capture regulatory gains by leveraging fines domestically based on its enforcement of the same set of laws. South Korea, for example, followed closely the European Union's ruling condemning Microsoft for an abuse of a dominant position in tying the Media Player with its operating system. Alternatively, foreign jurisdictions can outsource their enforcement to the European Union and free ride on its resources and investigations while benefiting from outcomes that are consistent with their own regulatory framework. Different rules would make free riding harder because an independent investigation based on a different legal framework might lead to a different regulatory outcome. These reasons make converging to the laws of the “winner” of the regulatory race appealing (Fox [1997](https://onlinelibrary.wiley.com/doi/10.1111/jels.12239#jels12239-bib-0017)).

#### Controls global diffusion---US needs to convince them to alter course.

**Bradford 20** --- Henry L. Moses Professor of Law and International Organization, Columbia Law School.

“The Chicago School’s Limited Influence on International Antitrust,” Columbia, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3516&context=faculty\_scholarship

What may have further compromised the global diffusion of Chicago School ideas is that by the time most foreign jurisdictions adopted an antitrust law, they had an alternative antitrust model to follow and often preferred to turn to the EU antitrust laws instead. While the United States has attempted to promote the “development of sound antitrust laws” abroad,96 historically, the EU system has had more direct influence on countries seeking to implement competition policies for the first time.97 There are several reasons for this, including that the EU actively promotes its model through preferential trade agreements and has an administrative template that is easy to emulate due to its relative statutory precision.98 Former FTC Chairman William E. Kovacic suggests that unlike the EU, the United States does not have the consolidated bargaining power to induce potential trade partners into adopting its antitrust models; it instead must persuade those jurisdictions that its experience and theories are superior.99 The United States’ attempts to emphasize the superiority of its policy, however, have rarely been successful. Indeed, we show elsewhere how the EU’s antitrust model eclipsed that of the US in the 1990s as the template for new antitrust jurisdictions.

However, the EU’s gradual adoption of economic analysis, in turn, may have contributed to the diffusion of the law and economics movement around the world. Thus, the United States’ ideas of antitrust law and economics have most successfully diffused only once the EU started to embrace and promote them as part of its own legal regime. Yet the EU never embraced a strong version of the Chicago School and has been hesitant to spread many of its principles. This partially explains why the variant of law and economics that has gained traction abroad is the variant embraced by the EU. As we show in the next Part, many jurisdictions around the world continue to follow the EU’s lead in prohibiting a broad range of anticompetitive conduct by a monopolist and restricting many types of vertical agreements that the Chicago School considered per se procompetitive. However, by recognizing efficiency defenses and enforcing their laws against the benchmarks of consumer welfare or efficiency, these jurisdictions also acknowledge the broader contours of law and economics as key to their antitrust policies.

#### Biden’s pushing Europe to scale down the DMA, threading a thin needle on antitrust is key.

**Feiner 2-23** --- News Associate at CNBC.

Lauren, 2-23-22, “Bipartisan lawmakers want Biden to tell Europe to stop ‘unfairly’ targeting U.S. tech companies,” CNBC, https://www.cnbc.com/2022/02/23/lawmakers-ask-biden-to-tell-eu-to-stop-unfairly-targeting-us-tech-companies.html

A bipartisan group of 30 lawmakers is urging President [Joe Biden](https://www.cnbc.com/joe-biden/) to push European leaders to alter language in their proposed Digital Markets Act so that it does not unfairly target U.S. tech companies.

In a letter sent Wednesday and shared exclusively with CNBC, the group, led by Reps. Suzan DelBene, D-Wash., and Darin LaHood, R-Ill., wrote that they “are greatly concerned that EU’s proposed approach to promoting competition among digital platforms unfairly targets American workers by deeming certain U.S. technology companies as ‘gatekeepers’ based on deliberately discriminatory and subjective thresholds.”

The letter comes as lawmakers are debating competition reforms at home that would also seek to rein in the power of the Big Tech companies. [Two such bills](https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html) have already passed the Senate Judiciary Committee this year with bipartisan support.

The White House has so far tried to thread a thin needle on the issue of competition reform at home and abroad, recently releasing a [statement](https://www.politico.com/newsletters/morning-tech/2022/02/04/under-pressure-biden-backs-antitrust-push-00005579) to Politico that it [supports](https://www.protocol.com/bulletins/biden-antitrust-us-eu) “the bipartisan progress being made in Congress” but is concerned about “distinct elements” of the EU’s plans.

The Digital Markets Act was originally [announced by the European Commission in 2020](https://www.cnbc.com/2020/12/15/digital-markets-act-eus-new-rules-on-big-tech.html) to tackle issues of online competition with which regulators around the world, including in the U.S., have grappled. That includes matters like tech companies giving better placement to their own products over others’ on their own platforms.

The lawmakers behind Wednesday’s letter wrote that they share the urge to do more to protect consumers and their privacy, but argued that American tech companies are unfairly singled out in the DMA. They pointed to a [Financial Times article](https://www.ft.com/content/49f3d7f2-30d5-4336-87ad-eea0ee0ecc7b) quoting an EU lawmaker who suggested last year that American tech giants [Apple](https://www.cnbc.com/quotes/AAPL), [Amazon](https://www.cnbc.com/quotes/AMZN), [Facebook](https://www.cnbc.com/quotes/FB), [Google](https://www.cnbc.com/quotes/GOOGL) and [Microsoft](https://www.cnbc.com/quotes/MSFT) were the “biggest problems” for competition policy in Europe.

The lawmakers called the DMA’s parameters “de facto discrimination.”

“As European leaders have made clear, the DMA as currently drafted is driven not by concerns regarding appropriate market share, but by a desire to restrict American companies’ access in Europe in order to prop up European companies,” they wrote.

#### Amex decision cemented insurmountable barriers to US platform antitrust. That’s perceived in Europe as immunizing tech monopolies AND cedes U.S. ability to influence global anti-trust.

**Rubin & Zacomb 20** --- \*Formerly an antitrust partner at Patton Boggs LLP in Washington, D.C. For the past 15 years, he focused his legal practice exclusively on antitrust and competition law and policy. \*\*Associate in MoginRubin LLP’s San Diego office and his practice focuses on antitrust, unfair competition, and complex business litigation, particularly as they relate to mergers and acquisitions.

Jonathan & Timothy, 5-19-20, "End of an Era: The U.S. is No Longer the Authority Figure for Multinational Mergers," National Law Review, https://www.natlawreview.com/article/end-era-us-no-longer-authority-figure-multinational-mergers

In 2001, Time Magazine editor Michael Elliott asked legendary General Electric CEO Jack Welch to reflect on the termination of his dream acquisition of Honeywell International, not at the hands of U.S. antitrust agencies but by the European Commission. If consummated, the $45 billion deal would have been an enormous feather in Welch’s already well-feathered cap. Instead, it marked the first time a European competition agency would spoil a merger between two U.S. firms. “Should a European be able to shape a merger between two American companies?” Elliott asked. “That’s the law,” replied Welch. “That really is just the way the world works.” “We’d all better get used to it,” Elliott wrote, because “soon, something like it will happen again.”

Elliott’s prediction was correct in 2001 and has become increasingly correct in the years since. Not only have capable antitrust enforcers emerged in jurisdictions throughout the world, but the U.S. has also relaxed its own enforcement standards. As a result, the U.S. no longer calls the shots when its multinationals want to merge. The failure of three recent deals – McGraw-Hill Education/Cengage Learning, Illumina Inc./Pacific Biosciences of California Inc., and Sabre Corp./Farelogix Inc. – illustrate this new world order, particularly as it relates to the U.K. Competition and Markets Authority.

U.K. CMA Offers Most Resistance to McGraw-Hill and Cengage Merger

McGraw-Hill and Cengage, two leading multinational textbook publishers, announced their intention to merge in May 2019. The merger would have combined the second and third largest college textbook publishers, creating a duopoly with Pearson Plc that would have controlled more than 80% of the market. The merger threatened to create duopolies in related and emerging markets, including those for student learning data and all-inclusive textbook access fees. The merger also endangered pro-consumer markets like the used textbooks market.

Of the numerous agencies reviewing the merger, the CMA offered the greatest opposition. After conducting a Phase I investigation, the CMA gave the parties an ultimatum – provide remedies to the competition problems caused by the merger or face a Phase II investigation. The parties submitted remedies, but they were rejected because they “did not represent important enough constraints on educational publishers to offset the CMA’s concerns about the loss of competition arising from the merger.”

The U.S. Department of Justice, on the other hand, was reportedly in line to approve the merger with relatively minor divestitures. This decision was made despite detailed submissions by influential watchdog groups and student associations that outlined several of the competition problems caused by the merger.

Even U.S. lawmakers, who often fail to grasp nuanced antitrust issues, correctly pegged several of the competition problems associated with the merger. In a strongly worded letter to the DOJ, Rep. David N. Cicilline of Rhode Island, Chairman of the House Antitrust Subcommittee, and Rep. Jan Schakowsky of Illinois, Chairman of the House Consumer and Commerce Subcommittee, asked for increased scrutiny for the deal, citing its potential effects on textbook prices and student data, its impact on pro-consumer markets like that for used books, and its influence over whether the industry shifts to an inclusive access fee model, which “will completely remove students’ ability to price-shop and will prevent students from reselling textbooks.”

CMA Takes the Lead for Illumina and PacBio Merger

Illumina, which dominates short-read DNA sequencing, announced in late 2018 that it would acquire PacBio, which dominates emerging long-read DNA sequencing. The central issue for the reviewing agencies was whether the companies are competitors even though short- and long-read sequencing were traditionally viewed as poor substitutes.

The CMA took the reigns on this analysis. In October 2019, the CMA determined the companies were competitors in a dynamic market and, therefore, the merger must be analyzed in a dynamic context. The CMA based this decision largely on non-price factors, including that merging parties (i) compete through innovation, (ii) are particularly concerned with each other’s innovations, and (iii) share a desire to be the preferred sequencer for as many projects as possible, including projects aimed at potential customers not currently in the market.

The CMA ultimately concluded the deal would reduce competition, potentially increase prices, lead to deterioration in quality and/or service, and harm innovation. The CMA also indicated that its preferred resolution was to block the deal altogether than to regulate the parties’ behavior or require some divestiture. For example, the CMA concluded a partial divesture by PacBio would not work because “the degree of operational overlap between functions in each business, the complete integration of sequencing systems within the businesses, and the fact that R&D and innovation-related activity is a centralized process which affects each company’s global offering.”

Only months later, in December 2019, did the FTC challenge the transaction as an unlawful attempt by Illumina to maintain its monopoly. The FTC largely followed the CMA’s lead, concluding the companies operated in the same market and the merger was an unlawful attempt by Illumina to maintain its monopoly power.

In January 2020, the parties terminated the merger. In announcing this decision, the companies cited a lengthy approval process and “continued uncertainty” caused by the reviewing agencies.

CMA Blocks Sabre/Farelogix Merger Despite U.S. Approval

Following an eight-day bench trial, a U.S. federal court greenlit airline booking services company Sabre Corp.’s acquisition of competitor and market disruptor Farelogix Inc., despite arguments by the DOJ that the deal would “extinguish crucial constraint on Sabre’s market power,” resulting in higher prices and less competition.

Although Sabre handles 50 percent of airline bookings made through U.S. travel agents and only a couple of other players occupy the market, U.S. Judge Leonard P. Stark ruled on April 7, 2020 that the DOJ hadn’t met its burden of proof and declined to enjoin the acquisition (United States v. Sabre Corp., No. 19-1548-LPS, 2020 U.S. Dist. LEXIS 64637 (D. Del. Apr. 7, 2020)).

Judge Stark’s decision seemed compelled by procedural and technical formalities, despite significant evidence that the acquisition was likely to harm competition. For example, he wrote that Farelogix “has historically been an innovator while Sabre has resisted change.” One airline executive testified, Farelogix “keeps GDS [global distribution systems] on their toes relative to innovating to keep up.” Sabre itself said in SEC filings that airlines with “direct connect initiatives” – like those offered by Farelogix – can weaken Sabre’s position when negotiating prices. Another airline executive described Farelogix’s direct connect technology as a “low cost substitute” for global distribution systems, like Sabre’s.

The judge acknowledged that allowing the deal may not seem in line with many of his findings “[o]n several points that received a great deal of attention at trial — whether Farelogix is a valuable company enjoying relative success in the market, whether Sabre and Farelogix compete, whether Sabre understands GDS bypass is a threat, whether Sabre stands to lose revenue even from the expansion of GDS passthrough, and Sabre’s motivation for its proposed acquisition of Farelogix ….” On these issues the Court was more persuaded by the DOJ than by the merging parties “largely due to the surprising lack of credibility … of certain defense witnesses,” referring by name to the Sabre and Farelogix CEOs and the Sabre deal leader.

Despite this evidence, Judge Stark held “Defendants have won this case. This is because the burden of proof was on DOJ, not Defendants. Defendants opted to tell the Court a story that is not adequately supported by the facts, but it was their choice whether to do so, and their failing does not determine the outcome of this case. Instead, it is DOJ which, under the law, has the obligation to prove its contention that the Sabre-Farelogix transaction will harm competition in a relevant product and geographic market. DOJ failed.” The judge said the government based its argument on a “simply unpersuasive” expert analysis. “Unlike Defendants’ evidentiary failings, DOJ’s are dispositive.”

The government selectively and “without persuasive explanation” dissected Sabre’s services into a category of “booking services,” leaving out the other services it provides to travel agencies, so the DOJ failed, according to the judge, to identify a relevant product market. This “does not accurately correspond to what actually is transacted in the market relevant to the proposed transaction,” Judge Stark found. Because Sabre operated a transaction platform for airline tickets between travel agents on one side and airlines on the other, the judge felt bound by the holding in Ohio v. American Express to require the DOJ to allege and prove harm to competition in a two-sided market. Because Sabre operated only on one side, providing services to airlines for both ticket sales as well as other transaction features not available on Sabre, the judge found it implausible that a firm like Sabre, which operates a two-sided transaction platform, would be competing in the same market.

As a result, the DOJ had failed in the court’s view to demonstrate harm to competition, prove new barriers to entry, establish the likelihood of increased prices, show that the deal would stifle innovation, or even identify a relevant geographic market.

A few days later, the CMA blocked the deal. Acknowledging that CMA’s decision comes at a challenging time for the travel industry due to the COVID-19 pandemic, CMA Chairman Martin Coleman nonetheless said, “It remains important that we protect competition among businesses that provide services to airlines and the benefits such competition can bring for airlines and passengers. We never take decisions to block mergers lightly and in this case the evidence of harm is clear.” Although we have no way of knowing, but the U.K.’s CMA would seem to agree with Judge Stark’s own comment that his ultimate decision “may strike some, including the litigants, as somewhat odd,” given his several findings that militated against the companies and their deal and in favor of the U.S. government’s case to block it.

Leadership Goes to Jurisdictions with Most Restrictive Policies

Unlike other forms of international cooperation grounded in notions of comity and geopolitical realities, leadership in international merger clearance defaults to the jurisdiction with the most restrictive policy. For decades, the U.S. served in this role; merger clearance by the FTC or DOJ would practically ensure worldwide approval. But the E.C.’s decision to block the GE-Honeywell acquisition marked something of an inflection point in the path of global enforcement.

The actions by the DOJ and CMA regarding the Cengage/McGraw-Hill merger exemplify the simultaneous weakening in the U.S. and strengthening in Europe of substantive merger clearance standards and demands. The CMA applied the more restrictive standard and therefore led the clearance process. The CMA not only required the parties to propose remedies to the competition problems it identified, but then rejected those remedies as insufficient. Cengage and McGraw-Hill called off the merger roughly one month later, strongly implying the CMA’s rejection played a key role in stopping the deal. The DOJ, on the other hand, was reportedly poised to approve the merger with relatively minor divestitures, largely ignoring competition concerns raised by lawmakers and advocacy groups.

The CMA again took the lead in the Illumina/PacBio merger review. The CMA was first to conclude Illumina and PacBio operated in a single dynamic market and that the merger was an attempt by Illumina to eliminate a nascent competitor. The CMA also indicated it would attempt to block the merger, as it did not see an alternative that would protect competition from a patent-protected monopolist in a market for an extremely important technology. Although the DOJ eventually reached similar conclusions and challenged the merger, it was not until months after the CMA.

But global divergence in substantive standards and expedience is only half the story, as the Sabre/Farelogix debacle demonstrates that jurisdictions have differing procedural requirements as well. In that case the U.S. government challenged a significant consolidation in a complex, high-tech sub-market in the airline industry only to be confronted with seemingly insurmountable procedural hurdles. Judge Stark’s mechanical and misguided interpretation of the Supreme Court’s holding in Amex—that the competitive effects in any antitrust case involving a transaction platform must be analyzed within a two-sided market definition—created an impossible legal hurdle for the government since only two-sided transaction platforms could compete against Sabre, a qualification Farelogix did not meet.

Putting aside the wrong-headedness of the court’s interpretation of Amex (examples abound of anticompetitive conduct by a two-sided transaction platform that does not require defining a two-sided market), the greater sin may have been to elevate formalism over substance. It is well known that substantive rights can be rolled back through purely procedural maneuvers. In the Sabre-Farelogix case, the court created an excessively inflexible market definition requirement and reached a conclusion seemingly at odds with the evidence largely because the government failed to offer a prima facie case. In other words, the merging parties needn’t have bothered presenting their unreliable and misleading evidence. The court ruled the DOJ failed to make out its case in chief, so all the merging parties had to do was show up.

By contrast, the CMA satisfied its market definition and elemental requirements through overwhelming evidence that demonstrated Farelogix represented the most likely source of industry innovation and, as such, the most significant competitive constraint on Sabre’s market leadership. The U.S. court was aware of this, having noted that Farelogix represents the only real threat to Sabre and the testimony of one airline executive who said it would cost $40 million for an airline to develop its own platform and more than $20 million a year to maintain. An innovator like Farelogix could be easily and/or intentionally stymied if controlled by Sabre, a proposition that seemed self-evident to the CMA but was swallowed whole by the procedural obstacles erected by the U.S. court.

Indeed, the U.S.-European procedural divergence in merger control is institutional. U.S. authorities must prove a case in court to obtain an injunction whereas agencies like the E.C. can impose injunctions without judicial intervention, placing the onus on the merging parties to challenge the injunction in court. One can have no quarrel with the U.S. system and a deep suspicion of the European approach, but the U.S. institutional structure should not be used as an instrument to roll back substantive antitrust law, as the court did in the Sabre-Farelogix case.

In terms of both substantive competition law standards and the procedural requirements for merger control, the U.S and Europe appear headed in opposite directions. And, based on the three deals discussed above, the adjustment necessary to realign the world’s competition merger policies should be made in Washington – not in London or Brussels.

#### Reversing that perception is key to quell impending EU antitrust overreach.

**Din 21** --- Technology reporter at POLITICO and author of Morning Tech

Benjamin, 7-14-2021, "U.S., Europe partner up on digital competition," POLITICO, https://www.politico.com/newsletters/morning-tech/2021/07/14/us-europe-partner-up-on-digital-competition-796493

TRANSATLANTIC INROADS ON ANTITRUST — They don’t always see eye to eye on issues like taxes and privacy, but the U.S. and Europe’s ongoing dialogue on digital competition has taken on new significance as both sides of the Atlantic ramp up their antitrust pressure on Silicon Valley.

— From Brussels to the Hill: Rep. [David Cicilline](https://cd.politicopro.com/member/151799) (D-R.I.), who chairs the House Judiciary antitrust panel and is leading the effort on the bipartisan antitrust package, met Tuesday with Andreas Schwab — the German member of the European Parliament who is handling the EU’s digital competition bill — as part of a joint parliamentary session hosted by the European Parliament’s Washington office.

Back in June, the U.S. National Security Council criticized Schwab [for being too “protectionist”](https://www.ft.com/content/2036d7e9-daa2-445d-8f88-6fcee745a259) in defining the scope of the EU’s digital competition bill. The MEP had proposed targeting only the five largest U.S. tech companies: Amazon, Apple, Facebook, Google and Microsoft. That approach, however, is not that far off from what Cicilline’s House bills do. Before Tuesday’s meeting, Schwab told our colleagues in Europe that both the EU and the U.S. are facing “similar questions.”

— The U.K. weighs in too: Andrea Coscelli, who heads the U.K.’s competition authority, said Tuesday on a panel of the country’s digital regulators that his agency is in constant contact with the FTC and the DOJ on antitrust matters. “We have quite a number of high-profile cases we’re doing together,” he said. And in April, Coscelli’s agency launched a special unit dedicated to reining in the tech giants — although its powers are not yet fully defined.

“If the U.S. agencies manage to achieve lasting change in some of the practices we’re worried about, it’s a massive bonus for us and U.K. consumers, because we then don’t need to act directly,” he said. “So it’s partially working together when it’s appropriate and partially following closely what’s happening in Washington.”

#### Upcoming TTC conference is key to convince them to scale down antitrust.

**Scott 21** --- Chief Technology Correspondent at POLITICO, writing about the global collision of technology and politics.

9-30-21, "POLITICO Digital Bridge: Trade and Tech Council debrief — Antitrust consensus — Anti-vaccine content," POLITICO, https://www.politico.eu/newsletter/digital-bridge/politico-digital-bridge-trade-and-tech-council-debrief-antitrust-consensus-anti-vaccine-content/

AND SO THAT’S THAT. With the final [statement](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_4951) published — and much glad-handing completed — senior EU and United States officials set out their stall for greater cooperation on trade and technology. All the greatest hits were there. So-called export controls and investment screening, mostly to keep China at bay. Possible limits on the use of artificial intelligence. Promises to work more closely on global trade challenges (also read: China.)

But for those expecting fireworks, this meeting was not that. EU and U.S. officials told me the goal of this first summit was merely to lay down a marker so that the TTC’s 10 working groups (details [here](https://www.politico.eu/newsletter/digital-bridge/politico-digital-bridge-trade-and-tech-council-details-data-flows-peril-gig-workers-rejoice/)) could get down to work on more concrete goals for the next meeting, mostly likely in France in early 2022. “We wanted to put forward a plan for what’s to come,” said one, who spoke on the condition of anonymity. “Now the working groups will get down to work. This is just start of something bigger.”

It’s certainly true that the mere fact there was a transatlantic meeting about everything from possible platform regulation to data governance to protecting critical supply chains should be viewed as some sort of win. Both sides still view each other via the prism of previous trade and digital clashes. So getting the EU’s Margrethe Vestager and Valdis Dombrovskis in the same room as the U.S.’s Antony Blinken, Gina Raimondo and Katherine Tai is a step in the right direction.

But Wednesday’s meeting left many questions unanswered. Critically, what’s the TTC actually for? For Washington, the focus is squarely on pushing back on China. The White House was particularly keen on linking the transatlantic meeting’s outcome with a separate, recent [statement](https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/24/joint-statement-from-quad-leaders/) from the so-called Quad countries of the U.S, Australia, India and Japan. For the EU, that’s still a step too far, although the TTC’s future work has a significant anti-China feel to it.

“There are areas that are in there, including some that have been more fleshed out than others, that are clearly on the agenda only because of shared concerns about China,” [Emily Kilcrease](https://www.linkedin.com/in/emily-kilcrease-4a8a9585/), director of the energy, economics and security program at the Center for a New American Security, and former official at the United States Trade Representative, told me. “Investment screening would not have such a robust presence on the agenda if there wasn’t a shared concern about Chinese acquisitions.”

Second is what to do about different approach to digital regulation. The TTC’s final communique made it clear this transatlantic approach would not affect whatever tech-related rules either Brussels or Washington pass. But in an event just before Wednesday’s meeting in Pittsburgh, Raimondo [reiterated](https://twitter.com/apolyakova/status/1443231397360062466?s=20) longstanding U.S. concerns about the EU’s antitrust proposals, called the Digital Markets Act, and how they may unfairly target U.S. tech companies.

#### AND, success at the TTC on digital competition spills over to contain Chinese digital authoritarianism.

**Atkinson 21** --- President, Information Technology and Innovation Foundation

Robert D., 9-13-2021, "Advancing U.S. Goals in the U.S.-EU Trade and Technology Council," ITIF, https://itif.org/publications/2021/09/13/advancing-us-goals-us-eu-trade-and-technology-council

Perhaps with the exception of consulting, China seeks global leadership, if not dominance, in every IT sector. Moreover, China is not just another Asian Tiger; it is a Leninist dictatorship that rejects Western values of free speech, an open press, democratic elections, and the rule of law. Indeed, the famous Document 9, an internal communique from the party in 2013, warned all cadres to stop universities and media from discussing seven topics: “Western constitutional democracy, universal values, civil society, neoliberalism, the Western concept of press freedom, historical nihilism, and questioning whether China’s system is truly socialist.”26 As an aspiring global hegemon, China uses a combination of carrots and sticks, including its “digital silk road,” to bribe and bully other nations into submission.27 Moreover, it has worked tirelessly to increase its influence on important international bodies related to IT and digital technologies, such as the International Telecommunication Union (ITU), in order to shield it from global scrutiny and help ensure its approach to IT and digital policy is widely adopted.28

As such, a key task of the TTC should be to cooperate both defensively and offensively with regard to China. If the EU and United States are willing to compromise on key IT and digital policy issues, then ideally the United States and EU would be able to cooperate against Chinese economic predation, with the goal of limiting damage to their interests while at the same time slowing Chinese technological advances. Policymakers should be wary of the alternative: If the United States and Europe cannot work together on digital issues, the probability of them working together on global digital issues of mutual interest shrinks dramatically.

U.S. officials should press the EU to work more closely on measures to constrain China. This can include 5G equipment and systems, Chinese investment screening, joint WTO cases against China, cooperation on cyberhacking and other intellectual property (IP) theft, supply-chain cooperation, reciprocal advanced technology strategy and program cooperation, joint blocking of Chinese imports when massive subsidies or IP theft or coercion are involved, cooperative export controls, and cooperation in international forums related to the digital economy.

The two governments should also work to collaborate on joint efforts to boost digital innovation and joint competitiveness. These can include joint participation in government research and development (R&D) programs, easier migration for technically skilled workers, and data sharing for AI, particularly in key public interest areas such as smart cities and health care. In addition, both should continue work to present a united front at international bodies defending not only the multistakeholder Internet governance system.

In short, while it would be ideal if the EU were to clearly join the United States to limit Chinese innovation mercantilism and digital authoritarianism, the EU moving even in limited ways in this direction should be considered a success.

#### Joint technical standards prevent China and Russia from splintering the open internet.

**Wheeler 21** --- Visiting fellow in Governance Studies at The Brookings Institution. Wheeler is a businessman, author, and was Chairman of the Federal Communication Commission (FCC) from 2013 to 2017.

Tom, 1-21-2021, "Time for a U.S.—EU digital alliance," Brookings, https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/

The global open internet is [splintering](https://en.wikipedia.org/wiki/Splinternet) as nation-states such as China and Russia wall themselves from the free flow of information while repurposing digital technology to their economic and ideological benefit. Liberal democracies are facing the threat that the future of the most powerful network in the history of the planet could be defined by others.

The European Union—which has led in the attempt to establish oversight of the dominant digital companies—is also leading in the effort to build a democratic alliance. Lost in the attention paid to the EU’s proposed [sweeping rules](https://www.brookings.edu/techstream/how-the-eu-plans-to-rewrite-the-rules-for-the-internet/) for the regulation of online platforms, is its [proposal](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2279) for a “specific dialog with the US on the responsibilities of online platforms and Big Tech” as part of a [post-inauguration summit](https://www.euractiv.com/section/global-europe/news/eu-plans-two-summits-with-us-next-year-aiming-to-forge-new-alliance-in-face-of-china/) with President Biden.

Such strategic discussions should be the beginning of an alliance of liberal democracies to protect the open and free values, as well as the economic strengths, of those societies. The North Atlantic Treaty Organization (NATO) was created as a military alliance in the sharply divided world of the 20th century. Now is the time for a Western digital alliance for the interconnected yet increasingly splintered 21st century.

Such an alliance could embrace two broad categories: protecting supply chains and protecting consumers and competition. Robert Knake, writing for the Council on Foreign Relations, has [proposed](https://www.cfr.org/report/weaponizing-digital-trade) a Western “digital free trade zone” to insulate democratic nations from autocratic regime control over hardware and software. This paper addresses the creation of an alliance of Western democracies—beginning with the U.S. and EU—to focus on the power of autocratic corporate empires and their effects on competition and consumers.

A DIGITAL ALLIANCE

In 1865, the French government assembled representatives of other European nations with state-owned telegraph networks. The attendees formed the International Telegraph Union (ITU) and agreed to a common set of standards for their activities. As the first supranational organization, it was a step toward today’s European Union.

A century and a half later, common technical standards are again at the heart of a new network. Beyond those technical standards, however, is a void in the establishment of behavioral standards for the network of the 21st century. It is no longer sufficient to allow dominant digital companies to act as pseudo-governments and make their own set of self-serving behavioral rules.

The telegraph transmitted data at about three bits per second, approximately 100 times faster than a mounted courier.[[1]](https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/#_edn1) That speed ate away at the time buffer that allowed borders on the map to have relevance. Today, networks operating at gigabit speeds eliminate such distinctions altogether—including the continental distinction between the United States and Europe. This seamless and speedy interconnection has created shared digital realities for the U.S. and EU that require shared policy solutions while respecting national sovereignty.

These common digital policy issues organize themselves into three broad classifications: the dissemination of misinformation and hate, the distortion of markets to become non-competitive, and the exploitation of consumers. While there is little international debate surrounding the identification of such problems, the interconnections that make these problems possible have taxed the ability of individual nation-states to respond.

The challenges of internet capitalism are common to both sides of the Atlantic. The capital asset of digital information is inexhaustible, non-rivalrous and applied at near-zero marginal costs (“build once, sell everywhere”) to feed expansion through network effects.[[2]](https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/#_edn2) These characteristics have created a new 21st century economic reality as surely as 19th century industrial capitalism replaced agricultural mercantilism.

In the 19th and early 20th centuries the new industrial economy necessitated the creation of regulatory oversight. Such regulation not only protected consumers and competition, but also had the effect of protecting industrial capitalism itself. We stand at a similar juncture with internet capitalism: to protect the public interest while continuing the best aspects of an innovative digital economy.

Yet governments have struggled to keep pace with the effects of the new digital economic model and the speed at which it operates. One consequence of the “move fast and break things” mantra is that the dominant digital companies have been able to define market behaviors before policymakers can catch up. Too often these behaviors are oblivious to their anticompetitive consequences and the public interest.

The real time nature of an interconnected globe cries out for nations with common values to develop shared oversight concepts for the marketplace results of those interconnections. The network effects that allow companies to scale rapidly would also allow for the rapid dissemination of these common policies.

In her September State of the Union [address](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655), European Commission President Ursula von der Leyen was quite direct: “Europe must now lead the way on digital—or it will have to follow the way of others who are setting these standards for us.” At the same time, she proactively asserted, “we are ready to build a new transatlantic agenda,” including in digital technology issues.

To date, the European Union has been the world leader in establishing such behavioral expectations. Until the recent antitrust actions, the United States has been largely absent from the field. The failure of the U.S. to develop domestic regulatory policies has cost it a leadership role in the interconnected world. “A common refrain among European officials,” [Politico reports](https://www.politico.com/news/2020/10/21/google-europe-us-antitrust-431036), “is that they’re being forced to take actions because the U.S. hasn’t.”

The result is an anomaly: U.S. companies have a global leadership position in digital technology, products and services—but the United States has shown little policy leadership. It would American companies and policymakers to recognize that in the interconnected world, failure in the latter undermines continued success in the former. Similarly, it would all liberal democracies to eschew the temptation to seek a regulation-imposed competitive advantage that itself accelerates splintering.

In early December, the EU proposed sweeping new oversight of the digital economy. The [Digital Services Act](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en) deals with online content issues. The [Digital Markets Act](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349) establishes behavioral expectations for the digital platforms judged to be market gatekeepers.

The EU’s new proposals continue efforts to find the right regulatory oversight of the digital giants. The speed with which digital technology imposes change has, however, outpaced the traditional oversight tools of government. As EU Executive Vice President Margrethe Vestager [explained](https://arstechnica.com/tech-policy/2020/12/eu-warns-that-it-may-break-up-big-tech-companies/), “It is painful that in digital markets the harm that can be done in that marketplace can happen very fast but the recovery of that marketplace can be very, very difficult.”

The challenges of regulation in the digital era were highlighted by a [report](https://www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=14734) of the European Court of Auditors. That review concluded the EU’s digital oversight “has not yet fully addressed the complex new enforcement challenges in digital markets, the ever-increasing amount of data to be analysed or the limitations of existing enforcement tools.”

This situation is not unique to the EU. Just like the network that stimulated concerns in the first place, the issues created by such connections do not respect national boundaries. Oversight of the digital marketplace would be greatly enhanced by the cooperative efforts of a digital alliance. Consideration of such an alliance can follow the three issues raised by the EU auditors: the complexities of enforcement; the amount of data to be analyzed; and the limitations of existing enforcement tools.

COMPLEXITIES OF NEW ENFORCEMENT CHALLENGES

Concepts and structures created to deal with the analog industrial world are insufficient for the digitally interconnected world in large part because of the nature of the capital assets of each. Business activity in the industrial era was built around hard assets such as coal, iron, and manufactured goods. The digital era is built around the soft assets of digital information. While data assets continue to enjoy industrial-like scope and scale economies, they are different in other ways that create strong tendencies to market failure and necessitate regulatory oversight.

“The industrial era was built around hard assets such as coal, iron, and manufactured goods. The digital era is built around the soft assets of digital information.”

As compared to industrial assets, information assets are incrementally inexpensive, inexhaustible, iterative and non-rivalrous. Computers perform calculations and networks distribute the results at a very low marginal cost. Whereas a ton of coal is exhausted by usage, a file of data can be used over and over. The use of that data, in turn, creates new data that produces new products. Finally, data is non-rivalrous in that usage by one party does not preclude usage by another.

Added to these basic differences in the root assets of the digital economy are three additional factors: network effects, low marginal cost distribution and “free” end user goods and services. Network effects are the epicenter of internet economics, as the value of a product or service increases as it connects with more people, which in turn creates a propensity to “tip” to monopoly. Thanks to the internet, this phenomenon is reinforced as the marginal cost of delivering that product or service to an additional user approaches zero. Together, these forces permit the product or service to be provided at no cost to the user, thus triggering further network effects that erect barriers to new entrants and allow monopoly pricing for those seeking access to users of the “free” service.

The economic model of the industrial era was constrained by assets that ultimately confronted diminishing marginal returns as costs rose and markets became saturated. The economic model of the internet era knows no such constraints, but rather is driven by an endless supply of data feeding boundless demand. At the heart of machine learning and artificial intelligence, for instance, is an unquenchable demand for more data. That demand is met by digital perpetual motion, where data use begets data products that beget more data use and more products.

Inexpensive, inexhaustible, iterative and non-rivalrous assets that take advantage of low-margin, network effect-driven digital capabilities mean that there is even greater mass production in the information economy than there was in the industrial economy. This produces the next challenge: how the self-perpetuating, never-ending process in which data produces new products, which produce new data, speeds the pace of change far beyond anything experienced in the industrial economy and beyond the capacity of industrial era structures.

EVER-INCREASING AMOUNT OF DATA TO BE ANALYZED

The operational model of the new economy is the use of big data to drive conclusions. Data-driven analytics are [used by Hollywood](https://thenextweb.com/neural/2020/11/20/this-ai-is-unimpressed-by-gillian-andersons-casting-in-the-crown/) to predict the public’s reaction to actors in various roles. European [rugby teams](https://www.independent.co.uk/sport/football/premier-league/liverpool/transfers-recruitment-jurgen-klopp-b1760916.html) and American [baseball teams](https://www.datarobot.com/blog/how-the-boston-red-sox-knock-it-out-of-the-park-with-analytics-and-ai/) have pioneered data-driven decision making in sports. Machine learning and artificial intelligence can have similar roles in regulatory oversight.

There exists, however, at least two problems in such data-driven regulatory analysis. The first is the regulators’ inherent unfamiliarity with building a data analytics engine and the opposition of the industry to provide access for meaningful input. The second problem is the need for consensus on the data analytics process and the “data elephant problem”. As the old story goes, multiple blindfolded people touching the same elephant come away with different conclusions about what they encountered depending on what part they touched. A cooperative effort to overcome these problems would standardize the information sought as well as its analysis.

A transatlantic digital alliance can begin to be built around common analytical systems to assess the digital marketplace. There is no shortage of such inputs, both governmental and academic.[[3]](https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/#_edn3) The areas of inquiry for such a convening are already known: [misinformation, disinformation and malinformation](https://ethicaljournalismnetwork.org/tag/fake-news/page/4); market gatekeepers; and consumer welfare issues such as privacy and the security of networks and their data.

These topics are continually discussed at multiple independent conclaves, as well as through informal exchanges such as the [International Competition Network](https://www.internationalcompetitionnetwork.org/about/). There is, however, an absence of a more formally organized opportunity for policymakers on both sides of the Atlantic to seek consensus on the interpretation of the data and the identification of the risks inherent in the digital economy.

LIMITATIONS OF EXISTING ENFORCEMENT TOOLS

While common data analysis efforts can identify marketplace risks and suggest regulatory mitigation, the tools available for such mitigation are too often insufficient.

The digital challenges are new, so the response to them must also be new and innovative. The challenge for the digital era is the development of a regulatory environment that is flexible enough not to inhibit innovation while enforceable enough to protect competition and consumers.

“The challenge for the digital era is the development of a regulatory environment that is flexible enough not to inhibit innovation while enforceable enough to protect competition and consumers.”

The rigidity of industrial era-style regulation has gifted the dominant digital companies with a three-pronged attack against any regulatory oversight. One argument asserts that rigid regulation stifles the genius of “permissionless innovation.” It is a legitimate but over-hyped concern that assumes the continued imposition of rigid industrial era “utility-like” regulatory micromanagement. Yet, when a more flexible circumstances-based regulation is suggested, the argument shifts to the adverse consequences of “regulatory uncertainty.” Finally, it becomes beneficial for the giant companies to argue that smaller companies cannot withstand the burdens of regulation.

The practical effect of all these excuses, of course, is simply the opposition to all forms of regulation.[[4]](https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/#_edn4) Rather than permitting the discussion of behavior-based oversight to be sidetracked by any of these arguments, policymakers should advocate a new approach.

When, beginning in the late 19th century, it became necessary to regulate industrial activities, governments simply copied the management model of those they oversaw. The rules-based bureaucratic supervision of factory production was simply transposed to government. The relatively stable technology of the time created relatively stable markets that allowed for such micromanagement at both at the corporate and government level. Such stability no longer exists.

The management of digital enterprises has taken a 180 degree turn from the industrial model to embrace agile management techniques capable of keeping pace with technology and marketplace developments. Included in such agile management is the use of standard-setting processes that normalize technology while also creating a process to assure its continued flexibility in response to new developments.

Conspicuously absent in the industry standard-setting activities, however, has been the creation and enforcement of public interest behavioral standards. Industry developed so-called “privacy codes,” for instance, are less about protecting the user’s privacy and more about how the company will violate that privacy. Consideration of the public interest is all too often absent from such standard setting and must be introduced to the process.

The challenge of 21st century regulatory oversight—on both sides of the Atlantic—is to protect the public interest while embracing techniques that mirror the agile management of the digital companies themselves. Such a new approach necessitates the development of a new regulatory paradigm that combines the proven effectiveness of industry’s standard setting process with expectations, oversight and enforcement established by government.

This could lend itself to the development of common digital alliance policies, but with sovereign enforcement. The behavioral standards process would begin with the identification of specified practices (e.g., shared access to data assets, privacy protections, etc.) and the direction to develop an industry standard governing those processes.[[5]](https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/#_edn5) The dominant digital companies would participate, along with representatives of the EU, U.S. and public representatives to collectively reach an agreement. To assure the process is not captured by one interest or another, the adoption of such outcomes would devolve upon the sovereign nations participating in the digital alliance.[[6]](https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/#_edn6)

TIME TO START

Fortunately, we may have a running start on such an undertaking. The internet itself has enabled a 21st century iteration of a Republic of Letters, the Enlightenment’s community of scholars that communicated via correspondence. Whether by email, web-based publications, or more lately Zoom, government officials, academics and others are using the medium that created the new digital challenges for the exchange of insights.

The pressing issue, however, is to move beyond discussion. Kickstarted by the suggested summit, the exhortation of President von der Leyen, the introduction of the EU’s digital initiatives, and a new American administration that believes in multilateralism, the European Union and the United States have an opportunity to begin to forge a digital alliance.

Typically, nations enter such cooperative relationships via treaty. The sclerotic process of treaty negotiation, however, has been ambushed by the speed with which digital technology evolves and digital companies impose their will on the marketplace. A cooperative effort to outline the fundamentals of behavioral standards for dominant digital platforms could be the beginning of a broader alliance to create a collective response to the

#### Fragmented internet spills over to collapse other forms of connectivity—And prevents cooperation to solve every major global threat

Merrill and Komaitis 21 – Nick Merrill is the director of the Daylight Lab at the UC Berkeley Center for Long-Term Cybersecurity. Konstantinos Komaitis is the senior director for Policy Strategy and Development at the Internet Society.

Nick Merrill and Konstantinos Komaitis, “The consequences of a fragmenting, less global internet,” *The Brookings Institution*, 17 December 2020, https://www.brookings.edu/techstream/the-consequences-of-a-fragmenting-less-global-internet/.

But the global internet is now under existential threat from fragmentation. And the problem with fragmentation is that it puts global cooperation at risk, as differences in the internet across borders are predictive of international trade and military relations, according to research conducted as part of the University of California, Berkeley Daylight Security Research Lab.

Such findings should recast discussions about internet fragmentation. Internet fragmentation does not concern narrowly the “free” movement of information (an ideal that has never been fully accomplished), nor does it merely challenge the internet’s “distributed” design, another ideal whose implementation has only ever been partial. Rather, a fragmenting internet is representative of and has the possibility of contributing to a fragmenting world order.

Such analysis of a fragmented internet looks at different layers of the internet “stack”—the building blocks that cobbled together comprise the internet—to quantify, for example, how similar France’s internet is to that of Germany, Canada, or Thailand. Using these country-to-country comparisons, we produce a network graph, with each country related to every other in a web of national internets that are, more or less, interoperable with one another. The graph reveals clusters that correlate with everything from military alliances to trade agreements—even to political principles such as freedom of speech. For example, content blocking patterns in European Union countries are significantly more similar to one another than they are to non-EU countries. The same is true of NATO countries.

Notably, these findings do not indicate that blocking policies cause, for example, freedom of speech to decline. Nor that restrictions on free speech cause a country to block websites. Rather, they indicate that website blocking patterns—the types of websites a country blocks—reveal information about a country’s position on the global stage.

In one sense, the strength of that relationship is unsurprising. The internet is, and has always been, both a product and a driver of political realities on the ground. From the role it played during the Arab Spring in 2012 to the way it has been used as a tool to interfere with the U.S. elections in 2016, the internet is a powerful tool for driving political change.

Internet fragmentation has always existed, but the fact that the internet has evolved the way it has, becoming global, is evidence that interoperability is more than just aspirational. World-scale collaboration, while difficult, is possible. It is as possible now as it was in the late 20th century.

Interoperability opens doors to participation and invites collaboration. To this end, the internet, and the threats to its operation as a global system, are a continuous invitation to work together. Not to agree, per se, but to agree to continue talking. To continue speaking the same proverbial language. Interoperability is not an end in itself. It is a means toward achieving shared goals. As cross-border goals emerge, from containing COVID-19 to battling climate change, interoperable ways of observing and discussing the world become more crucial.

Moving forward, policymakers must safeguard the fundamental interoperability of the global internet. Rules and legislation should prevent fragmentation, enshrining the principles of a decentralized network made from open, interoperable components. As our research shows, the rewards for doing so come in trade, military alliance and social freedoms.

To get to these regulations, policymakers must understand the internet’s ecosystem. Climate change provides an illustrative example: Cooperation is necessary, but action is impossible without understanding.

#### Extinction—Internet necessary and sufficient

Eagleman 10 (David Eagleman is a neuroscientist at Baylor College of Medicine, where he directs the Laboratory for Perception and Action and the Initiative on Neuroscience and Law and author of Sum (Canongate). Nov. 9, 2010, “ Six ways the internet will save civilization,”  
 <http://www.wired.co.uk/magazine/archive/2010/12/start/apocalypse-no>)

Many **great civilisations have fallen**, leaving nothing but cracked ruins and scattered genetics. Usually this results **from: natural disasters, resource depletion, economic meltdown, disease, poor information flow and corruption**. But we’re luckier than our predecessors because **we command a technology that no one else possessed: a rapid communication network that finds its highest expression in the interne**t. I propose that there are six ways in which **the net has vastly reduced the threat of societal collapse. Epidemics can be deflected by telepresence** One of our more dire prospects for collapse is an infectious-disease epidemic**. Viral and bacterial epidemics precipitated the fall of t**he Golden Age of **Athens,** the Roman Empire and most of the empires of the Native Americans. **The internet can be our key to survival because the ability to work telepresently can inhibit microbial transmission by reducing human-to-human contact**. In the face of an otherwise devastating epidemic, businesses can keep supply chains running with the maximum number of employees working from home. This can reduce host density below the tipping point required for an epidemic. **If we are well prepared when an epidemic arrives, we can fluidly shift into a self-quarantined society** in which microbes fail due to host scarcity. Whatever the social ills of isolation, they are worse for the microbes than for us. **The internet will predict natural disasters** **We are witnessing the downfall of slow central control in the media**: news stories are increasingly becoming user-generated nets of up-to-the-minute information. **During the recent California wildfires,** locals went to the TV stations to learn whether their neighbourhoods were in danger. But the news stations appeared most concerned with the fate of celebrity mansions, so Californians changed their tack: they uploaded geotagged mobile-phone pictures, updated Facebook statuses and tweeted. The balance tipped: **the internet carried news about the fire more quickly and accurately than any news station could.** In this grass-roots, decentralised scheme, there were embedded reporters on every block, and the news shockwave kept ahead of the fire. This head start could provide the extra hours that save us. If the Pompeiians had had the internet in 79AD, they could have easily marched 10km to safety, well ahead of the pyroclastic flow from Mount Vesuvius. **If the Indian Ocean had the Pacific’s networked tsunami-warning system, South-East Asia would look quite different today**. **Discoveries are retained and shared** Historically, **critical information has required constant rediscovery**. Collections of learning -- from the library at Alexandria to the entire Minoan civilisation -- have fallen to the bonfires of invaders or the wrecking ball of natural disaster. Knowledge is hard won but easily lost. And information that survives often does not spread. **Consider smallpox inoculation**: this was under way in India, China and Africa centuries before it made its way to Europe**. By the time the idea reached North America, native civilisations who needed it had already collapsed**. **The net solved the problem. New discoveries catch on immediately;** information spreads widely. In this way, societies can optimally ratchet up, using the latest bricks of knowledge in their fortification against risk. **Tyranny is mitigated** **Censorship of ideas** was a familiar spectre in the last century, with state-approved news outlets ruling the press, airwaves and copying machines **in the USSR**, Romania, Cuba, China, Iraq **and elsewhere**. In many cases, such as Lysenko’s agricultural despotism in the USSR, it **directly contributed to the collapse of the nation**. Historically**, a more successful strategy has been to confront free speech with free speech -- and the internet allows this in a natural way.** It democratises the flow of information by offering access to the newspapers of the world, the photographers of every nation, the bloggers of every political stripe. Some posts are full of doctoring and dishonesty whereas others strive for independence and impartiality -- but all are available to us to sift through. Given the attempts by some governments to build firewalls, it’s clear that this benefit of the net requires constant vigilance. **Human capital is vastly increased** **Crowdsourcing brings people together to solve problems.** Yet far fewer than one per cent of the world’s population is involved. We need expand human capital. Most of the world not have access to the education afforded a small minority. For every Albert Einstein, Yo-Yo Ma or Barack Obama who has educational opportunities, uncountable others do not. This squandering of talent translates into reduced economic output and a smaller pool of problem solvers. **The net opens the gates education to anyone with a computer**. A motivated teen anywhere on the planet can walk through the world’s knowledge -- from the webs of Wikipedia to the curriculum of MIT’s OpenCourseWare**. The new human capital will serve us well when we confront existential threats we’ve never imagined before. Energy expenditure is reduced** Societal collapse can often be understood in terms of an energy budget: **when energy spend outweighs energy return, collapse ensues**. This has taken the form of deforestation or soil erosion; **currently, the worry involves fossil-fuel depletion. The internet addresses the energy problem with a natural ease**. Consider the massive energy savings inherent in the shift from paper to electrons -- as seen in the transition from the post to email. **Ecommerce reduces the need to drive long distances to purchase products**. **Delivery trucks are more eco-friendly** than individuals driving around, not least because of tight packaging and optimisation algorithms for driving routes. Of course, there are energy costs to the banks of computers that underpin the internet -- but these costs are less than the wood, coal and oil that would be expended for the same quantity of information flow. **The tangle of events that triggers societal collapse can be complex**, and there are several threats the net does not address. **But vast, networked communication can be an antidote to several of the most deadly diseases threatening civilisation.** The next time your coworker laments internet addiction, the banality of tweeting or the decline of face-to-face conversation, you may want to suggest that the net may just be the technology that saves us.

#### Plan strikes a Goldilocks balance – makes US platform antitrust POSSIBLE but avoids the downsides of overdeterrence.

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

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

C. Plaintiffs Already Bear the Burden on Balancing

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

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

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

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

# 2AC

## Russia Adv

#### Studies prove all underlying conditions for sanctions success are there.

**Cortright 22** --- Professor Emeritus at the Kroc Institute for International Peace Studies at the University of Notre Dame

David, 2-28-2022, "Sanctions Are Coming for Russia – Experts Explain Why They are Likely to Hurt," Fashion Law, https://www.thefashionlaw.com/sanctions-are-coming-for-russia-experts-explain-why-they-are-likely-to-hurt/

What makes sanctions stick & sting

[We have studied the effectiveness](https://sanctionsandsecurity.nd.edu/news/the-sanctions-decade-assessing-un-strategies-in-the-1990s) of past sanctions both in terms of their economic impact and whether they attain their political objectives, and have found two conditions are necessary for sanctions to be effective, at least when it comes to their economic impact: (1) They must be multilateral, meaning they involve a broad coalition of governments, and (2) they must be implemented by countries that have extensive commercial relations with the targeted regime.

Furthermore, the countries with deep ties to the target must accept the risks and costs that result from their actions.

That is why the participation of a growing number of like-minded nations – including the U.K., Germany, France and other European states that have a much higher volume of trade with Russia than does the United States – is so crucial in making these sanctions succeed.

This unity and collective economic clout explain why the [Russian stock market went into a nose dive](https://www.cnn.com/2022/02/24/investing/ruble-russian-stocks-crash/index.html) and the ruble fell to a [record low against the dollar](https://www.nytimes.com/2022/02/24/world/russia-ukraine-invasion-putin-biden.html) after Russia launched its invasion and the new sanctions emerged. As a result, Russia’s billionaires [lost an estimated $71 billion](https://www.forbes.com/sites/iainmartin/2022/02/24/russian-billionaires-have-lost-nearly-90-billion-in-wealth-amid-ukraine-invasion/?sh=14c97eda3a60) on Feb. 24, and Standard & Poor’s and Fitch Ratings slashed the [country’s credit rating to “junk” status](https://www.bloomberg.com/news/articles/2022-02-25/moody-s-puts-russia-and-ukraine-ratings-on-review-for-downgrade).

Because the sanctions are multilateral in design and being implemented in close coordination with allies in Europe, Japan, Australia and other countries around the world, [our research suggests](https://sanctionsandsecurity.nd.edu/news/the-sanctions-decade-assessing-un-strategies-in-the-1990s) they will have a significant impact on Russia. [Previous estimates have suggested](https://www.cnn.com/2022/02/22/business/sanctions-russia-ukraine/index.html) aggressive sanctions like the ones being unleashed now could shrink Russia’s annual gross domestic product by 3 percent to 5 percent or more.

The costs of imposing sanctions on Russia

Discussions are continuing and pressure may build to take other, more severe measures in response to the Russian assault, especially if its military is deemed to be guilty of [committing war crimes](https://www.axios.com/zelensky-international-court-russia-5accf664-3c56-45d2-9d8f-f854e4ecf0c3.html). Other measures on the table include more direct product-based sanctions of oil, natural gas and aluminum. But they also [would have more immediate negative consequences](https://www.nytimes.com/2022/02/25/briefing/russia-war-kyiv-ukraine-attack.html) for Europe, another test of endurance for the economic battle with Russia.

In this case, the impact of the very strong sanctions levied [is hurting Russia now](https://www.reuters.com/markets/europe/swift-block-deals-crippling-blow-russia-leaves-room-tighten-2022-02-27/) and will increase substantially in the coming months. As long as the countries imposing the sanctions, as well as the companies and citizens who will also bear some of the costs, are willing to accept them, they will likely succeed in punishing Putin for his aggression against Ukraine.

## TTC Adv

No cards

## T – Scope

#### Scope has two parts – unlawful behavior and methodology for making that determination

Bauer, Professor of Law, Notre Dame Law School; Visiting Professor, Emory

University School of Law, ‘04

(Joseph P., “Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?” 16 Loy. Consumer L. Rev. 303 2003-2004)

Lately, much attention has been given to the scope of the antitrust laws. This discussion has two overlapping components: (1) consideration of the substantive doctrines specifying the behavioral or structural changes that are or are not unlawful and the appropriate methodology; and (2) analysis for making those determinations with attention given to the appropriate vehicles for enforcing the antitrust laws. Some argue that the antitrust laws proscribe activities that are either pro-competitive or at worst benign.' Further, they assert that the multiplicity of antitrust enforcers and enforcement devices has resulted in undue burdens, including excessive cost, time delay, and forestalling of legitimate, procompetitive behavior.

**Prohibitions are the means imposed on individuals**

**Battjes 9** – Assistant professor of constitutional and administrative law at the law faculty of VU University, Amsterdam,

Hemme Battjes, "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed," Leiden Journal of International Law, 22 , pp. 583-621, 9-1-2009, accessed via Nexis Uni

Does this 'relativity' of the minimum level of severity detract from the 'absolute' nature of Article 3, and hence imply a limitation or balancing as meant by the UK government? There is, arguably, no reason to suppose so. As the prohibition is defined by means of the effect a certain treatment has on the individual, its qualification as ill-treatment depends on the circumstances of the case and the features of the person concerned. Thus in Mayeka and Mitunga the Court ruled that detention of an unaccompanied five year-old child constitutes inhuman treatment, [116](https://advance.lexis.com/document/?pdmfid=1516831&crid=e2fb5ec5-8b4a-4989-a11c-3967e3c72dcb&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A605P-2S71-JS0R-23GP-00000-00&pdcontentcomponentid=400004&pdteaserkey=sr3&pditab=allpods&ecomp=qzvnk&earg=sr3&prid=f6e3a168-60b9-46d1-b026-fe8960301bc2) whereas detention under the same conditions would not (or not necessarily)do so for an adult, or the same child if accompanied by its parents. In the latter case the underlying reasoning is not that detention of the child is as such inhuman but justified by the presence of its parents. Rather, the detention of the accompanied minor would not cause fear and anguish. The minimum level of severity is, however, subject to another form of relativity:  
In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. [117](https://advance.lexis.com/document/?pdmfid=1516831&crid=e2fb5ec5-8b4a-4989-a11c-3967e3c72dcb&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A605P-2S71-JS0R-23GP-00000-00&pdcontentcomponentid=400004&pdteaserkey=sr3&pditab=allpods&ecomp=qzvnk&earg=sr3&prid=f6e3a168-60b9-46d1-b026-fe8960301bc2)

#### Topic vision – big tech is key

White 21 – Writer for Time, citing antitrust experts such as former FTC chairman William Kovacic.

Martha C. White, “Momentum is Building for Antitrust Reform. Here’s What that Means for Big Tech,” *Time*, 12 November 2021, https://time.com/6116953/antitrust-reform-big-tech-congress-biden/.

Worry about the concentration of wealth and power achieved by monopolistic—or potentially monopolistic—entities have always been wrapped up in each respective era’s technological innovations. It is not surprising then that the focal point of today’s debate around antitrust reform is the size and scope of internet giants like Google, Facebook (Meta Platforms, Inc.), Amazon and Apple—the pioneers laying the digital “railroad tracks” that have upended communication and commerce and, not coincidentally, allowed these companies to grow very, very powerful.

## 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 are key to sustainability – we can solve environmental harm by pricing in negative externalities, but the alt is worse

Budolfson 21 – Assistant Professor in the Department of Environmental and Occupational Health and Justice at the Rutgers School for Public Health.

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

## States CP

#### Rogue state DA—CP creates mass uncertainty that chills all business

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2003, Federalism in Antitrust, 26 Harv. J. L. & Pub. Pol'y 877

When states file antitrust cases under state statutes rather than under the Clayton or Sherman Acts, the likelihood of inconsistent and conflicting antitrust precedent is even higher. As a result, state action affects not only current cases, but can also affect future firm behavior. With mergers, the possibility of a challenge from any of the fifty states, each with its own standard of evaluation, could prevent companies from even attempting a beneficial transaction. As Lande points out, "it is confounding enough for antitrust counselors to have to contend with two potential federal enforcement agencies.

Even if state laws were identical, the interpretation and application of those laws would differ "since enforcers with divergent philosophies necessarily will interpret ambiguous terms differently in various factual contexts." Philosophical differences in approaches to antitrust enforcement are likely to stem from many sources, such as political affiliation, educational training, and personal experience. The National Association of Attorneys General (NAAG) Merger Guidelines for the states explicitly allow for this, noting that the general policy can be supplemented or varied in light of differing precedents, and "in the exercise of [the AGs'] individual prosecutorial ... discretion." While differing views can be helpful in some areas of law, such as when different states provide a testing ground for new regulations appropriate for federal adoption, this kind of experimentation is likely to be wasteful in the antitrust arena.

#### CP guarantees politicized hyper-enforcement

Krakoff 22 – Furman Academic Scholar

Joseph Krakoff, JD, NYU Law, yes that Krakoff but it’s real and published by JustSecurity and is about consumer litigation which is his area of focus and also Michigan doesn’t read a big tech affirmative so “sue” us, Big Tech Is Not Big Tobacco, How Today's Toxic Politics Would Distort Attorneys General Consumer Litigation Against Facebook, *Just Security*, January 13, 2022, https://www.justsecurity.org/79836/big-tech-is-not-big-tobacco/

Former Massachusetts Attorney General Scott Harshbarger and former San Francisco Chief Assistant City Attorney Dennis Aftergut recently made a fascinating proposal on Just Security, arguing that state attorneys general (AGs) should lead litigation against Big Tech, as they did with Big Tobacco 23 years ago. While the proposal offers an attractively creative method of regulating Big Tech and holding it accountable, a few cautions are warranted – namely that, in today’s hyper-polarized political environment, empowering elected, partisan AGs to dictate the way in which information on platforms circulates likely comes with more costs and fewer benefits than the authors assume.

Big Tech and Big Tobacco May Not Be as Similar as They Seem

The Harshbarger and Aftergut proposal seeks to solve harms ranging from social media’s disastrous effects on youth mental health to disinformation by harnessing national coordination between all 50 AGs, akin to the litigation strategy that resulted in the Tobacco Master Settlement Agreement (TMSA) of 1998. Scholars have called the TMSA, which required the largest tobacco companies to pay over $200 billion and included every state, the functional equivalent of federal law. This nationally coordinated AG model, the authors argue, should now be transplanted to another Big T – Big Tech. They further argue that courts ought to recognize an “AGs enforcing state law” exception to the (in)famous Section 230 of the U.S. Communications Decency Act (47 U.S.C. § 230, or “Section 230”), which currently immunizes platforms like Facebook from harms that result from both content Facebook lets circulate and its moderation decisions.

Harshbarger and Aftergut’s proposal is timely. The Ohio AG recently became first to file a suit against Facebook modeled in part on the tobacco claims. Shortly thereafter, a coalition of AGs from 10 states launched a joint investigation into Instagram’s impact on teens. Harshbarger and Aftergut are very likely correct that AG suits against Big Tech will increase, prompting inevitable comparisons to tobacco suits.

As the authors point out, too, in consumer protection suits against both the tobacco companies then and tech companies now, private litigation utterly fails to generate compensation or corporate accountability. And in both cases, Congress failed to update the existing statute or pass new ones to address novel but obvious public policy problems. Those two factors make AG suits, as an option of last resort, enticing.

But private claims failed in the two contexts for very different reasons. The tobacco defendants attacked the victims as irresponsible addicts – and, employing a “blame the smoker” strategy – had a near-perfect record until the AGs got involved. As the architect of the AGs’ litigation strategy, former Mississippi AG Mike Moore, put it, the state had “never smoked a cigarette,” and so couldn’t be blamed.

Big Tech is different. Private lawsuits against platforms have failed (or are highly likely to fail) due to a federal statute known as Section 230. Section 230 essentially immunizes platforms from civil lawsuits based on real-world injuries that their user-generated content causes by treating the platforms as publishers, not speakers, even in the context of algorithmically “boosted” messages, and immunizes any “good faith” content moderation choices that the platforms do undertake, on the same publisher theory.

As the authors rightly acknowledge, for the AGs to sue the platforms regarding any of the regulatory issues they identify, they would need to get a court to hold that Section 230 didn’t apply to AGs ever when they litigated state law claims regarding any asserted “informational” harm. And they propose a novel “loophole” to do just that:

Liability is not barred for actions under state law that are “consistent with” Section 230. A strong argument is available that a[n AG] lawsuit against Facebook based on state consumer laws that prohibit deceiving the public is “consistent with” §230’s immunity for a “publisher” of content.

Although novel, such a reading is far from implausible. While historically the Supreme Court has read Section 230 broadly, that appears very likely to change as the balance of the Court shifts in favor of conservative justices. In 2020 alone, Justice Thomas publicly inveighed on Section 230’s breadth twice, explicitly castigating how it legitimizes Twitter’s power to “cut off speech” as against core First Amendment values. That position is echoed by conservative jurists on lower courts, most recently DC Circuit Judge Laurence Silberman, whose inflammatory dissent charged Section 230 with permitting powerful Silicon Valley firms to engage in extreme “repression of political speech” which is “fundamentally un-American.” Prominent conservative jurists are actively searching for a mechanism to cabin Section 230’s reach – and an AG exception based in principles of states’ rights and state sovereignty may be an appealing means solution. The Court has consistently afforded AG litigation with what it has called a “special solitude” based on strong deference to sovereign enforcement of state laws, permitting AG suits to bypass other limitations for antitrust enforcement, tobacco litigation, and, most recently, opioid litigation.

Still, the novelty of this argument will likely make it an uphill battle. And beyond the question of whether courts would recognize the “AG exception” to Section 230 is the equally important question of whether they should recognize it.

The objective of the Aftergut-Harshbarger proposal – utilizing tobacco-style suits to regulate Big Tech’s enabling of viral spread of misinformation, which endangers everything from public health to democracy itself – is beyond reproach. But it overlooks three related problems with translating the AG model from Big Tobacco to Big Tech. Taken together, these problems suggest that the costs of recognizing an AG exception to Section 230 outweigh the benefits.

What Benefits Would AG Litigation Actually Deliver?

Overall, the long-term benefits of the TMSA have been disappointing, which bodes poorly for the real-world impact of consumer litigation that takes tobacco as its model.

First, Aftergut and Harshbarger argue that transposing the TMSA model would produce financial compensation for Big Tech’s victims. But while AG Harshbarger’s state of Massachusetts used settlement money to compensate victims and fund public health initiatives, a large majority of other states did not. According to a recent article by leading public health litigation experts Robert Rabin and Nora Freeman Engstrom, the TMSA failed to compensate victims structurally: the settlement contained no requirements on how states would spend their recoveries, so the money was deposited in state general treasuries and used for whatever purpose the legislature saw fit. The result, according to Engstrom and Rabin, was that states “cannibalize[d]” the TMSA money for uses entirely unrelated to public health, let alone tobacco.

Criticism of the TMSA has come from all corners. Senator John McCain took the AGs to task for how they used the TMSA in 2003, as did numerous media reports in the early aughts. As of 2016, the America Lung Association, the main consumer advocacy group tracking use of the TMSA funds, gave 41 states an “F” because, even still, virtually none of their recovery had gone toward its intended purpose. The GAO and NIH’s assessments are equally dire, while TMSA architect Moore called the way funds were allocated one of the “biggest disappointments” of his career.

Second, and perhaps more importantly, the authors argue that the TMSA model provides a long-term and effective mechanism to regulate Big Tech. But the TMSA’s regulatory and deterrent effects on the tobacco industry were largely ineffective, and in some ways counter- productive. That settlement turned the 50 states into the biggest shareholders of the five largest tobacco companies, which some argue functionally immunized the tobacco industry from antitrust claims while locking in the Big 5’s market dominance. The Ninth Circuit expressly rejected antitrust suits despite evidence of a price-fixing conspiracy, holding they were preempted by the TMSA. The antitrust issue is more problematic in the Big Tech context where antitrust has emerged as the key vehicle of corporate accountability.

The upshot is that evidence from the vast majority states shows a TMSA approach would result neither in compensation for victims nor effective regulation of Big Tech.

AG Litigation Risks Further Polarizing Big Tech Regulation

The nationwide coordination that made Big Tobacco litigation successful would also be necessary for Big Tech litigation to work, as Aftergut and Harshbarger acknowledge. But, given the extreme levels of political polarization regarding Section 230 and Big Tech, it is more likely that AGs today would fracture along party lines and fail to coordinate nationally, which would balkanize internet regulation and feed bitter cycles of polarization.

As Margaret Lemos points out, one of the most important considerations about AG suits is how any such litigation would fit into the politics of the moment. This is because the AGs are not normal private lawyers or civil servants at the Department of Justice or Federal Trade Commission. Rather, they are majoritarian political actors – 43 of 50 are directly elected – who use their position as a springboard for higher office often enough to generate the tongue-in-cheek aphorism that “AG stands for almost governor.” As such, one crucial driver of their litigating, settling, and fund distribution choices isn’t altruism – it’s political self-interest. After all, the main reason most elected officials do just about anything is to win more elections.

## Torts CP

#### Climate nuisance suits fail – don’t touch global emissions AND don’t actually stop emitting because we still need to produce energy

Wald ’21 – writer at Bloomberg Law, specializing in environment and energy

Ellen Wald, “Nuisance Laws an Ineffective Way to Hold Big Oil Accountable for Climate Change” <https://news.bloomberglaw.com/environment-and-energy/nuisance-laws-an-ineffective-way-to-hold-big-oil-accountable-for-climate-change>

The U.S. Supreme Court will soon decide a threshold issue affecting whether localities can sue oil companies for climate change related damages under state nuisance laws. Ellen R. Wald, president of Transversal Consulting, argues that using these laws is an irrational and ineffective way to hold big oil accountable for carbon emissions and actually hinders environmentalists’ goals.

In Colorado, California, Maryland and elsewhere, local officials, in conjunction with plaintiffs’ attorneys, are taking a new approach to suing mostly American oil and gas producers for alleged climate change impacts—attempting to use state nuisance laws to establish causes of action against these companies.

From a purely practical—not legal—perspective, these nuisance lawsuits are irrational, ineffective, and unreasonable. From a realistic perspective, these lawsuits are not useful to achieve environmentalist goals.

Fortunately, the U.S. Supreme Court has the opportunity to put an obstacle in their way. The court, which heard oral arguments on Jan. 19, will soon be deciding whether the oil industry should have another chance at arguing that BP Plc v. Mayor & City Council of Baltimore should move to federal court where judges are more likely to determine that federal law preempts these state statutes. This is important, because federal law says such pollution claims are interstate issues and are the purview of the Environmental Protection Agency and should not be left to state nuisance laws.

Carbon Emissions Are Produced Globally

The nuisance lawsuits are irrational, because the pollution at issue is of a truly global nature. Carbon emissions are produced globally, and carbon dioxide spreads throughout the world’s atmosphere. According to the United Nations’ most recent Emissions Gap Report, China emits more than twice as much greenhouse gas as the U.S. In fact, “China emits more than one-quarter of global GHG [greenhouse gas] emissions.”

Carbon emissions from China do not stay in China and do not cause climate change only in China. Likewise, Baltimore is impacted by global emissions and only slightly impacted by any specific emissions from its neighborhood. It is equally impacted by emissions from Africa and Europe and Asia and Maryland. Suing local companies for damages that may be caused by global carbon emissions is misguided.

In law, a nuisance is that which disturbs another, in the lawful and productive use of his property, through the unreasonable or unlawful use of one’s property. Since the oil business is lawful, the argument here would be that it is unreasonable. Even if that were the case—and it’s a hard argument to make because every single American citizen uses that produced oil—a local nuisance argument is the wrong tactic if the goal is environmental protection.

These lawsuits are also bound to be ineffective at achieving environmentalists’ goals. Even if the lawsuits somehow succeed in restricting the business operations of some energy producers, other overseas producers will still create carbon emissions with equally global impact. Moreover, the American market will still buy energy, from abroad if necessary.

American factories, power plants and consumers will still emit carbon within our own borders, even if the major American oil and gas companies have pledged to reduce their emissions in years to come. Fundamentally, climate change cannot be prevented by suing some oil and gas companies.

Nothing Local About These Lawsuits

Finally, the lawsuits are unreasonable, because if they are successful, they could only help to enrich foreign producers while harming the American marketplace. If producers that currently serve Americans are forced to pay damages for local complaints about global carbon emissions, foreign companies could prosper from higher oil prices and inroads into the U.S. market. Meanwhile, American consumers would pay more, and Americans could potentially lose jobs.

There is nothing local about these lawsuits. This is not akin to a nuisance claim when your neighbor emits something that disturbs you in your property. Colorado and Maryland are impacted by Sinopec (China), Rosneft (Russia) and KOC (Kuwait) just the same as they are impacted by the oil companies that the local governments chose to sue. Carbon emissions spread around the globe, and changing temperatures impact the planet as a whole. The emissions do not generally originate locally, and they do not generally harm locally.

Climate change is not an issue that can be addressed city by city. It must be done at a federal level with the reach of the federal government, both domestically and abroad. Yet, plaintiffs’ attorneys and localities have chosen to sue select oil companies under state laws. Neither the nuisance laws nor the state reach are sufficient to deal with the global nature of greenhouse gas emissions and climate change.

As the Manufacturers’ Accountability Project argues, “developing national energy policy is a legislative and regulatory matter and should not be driven by a number of state court judges across the country based only on a narrow set of allegations.” This argument should be instructive for any local officials considering this flawed legal approach. It is best for every party and for the environment to leave this as a national policy issue.

In fact, these lawsuits should raise quite a bit of skepticism. Since they can accomplish nothing for the environment, are they really about the environment? Or are they actually about politics and a payday?

## Biz Con

#### Plan only makes it possible to enforce antitrust – AmEx is overbroad and shields any antitrust application

**Shinder 21** --- Managing Partner of Constantine Cannon’s New York Office.

Jeffrey I., 11-8-2021, "Will New York Become An AmEx Free Zone?" Constantine Cannon, https://constantinecannon.com/antitrust-group/antitrust-today-blog/will-new-york-become-an-amex-free-zone/

While adding little substance to the mix, AmEx does make it harder to enforce federal antitrust laws against platform industries. To prove an antitrust violation in a two-sided transaction market post-AmEx, a plaintiff must demonstrate harm to competition that takes into account both sides of the market.  Moreover, as many predicted, AmEx has been embraced by defendants in numerous industries beyond payments, and courts routinely demand two-sided market proof even when the market in question cannot be properly characterized as a “transaction market.”[[1]](https://constantinecannon.com/antitrust-group/antitrust-today-blog/will-new-york-become-an-amex-free-zone/" \l "_ftn1)  Such overbroad applications of AmEx elevate the burden on antitrust plaintiffs, while giving defendants the ability to justify their infliction of harm to one side of the “market” by showing some procompetitive benefit on the other side.  It is no exaggeration to say that among the many death-by-a-thousand-cuts Supreme Court decisions that have chipped away at the antitrust laws in recent years, AmEx may prove to be the most significant cut of all.

**Pounders – A] FTC policy shifts thump**

**Diessel et al. 22** – Benjamin H. Diessel is a partner at Wiggin and Dana LLP; Robert M. Langer is senior counsel at Wiggin and Dana LLP; Zeynep E. Aydogan is an associate at Wiggin and Dana LLP

Benjamin Diessel, Robert Langer, and Zeynep Aydogan, "FTC Merger Policy Shifts May Spur Uncertainty And Risk," Law360, 1-14-2022, https://www.law360.com/corporate/articles/1455070/ftc-merger-policy-shifts-may-spur-uncertainty-and-risk

The Federal Trade Commission has recently taken bold measures to reshape its enforcement priorities for review of mergers and acquisitions.

The FTC shares jurisdiction over such reviews with the U.S. Department of Justice. Accordingly, new policies have historically been adopted jointly by the FTC and DOJ. Several recent actions of the FTC, however, have been undertaken unilaterally in a stark departure from that tradition.

First, the FTC unilaterally resurrected a long-abandoned practice of requiring prior approval policies in connection with certain transactions.

Second, the commission unilaterally withdrew the vertical merger guidelines that it had adopted jointly with the DOJ in 2020.

Finally, the commission announced that it would start issuing warning letters to parties to potential transactions, increasing the possibility that transactions may be subject to action even beyond the expiration of the 30-day waiting period.

This interagency split could have profound implications for how transactions are reviewed and whether they are approved. The potential tension comes at an unfortunate time, coinciding with exponential increases in transactions reportable under the Hart-Scott-Rodino Act.

This resulting opacity in the merger review processes exercised by the two agencies will require additional care by companies charged with navigating through the mergers and acquisitions process and managing antitrust-related risk.

Reissuing Prior Approval Policies

On Oct. 25, 2021, the FTC unilaterally issued a policy statement that effectively resurrected its pre-1995 practice of requiring prior approval policies.[1]

This policy requires all parties that enter into a merger consent agreement to agree that they will obtain prior approval for at least 10 years before closing any future transaction affecting a relevant market. Under the policy, the FTC may seek prior approval for a future transaction even if the parties abandon that transaction.

By contrast, the DOJ continues to operate under its extant prior notice requirements.

Two dissenting commissioners, Christine Wilson and Noah Phillips, issued a statement on Oct. 29, cautioning about the "chilling" effect that "it will have on mergers and acquisitions activity in the United States."[2]

The statement emphasized the "divergence" that the FTC's actions are causing between it and the Antitrust Division of the DOJ.

Withdrawal of the Vertical Merger Guidelines

On Sept. 15, 2021, the FTC voted to rescind the joint FTC-DOJ ~~vevrtical~~ [vertical] merger guidelines. Shortly thereafter, the DOJ issued a press release indicating that the vertical merger guidelines remain in place at the department.[3]

Phillips and Wilson characterized the FTC's decision to withdraw the vertical merger guidelines as an attempt to "pull the rug out from under the honest businesses and lawyers who advise them."[4]

They wrote that "the Majority's decision to withdraw the Vertical Merger Guidelines adds to the divide between enforcement at the FTC and the Department of Justice,"[5] and invoked long-standing "concerns about different procedures at the agencies."[6]

The dissenting commissioners stated that "unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear."[7]

They expressed concern that the FTC's decision to withdraw the guidelines adds to the divide between enforcement at the FTC and the DOJ, in light of the "concerns about different procedures at the agencies and perceived differences in the standards for an injunction."[8]

If, as predicted by some, the FTC's rescinding of the vertical merger guidelines indicates that it will more aggressively challenge vertical transactions than the DOJ, parties to potential vertical transactions will need to analyze and account for that risk.

Warning Letters Issued by the FTC

On Aug. 3, 2021, the FTC announced that it would begin to issue warning letters to companies to reported transactions when the commission cannot fully investigate within the requisite timeline. The FTC indicated that the warning letters would serve to notify the parties that the FTC's investigation remains open even beyond the HSR waiting period, alerting parties of the risk that the FTC may subsequently determine that the transaction is unlawful.[9]

The FTC's announcement of its practice to start issuing warning letters stands in sharp relief with both agencies' prior practices of rarely challenging consummated transactions. Notably, the DOJ has issued no similar guidance.

This apparent split introduces further uncertainty to parties and counsel navigating through transactions by increasing the risk of post-consummation investigations. Wilson has warned that the new policy will "raise the costs of doing mergers and threaten[s] to chill harmful and beneficial deals alike."[10] Wilson expressed concern "that the carefully crafted HSR framework is suffering death by a thousand cuts."[11]

#### B] 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.

#### BizCon low---multiple new 2022 trends.

**Mourgelas 2-7** --- Research analyst with Chief Executive Group.

Isabella, "CEO Confidence Index: Proportion of CEOs Planning To Increase Hiring Highest We've Seen," ChiefExecutive.net, https://chiefexecutive.net/proportion-of-ceos-planning-to-increase-hiring-highest-on-record/

After a strong start to the year, CEOs’ confidence in the future of business conditions dropped this month on uncertainty in the supply chain and labor market. This comes at a time when demand has not yet receded and the need for workers has only increased. CEOs are also concerned that increasing interest rates, inflation driving up material costs and decreasing consumer spending power, and instability in domestic and international politics will worsen business conditions. Despite their qualms, CEOs still expect Covid-19 to have a reduced impact on the overall economy by the time 2023 rolls around.

Those are the key findings from Chief Executive’s latest poll of 457 U.S. CEOs, fielded February 1 through 3, which asks America’s business chiefs to rate the environment today and 12 months out based on their assessment of business conditions—and forecast the impact on their company’s growth.

CEOs’ rating of future business conditions fell by less than 5 percent this month, down to 6.6 out of 10 from last month’s rating of 7. Their rating of current business conditions remained stable, however, hovering at 6.7 out of 10. Over the last six months, CEOs’ rating of current conditions has remained steadier compared to their forecast for the future, signaling resiliency in their ability to do business and uncertainty over what’s to come.

**Incoming non-antitrust regulations thump business confidence**

**Mullins and Tracy 2/7** – investigative reporter in the Washington D.C. bureau of The Wall Street Journal, covers technology policy for The Wall Street Journal

Brody Mullins and Ryan Tracy, "Biden’s Regulatory Drive Sparks Pushback From Business Lobbyists ," Wall Street Journal, 2-7-2022, https://www.wsj.com/articles/bidens-regulatory-drive-sparks-pushback-from-business-lobbyists-11644229802

WASHINGTON—The Biden administration is preparing a wave of new regulations as it embarks on its second year, sparking resistance campaigns from business lobbyists representing financial services, agribusiness, medical-device makers and others.

Lobbyists and business groups are responding to what some describe as the federal government’s most concerted regulatory push since the Obama administration. Some Democrats hope the regulatory effort will deliver some policy wins for progressives and union activists ahead of November’s midterm elections, especially now that President Biden’s congressional agenda has stalled amid infighting within the Democratic Party.

The White House’s newly installed chiefs at regulatory agencies are rolling out a lengthy list of new rules. Financial-services regulators are advancing measures seeking to address climate change and workplace diversity, crack down on Wall Street profiteering and reduce credit-card and banking fees for consumers.

Consumer-protection agencies are making a broad push to reduce corporate consolidation, especially in Silicon Valley and on Wall Street. Other agencies are readying new health and safety regulations for the medical-device industry, railroads, interstate gas pipelines, hospitals and power plants.

Taken together, the moves have alarmed businesses and prompted them to launch lobbying efforts to enlist allies in Congress.

“There’s growing concern within the business community that there has been a rush to regulate without fully factoring in the negative effects on industry and the economy,” said Ken Spain, a Washington strategist who is helping to coordinate the industry defense.

“With the election year upon us and the administration’s agenda stalling, the pace is expected to accelerate,” he said.

#### Econ decline doesn’t cause war – multiple warrants

Walt 20 – Robert and Renee Belfer Professor of International Affairs at the Harvard Kennedy School.

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

For these reasons, the pandemic itself may be conducive to peace. But what about the relationship between broader economic conditions and the likelihood of war? Might a few leaders still convince themselves that provoking a crisis and going to war could still advance either long-term national interests or their own political fortunes? Are the other paths by which a deep and sustained economic downturn might make serious global conflict more likely?

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose.

This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too.

Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure.

I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do.

Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely.

Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible.

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

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

## 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.

**The DOJ and FTC are already overstretched, but their prior resource allocation has proven they’ll move resources away from other less important teams**

**Kern 22** – tech policy reporter for POLITICO

Rebecca Kern, "Antitrust enforcers are drowning in mergers," POLITICO, 1-10-2022, https://www.politico.com/newsletters/morning-tech/2022/01/10/antitrust-enforcers-are-drowning-in-mergers-799773

FIRST IN MT: MORE LIKE A MERGER TSUNAMI — The Federal Trade Commission and Justice Department have been warning for months that a surge in merger filings has stretched them thin. They weren’t just grousing: In 2021, companies reported 4,130 mergers to the two agencies — more than double the number from the previous year, according to an analysis by the law firm White & Case. In December alone, businesses reported 285 mergers, dwarfing any previous December figure since 2011 (even though December often sees a surge, as companies seek to wrap up deals by the end of the calendar year).

[[Figure omitted]]

The flood of deals has forced the agencies to devote more of their already scarce resources to them. **The FTC has moved some attorneys focused on policy and international affairs**, for example, **to help with merger review**. Under law, the FTC and DOJ only have 30 days to decide whether a deal warrants a more in-depth probe, an added time pressure.

#### *Amex* specifically eats up agency resources

Ben Brody, Bloomberg, U.S. Google Monopoly Case Could Hit Supreme Court AmEx Hurdle, August 28, 2020, <https://www.bloomberg.com/news/articles/2020-08-28/u-s-google-monopoly-case-could-hit-supreme-court-amex-hurdle>

Google’s lucrative search ad business sells advertising space to brands around the results it provides to consumers. It also plays a key intermediary role connecting buyers and sellers of digital display ads across the web, and as a seller of display ad space for its YouTube video unit. Investigators have looked into all three, Bloomberg has reported.

Antitrust experts said that one reason for the delay in the Google lawsuit, which was expected in July, could be that government lawyers needed more time to construct the case to meet the standards in the AmEx ruling.

“That’s a complex, lengthy complaint to draft, and that takes time,” said Spencer Weber Waller, director of the Institute for Consumer Antitrust Studies at Loyola University Chicago. The government would probably have to create a “a belt-and-suspenders approach” that says why it would win under two kinds of market definitions, he said.

## Privacy DA

#### Plan solves – allows procompetitive justifications on one side, but doesn’t incorporate two-sided analysis to prima facie burden

Panner, partner at Kellogg, Hansen, Todd, Figel & Frederick, PLLC, where he practices antitrust law and appellate litigation, ‘21

(Aaron M., “Market Definition and Anticompetitive Effects in Ohio v. American Express,” January 18, <https://www.yalelawjournal.org/forum/market-definition-and-anticompetitive-effects-in-ohio-v-american-express>)

The majority’s conclusion that the market is two-sided is no response to the dissent’s objection. Characterizing the market as two-sided does not supply a satisfying answer to the question whether restraints that are proven to impede competition on one side of the platform should be subject to condemnation for that reason in the absence of proof—which the defendant has the burden ’to provide—that the benefit on the other side outweighs that harm. Putting the burden of establishing net harm on the plaintiff will, as a practical matter, insulate many practices from challenge, because proving what prices would be charged to one set of consumers in a but-for world is hard enough, let alone consumers on both sides of the platform.31 It is a fair criticism that the majority did not offer a satisfying reason that all two-sided platforms that display strong indirect network effects—or even all two-sided transaction platforms—should be protected by this net-harm requirement, irrespective of the nature of the challenged practice.

Furthermore, the Court did not explain why resolving the market-definition issue was necessary to the conclusion that a showing of net harm was required. The dissent contended that it was enough to show actual effects—higher merchant fees.32 The majority responded that defining the relevant market was necessary because the government was challenging a vertical restraint, and “[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market.”33 But the Court’s decision did not, in any obvious way, rest on a determination that American Express lacked market power. Furthermore, if the absence of market power was sufficient, as a matter of law, to foreclose liability for the challenged vertical restraint, any evidence of increased prices would have been beside the point.34

# 1AR

## Russia Adv

#### Constrains their military spending---physically unable to fight.

**Smith 3-7** --- Former Bloomberg Opinion columnist. He was an assistant professor of finance at Stony Brook University

Noah, 3-7-22, "How are the Big Sanctions hurting Russia so far? Noahpinion, https://noahpinion.substack.com/p/how-are-the-big-sanctions-hurting?s=r

The Russian defense industry

A weak ruble and bank cutoffs make it harder to buy imported components and machines for defense manufacturing. For example, precision-guided weapons, vehicle electronics, and communications equipment all need computer chips (semiconductors) to function. There was already a global chip shortage before the war, and now there are signs that Russian manufacturers are having trouble getting their hands on what they need:

Now, as Alperovitch notes, this isn’t just about the weak ruble or bank cutoffs — it’s also about export controls. He mentions the U.S.’ Foreign Direct Product Rule, but many other chip companies, including [South Korea’s Samsung](https://mobile.twitter.com/carlquintanilla/status/1499885650388172800) and Taiwan’s vaunted TSMC, are [also halting sales to Russia](https://www.washingtonpost.com/technology/2022/02/25/ukraine-russia-chips-sanctions-tsmc/). Protocol did [a report on Russian dependence on foreign chips](https://www.protocol.com/newsletters/protocol-enterprise/russia-ukraine-chips-shields-up?rebelltitem=8#rebelltitem8) last year, and found that European and U.S. companies sell them a lot of microprocessors, while their memory chip imports come mostly from South Korea and the U.S. That’s all done now.

This will hit Russian defense manufacturing immediately. Over the longer term, there will also be the problem that the machines Russians use to make their tanks and planes and rocket launchers and transport trucks will need spare parts as they wear out, and these will be in short supply.

And on top of all that, financial sanctions make it difficult for both the state and defense companies to actually pay their employees! Companies — including state-run ones — generally rely on a lot of overnight loans to make payroll and other payments. Now, with Russian banks in the process of being crippled by asset price plunges and lack of access to the Western financial system, companies may simply be unable to get the cash needed to keep the lights on. This was the upshot of a thread by political scientist Olga Chyzh, and folks who’ve worked in the region seem to agree:

(Note that failure to get paid salary on time will even make it hard for ordinary Russians to buy Russian-made goods at their local stores.)

What this all means is that the Russian military hardware that the Ukrainians are destroying is not going to be easy to replace. The website Oryx maintains [a meticulously curated list of visually confirmed equipment losses](https://www.oryxspioenkop.com/2022/02/attack-on-europe-documenting-equipment.html), and the toll so far is pretty stunning — 845 Russian vehicles lost in the first 11 days of combat, including 130 tanks. And the true numbers are likely to be significantly higher, given that many losses don’t get clear visual confirmation. Already the Russians are starting to supplement their military vehicles with [regular old pickup trucks](https://mobile.twitter.com/UAWeapons/status/1500564066246574081/photo/1). With the Russian defense industry crippled by sanctions, we might be looking at a severely weakened Russian army for a decade or more.

(And also remember that if Russian consumers are having a hard time getting their hands on medicines, Russian soldiers may also be running out, especially with their supply trucks being constantly blown up by the Ukrainians. That could mean more soldiers out of the fight due to illness or wound infection.)

#### Putin is a symptom, not a cause of Russian adventurism. Strong sanctions constrain future, militarized expansion.

**Fried & Karatnycky 21** --- \*Distinguished fellow at the Atlantic Council and former U.S. State Department coordinator for sanctions policy. \*\*Senior fellow at the Atlantic Council and the founder of Myrmidon Group.

Daniel & Adrian, 5-4-2021, "A New Sanctions Strategy to Contain Putin’s Russia," Foreign Policy, https://foreignpolicy.com/2021/05/04/sanctions-contain-russia-putin-west-us-eu-uk-europe-weaken-economy/

The long-term effect of sanctions could be profound. If Aslund’s and Snegovaya’s estimate is correct, Russia’s economy could grow by 64 percentage points less than without sanctions after 20 years. If the IMF’s slightly lower estimate is correct, the relative shrinkage would be 35 percentage points. Either way, it would mean a Russia with far fewer resources to spend on military adventures, subversion, disinformation, and repression. Recent years have already seen Moscow [reduce its ambitious plans](https://www.ft.com/content/763b1345-b703-40db-8065-167cbfe7f22f) for military spending, in part as a result of sanctions.

The rogue behavior not just of Putin, but of Russia’s vast military, security, and intelligence establishments, is deeply engrained in the country’s political culture and unlikely to change dramatically. In addition to current sanctions, it is therefore time for Washington and its allies to develop and implement a comprehensive long-term effort to impede Russian economic growth as long as Moscow remains on its aggressive course, thereby reducing the Kremlin’s potential for projecting power.

Even if the West should cooperate with Moscow wherever possible—on arms control and climate policy, for example—it must assume that Russia will remain aggressive for as long as Putin and his circle remain in power. The Western allies must therefore plan for what could turn out to be many years.

In such a plan, sanctions should not be limited to a few economic targets or the Russian state. Under Putin, much of the business, media, and cultural elite has been enlisted in support of the Kremlin’s attacks on other countries, whether military or cyber. Via Russian oligarchs and their businesses, Putin has also bought the support of former Western government officials and establishment figures, including in Britain, Germany, and Austria. These individuals can be targeted as well.

#### Solves war – returns us to post-Cold war era.

**Foerster 18** --- PhD, CGST Solutions.

Schuyler, 2018, “STRUCTURAL CHANGE IN EUROPE: IMPLICATIONS FOR STRATEGIC STABILITY,” INSS, <https://www.usafa.edu/app/uploads/Strategic-Stability-in> -Europe\_Foerster\_2018.pdf

Over the next two decades, the question of what constituted strategic stability lost any urgency as a policy imperative. Russia’s economic weakness following the collapse of the Soviet Union essentially suspended its military recovery and modernization until well into the first decade of the 21st century. NATO’s first post-Cold War Strategic Concept in 1991 acknowledged that the “threat of a simultaneous, full-scale attack on all of NATO’s European fronts has effectively been removed.”4 NATO’s 1999 Strategic Concept repeated the 1991 language that the fundamental purpose of NATO’s nuclear forces was “political” and that the circumstances in which NATO might have to contemplate their use were “extremely remote.”5 That document highlighted Russia’s “unique role in Euro-Atlantic security” and anticipated that NATO and Russia “will give concrete substance to their cooperation.

#### Effective sanctions key to negotiating leverage – that solves

**Charap 3-2** --- Senior political scientist at the RAND Corporation.

Samuel, 3-2-22, "Ensuring Russia's War with Ukraine Doesn't Morph into Direct Conflict with NATO," No Publication, https://www.rand.org/blog/2022/03/ensuring-russias-war-with-ukraine-doesnt-morph.html

Third, the West could leverage some sanctions to push Putin to abandon his core war aim of decapitating the Ukrainian government and installing a pro-Russian puppet. Using relief of the central bank sanctions, for example, to compel a cease-fire and a negotiated settlement would not only minimize human suffering in Ukraine, it could also signal the limits of Western intentions, making clear the sanctions are not about overthrowing Putin's regime.

#### Structural factors ensure a deal is possible---BUT, the threat of severe economic retaliation is key to make it sustainable.

**Lieven 3-9** --- Senior research fellow on Russia and Europe at the Quincy Institute for Responsible Statecraft.

Anatol, 3-9-2022, "How to get to a place of peace for Ukraine," Responsible Statecraft, https://responsiblestatecraft.org/2022/03/03/how-to-get-to-a-place-of-peace-for-ukraine/

The course of the war so far has already clarified certain things, in a way that helps to lay the basis for peace. On the one hand, the courage and unity of Ukrainian resistance has already won a great victory for Ukraine. If the Kremlin’s plan was to impose on Ukraine a Russian puppet government, then — assuming that the Kremlin is still capable of recognizing basic reality — this plan has already failed.

The Ukrainians have in fact achieved what the Finns achieved by their heroic resistance against Soviet invasion. The Finns convinced Stalin that it would be far too difficult to impose a Communist government on Finland. The Ukrainians have convinced sensible members of the Russian establishment — and hopefully, Putin himself — that Russia cannot dominate the whole of Ukraine. The fierce resistance of the Ukrainians should also convince Russia of the utter folly of breaking an agreement and attacking Ukraine again.

For it is now obvious that any such pro-Russian authorities imposed by Moscow in Ukraine would lack all support and legitimacy, and could never maintain any kind of stable rule. To keep them in place would require the permanent presence of Russian forces, permanent Russian casualties and permanent ferocious repression. In short, a Russian forever war. Moreover, such Russian hopes depended on being able to seize Ukrainian cities easily, with few civilian losses. If Russia has to storm these cities amidst huge destruction and loss of life, how can it possibly then appeal for the support of their populations?

On the other hand, while the West has quite rightly imposed very harsh economic sanctions on Russia in response to its criminal invasion, the United States, NATO and every NATO government have stated officially and repeatedly that they will never send their armed forces to defend Ukraine. In practice, therefore, neither Ukraine nor the West would sacrifice anything concrete by a Ukrainian treaty of neutrality, and it would be utterly wrong to ask Ukrainians to die for an empty fiction.

On the ground, the Russian army has quickly failed to achieve its main objectives in the north and east, necessitating fierce, costly and horribly destructive battles to capture Ukrainian cities. Russian forces appear to be inadequate in terms of numbers for the tasks they have been set. The Ukrainian capital, Kiev, has three million people — a huge military challenge if it is strongly defended.

The Russians are putting themselves in a position to attack Kiev, but have not yet done so. This raises the possibility that for the moment at least Moscow’s intention is to put pressure on the Ukrainian government, rather than destroy it. All of these factors create a strong incentive for the Russian government to agree to a compromise peace, if this allows them to withdraw with the appearance of partial success.

However, in the south the Russian army based in Crimea has advanced much further. It seems to have linked up by land with the Donbas, and to be making progress towards capturing the whole of Ukraine’s Black Sea coast. The Russians also seem to be driving the Ukrainian forces from the whole of the provinces of Donetsk and Lugansk (up to now, the separatist republics have only occupied part of those provinces). If Russian forces establish themselves strongly in these areas it will be exceptionally difficult for Ukraine ever to drive them out again by military means.

So even if the regime of President Putin eventually falls as a result of its monstrous and criminal gamble in Ukraine, it will still be necessary to negotiate the terms of Russian withdrawal with whatever Russia government succeeds to power, and that government will insist on certain compromises. It is very unlikely indeed that Russia will ever simply withdraw unconditionally from all the Ukrainian territory it has occupied since 2014, in the way that both the Soviet Union and the United States withdrew from Afghanistan. Russia’s stake in Ukraine and the Russian minority in parts of Ukraine is far too deep for that, and will be shared to a greater or lesser extent by all Russian governments (as it was shared by the Yeltsin government of the 1990s).

The basic terms of any peace agreement could be the following. Russian forces should withdraw completely from all the areas of Ukraine that they have occupied since the invasion began. Ukraine for its part could to sign a treaty of neutrality loosely modeled on the Finnish-Soviet Treaty of 1948 and the treaty by which Western and Soviet forces withdrew from Austria in 1954. These treaties ensured the internal sovereignty of these countries. It should be noted that while neither country was a member of NATO (or, during the cold war, the EU), both were recognized as fully part of the West due to their success as market democracies, which their neutral status did nothing to impede. This would allow Ukraine to achieve its key objectives as well as the safety and prosperity of its people. A compromise along these lines would be a success for Ukraine.

For Russia, the exclusion of possible future NATO membership remains crucial to any peace agreement. As William Burns, present Director of the CIA and U.S. ambassador to Russia, memoed Secretary of State Condoleezza Rice from Moscow in 2008:

“Ukrainian entry into NATO is the brightest of all redlines for the Russian elite (not just Putin). In more than two and a half years of conversations with key Russian players, from knuckle draggers in the dark recesses of the Kremlin to Putin’s sharpest liberal critics, I have yet to find anyone who view Ukraine in NATO as anything other than a direct challenge to Russian interests…” (William J. Burns, [The Back Channel](https://www.amazon.com/s?k=the+back+channel+william+burns&i=stripbooks&crid=2BRJQODBUK1BX&sprefix=Burns+back+%2Cstripbooks%2C127&ref=nb_sb_ss_ts-doa-p_1_11): American Diplomacy in a Disordered World)

As part of this treaty, Russia would have to guarantee the sovereignty and territorial integrity of Ukraine. However, even liberal members of the Russian establishment insist that as a matter of realism, it must be recognized that Russia cannot hand back Crimea (re-annexed by Russia in 2014) and the Donbas separatist republics (recognized as independent by Moscow on the eve of war) to Ukraine. At best, Russia might agree to reopen the Minsk II negotiations on a confederal relationship between these republics and Ukraine. In the opinion of Alexey Gromyko, Director of the Institute of Europe at the Russian Academy of Sciences:

“Russian troops will be withdrawn as soon as a political settlement reached according to the basic Russian conditions: the recognition of Crimea as a part of Russia (otherwise the security threat for Crimea will be perennial as well as a threat to the water supply), the recognition of the two Donbas republics in their full administrative borders (or some other kind of de facto settlement without the official recognition of the republics by Kiev), limitations on the Ukrainian military (primarily no strike systems, which should be defined), a status of military neutrality akin to the Austrian precedent under legally binding international guarantees…For the West to touch the issue of Russian sovereignty over Crimea is a dead end. If such a linkage is established that would show that either the US does not understand not Putin’s but Russian attitudes to the peninsular and the sentiments of people who live there, or that it does it on purpose to leave the new sanctions for long with unpredictable consequences ”

In other words, to insist on the return of Crimea to Ukraine as part of any peace settlement would very likely only prolong the war and make peace permanently impossible, under any future Russian government. However, as [suggested](https://www.politico.com/news/magazine/2022/01/10/how-to-get-what-we-want-from-putin-526859)by Thomas Graham, Senior Director for Russia at the National Security Council from 2004 to 2007, any change in the international status of these and other disputed territories in Europe must be confirmed democratically by local referenda under international supervision. The West can also demand separately that as part of the price of Western support for an agreement Russia should recognize the independence of Kosovo and allow the United Nations to do so.

The West should incentivize Russia to agree to such a treaty and withdraw its forces by promising that if Moscow does this, we will lift all the sanctions imposed on Russia. These sanctions have been passed in retaliation for the Russian invasion, not to change the regime in Moscow (however much we may hope that the Russian people themselves may do this).

To pursue the agenda of regime change at the cost of innumerable Ukrainian lives would be deeply immoral, and would recall some of the worst aspects of U.S. behavior during the cold war. As for Russia, it is likely to stick to the terms of such a peace agreement because it is in its interest to do so — and because the West must state categorically that any major violation will bring the automatic re-introduction of full economic sanctions against Russia.

#### No impact---empirics prove retaliation will be small and directed at allies, NOT the U.S.

Beckley 18 --- Fellow in the International Security Program at Harvard Kennedy School's Belfer Center for Science and International Affairs and assistant professor of political science at Tufts University

Michael, Fellow in the International Security Program at Harvard Kennedy School's Belfer Center for Science and International Affairs and assistant professor of political science at Tufts University, “Unrivaled: Why America Will Remain the World's Sole Superpower,” Cornell University Press, September 15, 2018

Economic Soft Balancing. The United States has almost never been sanctioned during the post—Cold War era, but it has sanctioned other countries forty-six times, accounting for nearly 60 percent of all cases of economic sanctions imposed since 1991.46 According to a recent study, U.S. sanctions succeeded in coercing the target state to comply with American demands in more than 40 percent of these cases.

The United States is uniquely empowered to impose economic sanctions because it plays a central role in global shipping and banking: the U.S. Navy can intercept shipping almost anywhere in international waters;4S and the U.S. dollar is used in 80 percent of all financial transactions worldwide. Most dollar-denominated transactions cross the American financial system, so the U.S. government has ample opportunities to manipulate or freeze the transactions and assets of hostile countries.

Furthermore, when the United States imposes sanctions, it Often gets its wealthy allies to help Out. In some Cases, therefore, the United States has been able to cut hostile regimes off from hard currency, financial credit, vital imports, and access to assets in North America, Western Europe, Oceania, and parts of East Asia.51 For example, after Russia invaded Ukraine in 2014, the United States, the EU, Japan, Switzerland, Australia, and Canada froze Russian assets on their territory, prohibited their banks from conducting transactions with Russian entities, banned top Russian leaders and businesspeople from traveling to their countries, and cut Russia off from advanced technology imports. The multinational sanctions imposed on Iran from 2006 to 2016 were even more onerous, amounting to an almost total economic embargo on the country.

Instead Of sanctioning the United States, and inviting economically devastating retaliation, rival powers have focused their economic ire on America's allies. Russia, for example, has manipulated oil and gas prices at least fifteen times since 1991 to coerce countries in central and eastern Europe. On three Of these Occasions, Russia targeted N ATO members: Lithuania in 2006, and Poland and Slovakia in 2014.53

China, too, has sanctioned several U.S. allies during the past decade, banning rare earth metal exports to Japan in 2010 during a dispute over the Diaoyu/Senkaku Islands; salmon imports from Norway after the Norwegian Nobel Committee awarded the Nobel Peace Prize to Chinese dissident Liu Xiaobo in 2010; banana imports from the Philippines during a standoff over Scarborough Shoal in 2012; and visas for some South Korean celebrities, businesspeople, and tourists after Seoul decided to deploy the Terminal High Altitude Area Defense (THAAD) missile defense system in 2017. su

Some of these sanctions arguably weakened the United States by cowing its allies into concessions. Norway, for example, released a statement in 2016 promising to "fully respect China's sovereignty . and core interests"; and the Philippines has downplayed the 2016 world court ruling it won against China's territorial claims, canceled some military exercises with the United States, and halted construction on a sandbar in a disputed area of the South China Sea.56

In most cases, however, China and Russia's sanctions have not significantly improved their strategic situations. The United States offset Russian gas sanctions by shipping American natural gas to allies in eastern Europe. Japan responded to China's sanctions by reasserting its claims in the East China Sea, bolstering its military, and reducing its reliance on Chinese rare earths.3h The Philippines still occupies Chinese-claimed portions Of the South China Sea and is allowing the United States to expand and upgrade its military bases on Filipino territory? And South Korea deployed THAAD in September 2017.60

#### Sets a precedent modelled by other rogue states.

**Smith 22** ,2-24-2022, "Russia's invasion of Ukraine could set a dangerous precedent, US security expert says," WPDE, https://wpde.com/news/nation-world/russias-invasion-of-ukraine-could-set-a-dangerous-precedent-us-security-expert-says-russia-ukraine-united-states-vladimir-putin-military-war

WASHINGTON (TND) — As new sanctions are being rolled out following Russia’s invasion of Ukraine, there are talks of the ultimate sanction: kicking Russia out of the international "SWIFT" banking system. The Belgium-based organization is used by more than 11,000 institutions globally, allowing money to be moved from bank to bank.

It’s something Ukraine’s foreign minister called for Thursday and President Joe Biden has said that it is something the U.S. is considering it but not all of its allies are on board.

“It would basically make it very difficult for European states to make purchases from Russia, including purchasing oil. But the issue here is the European states do not want this sanction implemented,” said Fred Flietz, vice chair of the Center for American Security with the [America First Policy Institute](https://americafirstpolicy.com/priorities/center-for-american-security).

Putin said the move would be equivalent to a declaration of war when it was discussed as an option against Russia in 2014.

Flietz — a former U.S. chief of staff for the National Security Council who has worked with the CIA and State Department — says this situation isn’t unprecedented but it leaves questions for the U.S.

“When Donald Trump put sanctions on Iran, in late 2018, swift sanctions were included over the objections of the Europeans. That is the Europeans tried to stop this, and Trump basically ran over them and said, ‘we’re going to do it anyway.’ Biden didn't do that. He gave in to the Europeans who did not want this tough sanction, just like they didn't want to Iran," Flietz said. "I think the question here is, why were Trump's sanctions against Iran tougher than Biden's sanctions?”

Another potential option for the U.S. is cyberattacks against Russia to disrupt its military forces, knocking out power and internet and slowing down railroad service.

Flietz says that would be a dangerous route for the Biden administration because the U.S. would be inserting itself in the conflict in a direct way.

“I think that would basically be calling a war with Russia. I don't support that. We should be using diplomacy, sanctions, world persuasion, but warfare, even if it's cyber warfare, I think that's a mistake.”

He believes as it stands right now, Biden has done a good job maintaining the stance that American troops are only in eastern Europe to protect NATO allies.

“I'm happy to see that Joe Biden seems to understand that we cannot send American troops into Ukraine. It doesn't make sense. It is not a member of NATO,” Flietz said. “I don't think he’s [Putin] going to cross the borders of NATO to invade a NATO state, but if he does, that's when NATO troops will get involved. Let's pray that never happens.”

Some are also concerned that Russia is setting a precedent, signaling to other governments that would like to invade other countries for their own interests.

“This is an important precedent because we're worried about a third World War that could destroy the world with nuclear weapons,” Flietz said. “It’s very dangerous when a nuclear-armed state engages in an act like this that could involve NATO and I think North Korea is noticing this, Taiwan and China are noticing this. Iran is noticing this. It does create a very dangerous precedent that there'll be another rogue state that tries to do the same thing.”

#### Ukraine’s a test case for global revisionism---strength of response is key to prevent emboldenment.

**Stening 22**, Tanner, 2-24-2022, "What Russia’s invasion of Ukraine means for the global balance of power," News @ Northeastern, https://news.northeastern.edu/2022/02/24/global-power-balance-russia-ukraine/

Russia has launched a full-scale invasion of Ukraine, provoking a ground war in Europe that is likely to test regional security alliances and agreements in ways not seen in decades.

On Thursday, Russian President Vladimir Putin [vowed](https://www.nytimes.com/live/2022/02/24/world/russia-attacks-ukraine) to, among other things, “demilitarize” the ex-Soviet country, providing the pretext for what he called a “special military operation” that resulted in [dozens of Ukrainian military and civilian casualties](https://www.aljazeera.com/news/2022/2/24/russia-ukraine-invasion-casualties-death-toll) within the invasion’s first few hours.

The implications of the multipronged invasion for Ukraine, an aspiring North Atlantic Treaty Organization (NATO) member nation, are immense. The attack also could reverberate beyond Eastern Europe and threaten the balance of power globally.

But exactly how the conflict will affect the prevailing “[international liberal order](https://www.gmfus.org/news/what-liberal-international-order)” depends, precisely, on how the U.S. and its allies respond, Northeastern experts say. Although the subject of [some debate](https://academic.oup.com/ia/article/94/1/7/4762691), the international liberal order is a term used by academics, pundits, and political leaders to broadly characterize the set of rules, norms, and institutions around which the post-Cold War world is organized, which broadly favors multilateralism, liberal democratic ideals, and anti-authoritarianism.

“Certainly the concerns parallel some of the things we saw during the Cold War, with Russia attempting to assert primacy in the international system,” says Northeastern’s [Julie Garey](https://cssh.northeastern.edu/faculty/julie-garey/), assistant teaching professor of political science who specializes in international relations.

With Russian aggression now fully underway, international observers [have speculated](https://www.theatlantic.com/international/archive/2022/02/vladimir-putin-ukraine-taiwan/622907/) about a potential Chinese takeover of Taiwan, which Beijing has long claimed as its territory.

Fearing a Chinese response, Taiwan [increased its government’s alert level](https://www.reuters.com/world/asia-pacific/taiwan-reports-nine-chinese-aircraft-its-air-defence-zone-2022-02-24/) on Thursday. Taiwanese President Tsai Ing-wen has said Taiwan in some ways identifies with Ukraine’s position given past “threats and intimidation” from China, according to [CNN](https://www.cnn.com/2022/02/23/china/taiwan-ukraine-parallels-china-russia-intl-hnk-mic/index.html).

China’s expansion has led to recent crackdowns on democratic forces and ideals in the east, most notably when it [seized control of Hong Kong](https://www.nytimes.com/2021/06/28/world/asia/china-hong-kong-security-law.html), which had been slipping out of the Chinese Communist Party’s control for some time, says [Mai’a Cross](https://cssh.northeastern.edu/faculty/maia-cross/), the Edward W. Brooke Professor of Political Science and International Affairs at Northeastern.

“China has been—in a whole range of ways—testing the global order and essentially getting away with it,” Cross says.

But Russia’s invasion of Ukraine hits a lot closer to home. Putin said the invasion is a response to Ukraine’s embrace of NATO and the West—even though the former Soviet bloc country is “no closer to joining” the [intergovernmental alliance](https://www.nato.int/cps/en/natolive/topics_37356.htm) because of ongoing territorial disputes, among other reasons, Cross says.

In some ways, the conflict is going to be a “test case” to see “how the world holds on to this liberal international order,” she says.

“When great powers try to destabilize the international order, they’re attacking established norms,” Cross continues. “And when norms of proper behavior start to crumble, then it means other powers may feel emboldened to act in this way—and they will only feel emboldened on the basis of the response.”

Thursday afternoon, U.S. President Joe Biden announced new sanctions against Russia, including export blocks on technology, and limits on state-owned banks. Biden said the sanctions would dramatically hinder Russia’s ability to compete and participate in the global economy, as well as limit its military capabilities, according to the [Wall Street Journal](https://www.wsj.com/articles/biden-expected-to-detail-harsh-sanctions-on-russia-after-putin-attacks-ukraine-11645711417).

## Privacy DA

#### Section 5 authority limits enforcement

Chao et al 19 – Becky Chao is a policy analyst at New America’s Open Technology Institute, where she works to promote equitable access to a fair and open internet ecosystem. Eric Null was senior policy counsel at the Open Technology Institute, focusing on internet openness and affordability issues, including network neutrality, Lifeline, and privacy. Claire Park is a research assistant with New America's Open Technology Institute (OTI), where she researches and writes on technology policy issues including broadband access and competition, as well as privacy.

Becky Chao, Eric Null, & Claire Park, November 20 2019, “Enforcing a New Privacy Law,” New America, https://www.newamerica.org/oti/reports/enforcing-new-privacy-law/the-ftc-is-currently-the-primary-privacy-enforcer-but-its-authority-is-limited

Second, Section 5—which forms the core of the FTC’s jurisdiction over privacy—does not give the agency sufficient authority to protect privacy. Section 5 empowers the commission to pursue actions against “unfair or deceptive acts or practices.” An act or practice is considered unfair if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”4 An act or practice is considered deceptive if it involves a material representation, omission, or practice that is likely to mislead a reasonable consumer.5 This enforcement regime, which primarily addresses companies’ notice and disclosure policies, has created incentives for companies to simply avoid promising clear privacy protections so they can avoid the risk that they may be held accountable for violating those promises. Gellman argued, for instance, that cases brought under the agency’s deception authority have resulted in company disclosure through “vaguer and less clear privacy notices” to which companies cannot be held accountable. Instead, the FTC should wield its unfairness authority more: if the goal is to change company practices, as Gellman suggested, “you can do that more through unfairness and set standards for everybody else than you can through [the] deception” authority.

However, the FTC’s existing unfairness authority as currently utilized also fails to ensure strong privacy protections. Getachew noted that “one of the challenges of the unfairness standard is that it's not only [asking] is something unfair, but is that practice outweighed by any benefits that a consumer might receive? Are there any economic advantages to that practice? And is that better than anything that could be considered unfair?” Thus, even if a practice could be considered unfair, if the FTC finds that the practice potentially benefits some consumers in some way, the balancing test may prevent the agency from taking action.

#### Even Ireland has more staffers than the FTC’s privacy division

Chao et al 19 – Becky Chao is a policy analyst at New America’s Open Technology Institute, where she works to promote equitable access to a fair and open internet ecosystem. Eric Null was senior policy counsel at the Open Technology Institute, focusing on internet openness and affordability issues, including network neutrality, Lifeline, and privacy. Claire Park is a research assistant with New America's Open Technology Institute (OTI), where she researches and writes on technology policy issues including broadband access and competition, as well as privacy.

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The FTC lacks capacity to effectively enforce privacy laws

The FTC currently lacks capacity to exercise its jurisdiction over privacy regulations effectively. First, the FTC lacks the staffing resources it needs to carry out its privacy work. The FTC has around 40 full-time staff working on privacy issues, which is significantly fewer than many foreign data protection authorities in smaller countries.8 For instance, the U.K. Information Commissioners’ Office employs over 500 people to regulate data privacy,9 and the Irish Data Protection Commissioner employs about 130 people to enforce the General Data Protection Regulation.10 The agency charged with enforcing privacy in the United States should be properly staffed to ensure that when companies violate privacy rules, they are directly held accountable. As FTC Chairman Joseph Simons wrote to Rep. Frank Pallone Jr. (D-N.J.), the agency has “brought on average about twenty privacy and data security cases per year over the past five years … With more staff we would be able to bring more cases under our existing authority; providing us with additional authority would notably improve our ability to bring significantly more privacy and data security cases.”11 With only 40 full-time staff dedicated to the issue, the FTC simply cannot be aggressive in protecting privacy across the country.

Second, it is unclear whether the FTC has the technological expertise it needs to enforce privacy laws. Not only has the office of the chief technologist been vacant since May 2018,12 but as of April 2019, the agency also only employs around five technologists on staff, with only around three technologists working on privacy and security research and casework.13 FTC Chairman Simons has asked Congress for additional resources to hire an estimated ten to fifteen technologists to support ongoing work in these areas,14 and former Commissioner Terrell McSweeny has called for the creation of a freestanding Bureau of Technology to bolster the agency’s technological expertise.15 Without a robust understanding of technology—including online advertising methods, algorithmic tools, and machine learning—the FTC will be hampered in its ability to protect privacy.

#### No link to offense – allows evaluation of harms on both sides of the platform, just changes the balancing stage

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

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

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

## T

**Expanding the scope of antitrust increases antitrust violations---that’s distinct from immunity**

**Lofaso 21** – Associate Dean for Faculty Research and Development and a professor at the West Virginia University College of Law. The National Labor Relations Act: Law and Practice is a comprehensive, authoritative treatise on the entire scope of the National Labor Relations Act (NLRA) and related statutes, as interpreted by the National Labor Relations Board and the courts

Anne Marie Lofaso, "5 National Labor Relations Act: Law & Practice § 43.02," Matthew Bender & Company, Inc., 2021, accessed via Nexis Uni

Further, an antitrust violation requires a showing of a reduction of competition in the market in general, not just an injury to the plaintiff-competitor.5 Additionally, in many instances, the claims or potential claims are, in fact, labor disputes dressed in the guise of antitrust claims; they seek to provide an antitrust remedy for an injury that is properly remedied by the federal labor laws. The federal courts have uniformly rejected such attempts to expand the scope of the antitrust laws to encompass interests dealt with directly in the federal labor laws and other statutes.6 Nonetheless, merely because the conduct complained of is arguably protected by federal labor law does not render the conduct immune from antitrust attack.7

#### Contextual ev proves – standards of review control the scope of Sherman

Orbach, Professor of Law and the Director of the Business Law Program, the University of Arizona College of Law, ‘15

(Barak, “The Durability of Formalism in Antitrust,” 100 Iowa L. Rev. 2197)

When addressing substantive questions, courts often use presumptions and rules that answer factual inquiries and economize the need to examine actual circumstances. For example, under present law, price fixing is illegal per se, a price squeeze is practically per se legal, and market share often defines monopoly power or lack thereof. Such doctrines are adopted when the Supreme Court believes that circumstances are “always or almost always” irrelevant. When beliefs of this kind are imprecise—and historically many such beliefs turned out to be flawed—doctrines addressing substantive antitrust issues establish poor policies.

Past concerns regarding vertical price and nonprice restraints are a prime example of beliefs that shaped formalism and their abandonment, which led to relaxation of that formalism. But the relaxation of per se bans on vertical restraints (formalistic rules) was facilitated through the adoption of a formalistic distinction between vertical and horizontal restraints. Another example of troubled formalism is the Supreme Court’s section 2 jurisprudence in recent decades. Heavily influenced by outdated economic theories and beliefs, in recent decades the Supreme Court developed several doctrines that considerably narrowed the scope of section 2 of the Sherman Act. These doctrines are likely to evolve and allow courts greater discretion when they consider exclusion claims.

#### This is the entire reason that we think the legislation currently in Congress “expands the scope”

**Kuntz 21** --- J.D. Candidate at The University of Maryland Francis King Carey School of Law

Kendall, 2-23-2021, " Can the Courts and New Antitrust Laws Break Up Big Tech?," Maryland Carey Law, https://www.law.umaryland.edu/Programs-and-Impact/Business-Law/JBTLOnline/Break-Up-Big-Tech/

If you have a social media profile on [Facebook](https://about.fb.com/technologies/facebook-app/), have shopped online on [Amazon](https://www.aboutamazon.com/about-us), have run a search on [Google](https://about.google/products/), or have purchased an application through [Apple's App Store](https://www.apple.com/app-store/), you have interacted with Big Tech.  [Big Tech](https://www.pcmag.com/encyclopedia/term/big-tech) refers to the major technology companies including Apple, Google, Amazon, and Facebook.  Big Tech is known for its [dominance](https://www.reuters.com/article/us-usa-tech-antitrust-congress-factbox/how-big-tech-companies-gain-and-maintain-dominance-idUSKBN26R3RD) in online searching, advertising, social networking, and shopping, but in 2020, a great deal of its [publicity](https://www.cnn.com/2020/10/06/tech/congress-big-tech-antitrust-report/index.html) surrounded an investigation by Congress for violations of antitrust law.  For years, Big Tech has been using its power to [suppress market competition](https://www.vox.com/recode/2020/10/6/21505027/congress-big-tech-antitrust-report-facebook-google-amazon-apple-mark-zuckerberg-jeff-bezos-tim-cook) and engage in “take it or leave it” business negotiations, thereby [evading antitrust regulation that is “overwhelmingly focused on the welfare of the consumer."](https://www.nytimes.com/2019/06/20/technology/tech-giants-antitrust-law.html)  The United States Government has begun the process of attempting to break up Big Tech by filing a [flurry of lawsuits](https://www.lexology.com/library/detail.aspx?g=cdedf90c-541e-4c1f-87c4-0c976ebac800) against Big Tech, including against Google and Facebook, and [by proposing legislation](https://www.startribune.com/klobuchar-pushes-to-overhaul-antitrust-laws/600018940/?refresh=true) aimed at checking Big Tech power, expanding the scope of current antitrust laws, and augmenting enforcement resources.

There are three core antitrust laws in effect today:[the Sherman Act](https://www.law.cornell.edu/wex/sherman_antitrust_act), [the Clayton Act](https://www.ftc.gov/enforcement/statutes/clayton-act), and [the Federal Trade Commission Act](https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act).  These three antitrust laws attempt to protect market competition for the benefit of consumers.  [The Sherman Act](https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws) outlaws monopolies and contracts that unreasonably restrain trade.  [The Clayton Act](https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws) prohibits mergers and acquisitions that substantially lessen competition or create a monopoly.  Lastly, [the Federal Trade Commission Act](https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws) bans “unfair methods of competition” and “unfair or deceptive acts or practices.”  Antitrust laws are not established to punish success, but are focused on preventing anticompetitive effects, exclusionary practices, reduced consumer choice, and hindered innovation.

From June 2019 through October 2020,[Congress examined the digital dominance and business practices of Amazon, Apple, Google, and Facebook](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519) to determine how their market power affected the economy and democracy.  Congress [found](https://www.cnn.com/2020/10/06/tech/congress-big-tech-antitrust-report/index.html) that the totality of the evidence demonstrated that Big Tech has too much monopoly power, and it must be reined in to protect economic freedom and encourage fair market competition.  Congress also reviewed existing antitrust laws and determined that such laws needed to be strengthened.

On October 10, 2020, the U.S. Department of Justice (“DOJ”) and eleven states [filed a lawsuit against Google](https://fm.cnbc.com/applications/cnbc.com/resources/editorialfiles/2020/10/20/Complaint.pdf).  The complaint alleged that Google violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by “unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising . . . through anticompetitive and exclusionary practices.”  Google’s alleged anticompetitive and exclusionary practices included Google entering into exclusionary agreements with distributors that prohibited Google’s distributors from dealing with Google’s competitors and required the distributors to display Google applications, like the search application, in prime positions where consumers would likely begin their web searches.  These exclusionary agreements enabled Google in recent years to account for nearly 90% of all general search engine queries in the United States, thus foreclosing competition for internet searching.

Shortly after filing a lawsuit against Google, [the Federal Trade Commission (“FTC”) filed suit against Facebook.](https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf)  That complaint alleged that Facebook violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) through “its anticompetitive conduct and unfair methods of competition in or affecting commerce.”  Notably, the lawsuit defined Facebook’s anticompetitive conduct to include (1) acquiring Instagram and (2) acquiring WhatsApp, to “squelch those threats.”  The FTC has argued that Facebook’s continued ownership and operation of Instagram and WhatsApp prohibits direct competitive threats and raises barriers to entry into personal social networking, thereby protecting Facebook.  Without neutralizing Facebook’s anticompetitive conduct, the complaint explained that Facebook would likely seek to acquire “any companies that constitute . . . threats to its personal social networking monopoly.”

[Facebook responded by calling](https://about.fb.com/news/2020/12/lawsuits-filed-by-the-ftc-and-state-attorneys-general-are-revisionist-history/) the lawsuits revisionist history.  When Facebook acquired Instagram in 2012, the FTC voted 5-0 to clear the transaction, finding it did not make the market any less competitive.  Why would the FTC now allege that the acquisition was anticompetitive, when the FTC had unanimously approved it years before?  Pre-acquisition, Instagram only had about 2% of the users it has today, no revenue, and minimal infrastructure.  In 2012, Instagram had only [30 million users](https://www.vox.com/2017/4/9/15235940/facebook-instagram-acquisition-anniversary).  In 2012, Facebook had surpassed [one billion active users](https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/).  While Facebook CEO Mark Zuckerberg has expressed “[it is better to buy than compete](https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf),” when Facebook acquired Instagram in 2012, [the platforms may have been competing in the photo sharing sphere](https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf), but by [pure scale of size, they were not competitors](https://www.cnbc.com/2019/09/24/facebook-bought-instagram-because-it-was-scared-of-twitter-and-google.html).  As of 2021, [Instagram has clearly become a mainstay in the social media world,](https://blog.hootsuite.com/instagram-statistics/) but pre-Facebook acquisition, with a limited number of users, Instagram could have virtually disappeared, [like MySpace did](https://www.lifewire.com/is-myspace-dead-3486012).  With an uncertainty surrounding the longevity of social media platforms, the FTC may have originally approved the acquisition of Instagram because [Instagram and Facebook were not directly competing over users](https://www.cnbc.com/2019/09/24/facebook-bought-instagram-because-it-was-scared-of-twitter-and-google.html), and it was impossible to predict, at the time, how long Instagram, or Facebook, would continue to exist.  However, it is clear today that [Instagram has survived and thrived under Facebook](https://www.vox.com/2017/4/9/15235940/facebook-instagram-acquisition-anniversary).  With Instagram escaping a [similar fate to MySpace](https://www.lifewire.com/is-myspace-dead-3486012), and becoming a mainstay in the photo-sharing world, [Facebook has been able to hinder other firms from competing](https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf) in the photo-sharing segment.  Facebook’s 2012 acquisition of Instagram may not have originally seemed anticompetitive, but with Instagram blossoming into the dominant photo-sharing platform it is today, the merger has had anticompetitive effects warranting new review by the FTC.

The push to break up Big Tech has bipartisan support.  [A poll by Vox and Data for Progress](https://www.vox.com/2021/1/26/22241053/antitrust-google-facebook-break-up-big-tech-monopolyhttps:/www.vox.com/2021/1/26/22241053/antitrust-google-facebook-break-up-big-tech-monopoly) found that 59% of overall people surveyed supported breaking up Big Tech; 55% of those supporting the break-up of Big Tech were Democrats, while 61% were Republicans.

The consistent feelings surrounding Big Tech, irrespective of political party, are important, as Senator Amy Klobuchar, D-Minn., unveiled a [“sweeping antitrust reform bill”](https://www.cnbc.com/2021/02/04/klobuchar-unveils-sweeping-antitrust-bill-laying-out-her-vision-as-new-subcommittee-chair-.html) on February 4, 2021.  Senator Klobuchar’s [Competition and Antitrust Law Enforcement Reform Act](https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf) (“CALERA”) seeks to reform current antitrust laws, making it more challenging for big companies to get mergers and acquisitions approved, and giving enforcers, like the FTC and DOJ, more enforcement power.

CALERA has a number of key proposals to current antitrust laws and enforcement.  Among many proposed changes, CALERA has importantly proposed to change the standard and burden for proving that the merger or acquisition would not cause harm.  Currently, under the Clayton Act, regulators must prove that the proposed merger or acquisition would hurt consumers “[when the effect of such acquisition may be substantially to lessen competition](https://www.law.cornell.edu/uscode/text/15/18)” in the market.  [CALERA](https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf) seeks to shift the burden and standard, requiring that the merging or acquiring entities prove that the merger would “create an appreciable risk of materially lessening competition.”  While it will be up to the courts to interpret this new standard in practice, the new standard is a means to prevent a corporate merger or acquisition where there would be insufficient evidence to demonstrate that competition would be substantially lessened.

**Expanding the scope of antitrust laws requires amending standards by which violations can be found**

**Epstein 19** – Laurence A. Tisch Professor of Law, The New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, the University of Chicago

Richard A. Epstein, "SYMPOSIUM: Judge Koh's Monopolization Mania: Her Novel Antitrust Assault Against Qualcomm Is an Abuse of Antitrust Theory," 98 Neb. L. Rev. 241, 2019, accessed via Nexis Uni

The question then arose whether the violation of the Telecommunications Act counted as a violation of the antitrust laws as well. The statutory framework contained two key provisions. The Telecommunications Act was not allowed to preempt the operation of the antitrust laws: "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 64By the same token, the status quo was preserved because the Telecommunications Act also did nothing to expand the scope of the antitrust laws. It did not create new claims going beyond existing antitrust standards. The creation of any additional antitrust standards would be equally inconsistent with the saving clause's mandate that nothing in the Telecommunications Act would "modify, impair, or supersede the applicability" of existing law.

**Changes in scope determine legality**

**Hovenkamp 83** – Associate Professor University of California, Hastings College of the Law

Herbert Hovenkamp, "State Antitrust in the Federal Scheme," 58 Ind. L.J. 375, 1983, accessed via Nexis Uni

More importantly, the notion that federal antitrust law is aggressive while state law is passive is largely a thing of the past. Since the early [\*377] 1970's the United States Supreme Court has gradually restricted the scope of federal antitrust liability and narrowed the range of private persons who may sue for antitrust violations. 9 On the other hand, many states have broadened the scope of their antitrust laws and have granted standing to a broader class of plaintiffs than have a cause of action under the federal laws. As a result, activities that are not illegal under federal law are condemned by the antitrust law of some states. 10 Furthermore, some persons who have suffered injury because of antitrust violations have a damages action under various state antitrust laws while they have no such action under the federal statutes. 11

**Scope of the antitrust laws determines what conduct is illegal**

**Ross 61** – Judge, United States District Court, Nevada

John Rolly Ross, "Bolick-Gillman Co. v. Continental Baking Co.," 206 F. Supp. 151, United States District Court for the District of Nevada, 12-28-1961, accessed via Nexis Uni

We are faced with a second amended complaint which seeks damages against defendant under Section 4 of the Clayton Act, 15 U.S.C.A. § 15, by reason of an alleged violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13(a).

Plaintiff alleges, in essence, that it was a wholesale distributor of bread in the Las Vegas, Nevada, area for an Arizona manufacturer; that defendant, who was a Utah manufacturer of bread, made use of an exclusive distributor in the Las Vegas, Nevada, area who was in competition with plaintiff; that defendant charged prices to its Las Vegas distributor which were lower than those charged to its distributors elsewhere; and that, as a result of such alleged price discrimination, plaintiff was injured.

The question is whether plaintiff is within the scope of those statutes which make certain types of conduct illegal and give to certain persons the right to recover damages which result from such conduct. 1.