# 2AC

## Platforms Adv

#### Market definition shouldn’t matter – should prefer context-specific inquiries instead of categorical pronouncements

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. 610, https://www.yalelawjournal.org/pdf/PannerEssay\_8qgt26i3.pdf.

This Essay addresses whether the Court’s determination that the credit-card market is two-sided was necessary to the outcome in American Express. It is not immediately clear why the question whether a relevant market is one-sided or multi-sided should control the plaintiff’s prima facie burden of demonstrating anticompetitive effects. The Court’s conclusion that the market for credit-card services is two-sided served as shorthand for its conclusion that the plaintiffs could not establish that the challenged practice harmed competition and consumers simply by showing that it resulted in higher merchant fees, without accounting for the impact on cardholders at the front end. But the determination that the market is two-sided does not provide a satisfying answer to the question why, in general, the presence of significant indirect network effects—which the Court cited as the basis for its two-sided market definition—demands a showing of net harm.

Despite the broad and categorical tenor of parts of the Court’s opinion, American Express is best understood in the context of the vertical restraints at issue and the market context. The Court’s market-definition conclusion reflects the (in my view sound) determination that to accept proof of higher merchant fees as prima facie evidence of harm to competition from the challenged restraints would be to favor the interests of merchants over those of cardholders, without an adequate competition-policy justification. But the Court’s market-definition conclusion is best treated as dicta—the Court’s discussion of anticompetitive effects does not depend on it. Moreover, even in the context of two-sided platforms with strong indirect network effects, evidence of market effects on a single side of a two-sided platform may provide a sufficient basis for antitrust concern. What is required is careful consideration of competitive context and the nature of the challenged practice, not an approach that allocates burdens based on a categorical determination that the market is one-sided or two-sided.

#### Aff’s framework accounts for countervailing effects on both sides – court can conclude that the benefits on one side outweigh the harm on the other side, but it should be the defendant’s burden to establish those benefits – that’s Hovenkamp – here’s more ev

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.

#### Uniqueness goes aff – netting makes it effectively impossible to challenge practices – that’s Salop – here’s more ev

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

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

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

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

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

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

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

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

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

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

#### Turn—their link is backwards for platforms—defense-friendly regime incentivizes platforms NOT to innovate

Newman, Trial Attorney, U.S. Department of Justice, Antitrust Division, ‘12

(Jordan, “Anticompetitive Product Design in the New Economy,” 39 Fla. St. U. L. Rev 682)

What all these approaches have in common is that they place a thumb on the scale in favor of defendants, at least as compared to the generally used section 2 exclusionary-conduct inquiry,258 essentially a rule-of-reason analysis. The D.C. Circuit in Microsoft III set forth the general method of analysis, complete with allocations of the burden of proof. First, the burden is on the plaintiff to make a prima facie case that the defendant has engaged in monopolistic conduct (properly defined).259 If the plaintiff does so, the burden then shifts to the defendant to show a procompetitive justification for the redesign.260 If the defendant fails to do so, the conduct is exclusionary.261 If, however, the defendant shows some plausible justification, the burden shifts back to the plaintiff to rebut that justification.262 If the plaintiff fails to do so, then the plaintiff must show that the anticompetitive harm outweighs the procompetitive justification.263 The leading treatise takes issue with the last step, at least insofar as it seems to call for courts to engage in “balancing” of close cases—advocating instead a burden-shifting analysis that, while perhaps somewhat less defendant-friendly than the above approaches, calls for “resolv[ing] close cases in favor of the defendant.”264 The various approaches described above, however, end the analysis and dismiss the claim as soon as the defendant shows any plausible justification for its behavior. This favorable treatment traditionally accorded to defendants in this area is due largely to the concerns noted above—the fear that, because (1) the markets themselves act as a check on exclusionary product redesigns (making them quite rare) and (2) antitrust courts are generally not competent to second-guess design changes, condemning product redesigns will tend to unduly stifle innovation.

Yet, as shown above, these concerns largely dissipate in the types of markets under discussion. As to the first, the nature of code-based products and the widespread availability of high-speed Internet access have combined to make the now standard method of redesigning these products—software updates—a uniquely attractive method of foreclosing rivals. This is so for three primary reasons: (1) low development and distribution costs,265 (2) low risk that consumers will reject redesigns,266 and (3) low losses incurred if these product redesigns fail.267 Additionally, new-economy markets tend to be characterized by strong positive network externalities, which may further incentivize monopolistic behavior.268 Given the confluence of these factors, it is much more likely that Ci > Pm – LR in these markets.

And with regard to the second concern, as shown above, the inherent and unique nature of code-based product redesign makes it uniquely susceptible to antitrust scrutiny.269 Given that such redesigns are more easily analyzed than traditional, physical product redesigns, it should come as no surprise that firms may be able to offer no justification for their conduct (as occurred in Microsoft III). Alternatively, they may simply settle out of court or enter into consent decrees (as may have occurred in In re Intel). At any rate, the point is that antitrust courts no longer need to simply throw up their hands and find for defendants in design-related cases.

Since these concerns largely dissipate in these markets, the need to place a thumb on the scale in favor of defendants—that is, the need for the inquiry to end as soon as the defendant makes any plau sible claim of a procompetitive benefit—dissipates as well. And in the formula expressed above, a defendant-friendly approach lowers R by reducing the risk of antitrust liability for engaging in exclusionary, design-related conduct. Absent the usual check of market forces, such an approach even further incentivizes such conduct. Firms can and almost certainly do engage in anticompetitive design in these markets; witness Microsoft’s commingling of code,270 the FTC’s theory in In re Intel, 271 or Apple’s allegedly exclusionary software updates.272 While courts are rightly reluctant to review antitrust challenges to physical product design changes, code-based product markets exhibit unique features that obviate the need for an overly defendant friendly analysis.

## Conduct Adv

No cards

## A-Spec

Lol

## Regulation CP

#### Antitrust key—ex ante regulation is extremely dangerous in platform markets—ex post litigation minimizes costs

Shelanski, JD, PhD, Professor @ the Georgetown University Law Center, Partner, Davis Polk & Wardell, former ORIA Administrator, former FCC Chief Economist, former Director of the FTC Bureau of Economics, ‘13

(Howard, “Information, Innovation, and Competition Policy For The Internet,” University of Pennsylvania Law Review, May 2013, Vol. 161, No. 6)

Competition enforcers could adopt a number of approaches to these mixed results depending on whether the changes are on balance more beneficial than harmful, or depending on whether the harms are intentional or not. Both inquiries, however, run the risk of calling into question company's best judgment about how to engineer its own products. Finding that an innovation—say a new proprietary interface or product integration is anticompetitive because the value of the innovation to consumers deemed ex post to be outweighed by the costs of competitive exclusion cause firms to hesitate to make beneficial product changes. Knowing the firm could be punished for the effects the innovation has on rivals if the innovation does not turn out well (or perhaps turns out too well for compet itors' tastes), the firm will raise the required ex ante probability of success and undertake fewer R&D efforts. Similarly, punishing a firm that has or mixed motives for undertaking innovation might harm consumers deterring product changes that benefit consumers despite the firm's partly anticompetitive motives.

Absent compelling evidence, then, caution and modesty in enforcement are warranted in this area. This prescription comes not from a glib hope that competition or innovation will somehow eradicate any harm, but from risk that intervention is as likely to make things worse as to make things better. Some have advocated for a government regulatory body to evaluate search algorithms and other intermediary behavior on the Internet.112 There are compelling reasons to be very skeptical of interposing such a government review process into the ongoing and demanding process of private innovation. Algorithms change quickly and must adapt to gaming manipulation by those seeking to profit from online search.113 Regulators are certain to know less about a new technology than those who invent work with it daily. Moreover, regulatory processes and related litigation will inevitably become part of rivals' competitive strategy, distracting resources from competition and innovation in the marketplace. A much better course is for government to give a wide berth to innovation, even where the firm's intentions may not seem benevolent and where the conduct may appear harm competition at the same time that it benefits consumers. And where there is a compelling case for harm, ex post intervention on a case-by-case basis through antitrust law is preferable to general regulation in this context.

This wide berth does not, however, mean we should abandon enforcment or place all purportedly innovative conduct beyond the reach of antitrust law. Microsoft 7/114 gave significant deference to product innovation and integration, but clearly left open the door to a finding that such activity was a ruse or pretext for anticompetitive exclusion. It allowed for antitrust liability where a product innovation was not in some way different and better than what a consumer could do for himself, thereby preserving anticompetitive tying as a possible claim against a software platform.115

Generalizing from the Microsoft II decision, where innovation was clearly a pretext for harming rivals or for deterring rival innovation, competition enforcement should be available. Two kinds of conduct which digital platforms have been accused of undertaking would appear to harm innovation without constituting legitimate innovation: raising rivals' costs and forced free riding.

#### Government R&D fails – market is key

Valverdea & Pisanib 16 - Chair Jean Monnet of EU Law & International Federation of Pharmaceutical Manufacturers and Associations

Jose Luis Valverdea, and Eduardo Pisanib, “The Globalisation of the Pharmaceutical Industry,” Pharmaceuticals Policy and Law, Volume 18, 2016, https://www.ifpma.org/wp-content/uploads/2016/11/The-Globalisation-of-the-Pharmaceutical-Industry-Monograph.pdf#page=51

While some proposed measures have their theoretical and/or practical merits, and can complement the current privately funded R&D model, they cannot replace it. From a pragmatic point of view, charitable R&D initiatives, state-directed R&D, and/or public-private partnerships could not sufficiently finance the development of needed innovative medicines in an efficient and sustainable way as through the current capital-market based R&D model (Fig. 1). No alternative R&D models could replace the private pharmaceutical R&D model with its functioning patent system, without severely affecting the development of new life-saving medicines. The often discussed “de-linkage” of the price for a medicine and R&D costs remains academic as none of the suggested models could provide the continued supply of resources for research as the financial markets do. Especially with regard to NTDs, where market incentives are not available, the further fostering of collaboration between WHO, industry, national authorities and other stakeholders – complementing rather than replacing private-sector funded research – can be expected to continue to produce encouraging results in the future. New models should therefore be seen as complementary, as add-ons to current collaborations, rather than as radical changes to the current innovation ecosystem.

#### U.S. antitrust action invigorates global leadership – spurs a digital alliance with the EU that counters Russian/Chinese fragmentation of the internet

Wheeler 21 – Visiting fellow in governance studies at the Brookings Institution. Former FCC chairman.

Tom Wheeler, “Time for a U.S.-EU digital alliance,” *The Brookings Institution*, 21 January 2021, https://www.brookings.edu/research/time-for-a-us-eu-digital-alliance/.

The global open internet is splintering 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 for the regulation of online platforms, is its proposal for a “specific dialog with the US on the responsibilities of online platforms and Big Tech” as part of a post-inauguration summit 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 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] 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] 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, 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, “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 deals with online content issues. The Digital Markets Act 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, “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 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.

#### Fragmented internet causes extinction – prevents collaboration to solve global threats

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.

## States CP

#### States can’t do the plan – they’re bound by federal decisional precedent

Richard A. Duncan is a partner in the Minneapolis office of Faegre & Benson LLP, and Alison K. Guernsey is presently a third-year law student at the University of Iowa College of Law and Editor-in-Chief of the Iowa Law Review, 2008, Waiting for the Other Shoe to Drop:

Will State Courts Follow Leegin? https://www.faegredrinker.com/webfiles/leegin\_article.pdf

This article explores yet another barrier to widespread adoption of RPM programs, one that is particularly applicable to franchisors seeking to negotiate national account pricing or to establish nationwide minimum pricing: state antitrust laws. Nearly all states have antitrust statutes, and those few that do not have such laws regulate anticompetitive conduct through consumer protection statutes or common law theories. The good news, at least for those who favor uniform national economic regulation, is that most state courts follow federal antitrust precedent, either because of statutory command or a decisional preference for uniform operation of state and federal antitrust laws. However, a significant minority of states feel themselves relatively unbound by federal precedent, and even those that do follow federal decisional law generally leave themselves an escape route if federal law varies from state statute or putative state policy goals.

This article reviews the current statutory and decisional law on RPM in the fifty states and the District of Columbia, and offers some predictions on which are likely to continue to prohibit RPM. Because this area of the law is now rapidly changing, it is also foreseeable that state legislatures will attempt to pass new statutes prohibiting RPM in reaction to Leegin. Twenty-five states did just that to permit “indirect purchasers” to sue for monetary damages after the Supreme Court held in Illinois Brick Co. v. Illinois that such purchasers lacked standing to sue under federal antitrust law. 7 Ultimately, Leegin does offer significantly greater leeway to suppliers to regulate their customers’ pricing behavior and for national account pricing programs in particular to flourish. However, during the transition to the post-Leegin world, franchisors must still take care when designing sales and distribution programs to assess the likely response of individual states to restraints on resale prices.

State Levels of Adherence

Most states have antitrust statutes containing provisions analogous to, or the same as, Section 1 of the Sherman Act. In fact, only four states—Arkansas, Vermont, Georgia, and Pennsylvania—do not. 8 Consistent with the manner in which many state statutes parallel the language of federal antitrust provisions, the majority of states also give deference to federal decisional law when interpreting their state antitrust statutes. There are exceptions for instances in which the state statutory language differs significantly from that of the Sherman Act or when the state legislature has expressed a policy interest at odds with federal precedent.

#### 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.

## Platforms PIC

No cards

## Court Ptx DA

#### Antitrust doesn’t affect legitimacy – no one cares

Baum and Devins 10 – Lawrence Baum is a professor emeritus in the Department of Political Science at Ohio State University; his primary research focus is judges’ behavior in decision making. Neal Devins is Sandra Day O’Connor Professor of Law and Professor of Government at William and Mary Law School.

Lawrence Baum and Neal Devins, “Why the Supreme Court Cares About Elites, Not the American People,” *The Georgetown Law Journal*, vol. 98, 2010, pp. 1549-1550, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs.

It is worth underlining the point that a great deal of the

Court’s work is essentially invisible to the public. Decisions in fields such as antitrust and patent law may be highly consequential, but it seems unlikely that there are strong public feelings about those decisions. Even if Justices seek to maintain the Court’s legitimacy, they have no reason to worry that public outrage in decisions in those fields will damage this legitimacy.170 More telling, the Rehnquist Court’s federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated eleven federal statutes on federalism grounds,171 thereby shifting the balance between the federal government and the states substantially. Nevertheless, these decisions (although prompting significant law review commentary) appeared to have low political salience.172 Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or any other Supreme Court invalidations of federal statutes.173

#### Court doesn’t care about appearing libreal – their evidence cherry-picks cases – VRA and campaign finance cases prove

Litman and Murray 7/1 – Leah Litman is an assistant professor of law at the University of Michigan Law School. Melissa Murray is a professor of law at the New York University School of Law.

Leah Litman and Melissa Murray, “Don’t be fooled: This is not a moderate Supreme Court,” *The Washington Post*, 1 July 2021, https://www.washingtonpost.com/opinions/2021/07/01/make-no-mistake-this-is-conservative-supreme-court-it-just-sometimes-acts-slowly/.

This Supreme Court term was significant mostly because of what the court did not do: The newly constituted 6-3 conservative supermajority did not use every case to openly and dramatically move the law rightward. Rather, in several important cases — including those involving the fate of the Affordable Care Act and the tension between religious liberty and gay rights — the court managed to resolve matters on seemingly narrow grounds and with broad majorities that transcended ideological differences.

But to call this term a model of judicial restraint — or even nonpartisanship — would be misleading. This is not a moderate or apolitical court. It is a reliably conservative court that, on occasion, chooses to act incrementally.

Characterizing this term as moderate would also overlook the profound impact of the court’s final two decisions, a pair of 6-to-3 rulings — one that hobbled what remains of the Voting Rights Act and another that lays a foundation for a seismic shift in campaign finance rules.

In some cases where there was cross-ideological agreement, the court achieved that result by deciding very little. In its 8-to-1 ruling on the case of the cheerleader disciplined for vulgar speech, the court declined to impose a broad rule letting schools regulate students’ off-campus speech in all circumstances. But meaningfully, the court did not say off-campus speech was never subject to oversight by school authorities. As its reasoning suggests, cross-ideological agreement is possible, as long as you agree to not say very much.

Technical legal doctrines also gave the court a way to appear less ideological. In the Affordable Care Act case, the court, voting 7 to 2, turned aside a third challenge to the law on the narrow grounds that the states and private parties challenging the law didn’t have standing to sue because they couldn’t show they were injured by the unenforceable requirement to obtain insurance.

Cross-ideological agreement also prevailed in the case involving whether Catholic Social Services could decline to certify same-safe couples as foster parents. In Fulton v. City of Philadelphia, the court ruled unanimously in favor of Catholic Social Services’ challenge to Philadelphia’s policy requiring city contractors not to discriminate on the basis of race, sex or sexual orientation. But the court’s fragile unanimity only warded off the more aggressive approach to religious liberty favored by some of the court’s Republican-appointed justices.

Much to the chagrin of some of the court’s most stalwart conservatives, the decision avoided overruling a major religious liberty precedent. But even in its so-called restraint, the majority changed the law. By invalidating a nondiscrimination requirement on the ground that it includes some system for exercising discretion — even if that discretion is never exercised — the court’s ruling opens the door to religious liberty challenges to a wide range of laws and policies.

In lower-profile cases, the court behaved in more obviously ideological ways — with conservatives banding together to aggressively move the law sharply to the right. In a major labor case that continues the conservatives’ hostility toward unions and worker organizing, the six conservative justices voted to invalidate a California regulation that facilitated agricultural workers’ ability to unionize.

The ruling could affect other private-sector unions’ ability to enter employers’ property if organizers cannot easily contact workers off-site. But the potential impact goes far beyond labor organizing. The court concluded that a California law that allowed union organizers to enter a workplace for a few hours a day constituted a taking of private property. This finding could call into question all manner of laws and regulations that require businesses to allow certain people onto their property — including for health and safety inspections, for child welfare or to prevent discrimination in the provision of goods and services.

In another case that will insulate corporations from regulation, five conservative justices held that a major credit reporting agency could not be sued for wrongly labeling its customers as possible terrorists or drug traffickers on a Treasury Department watch list. The decision accelerates a trend toward blocking the courthouse doors to persons seeking to enforce federal consumer protection laws.

As the term reached its conclusion, the muscular conservatism of the Roberts court was in full flower. In a major Voting Rights Act challenge, the justices sharply divided along ideological lines, weakening what remained of the act’s protections for our multiracial democracy. Likewise, in a challenge to a California public disclosure law, the court determined that states cannot require charities to report the identity of their donors to state authorities — a decision that will likely have sweeping repercussions for state and federal laws that require disclosure of campaign donations.

Instead of viewing this term as a triumph of restraint and moderation, we should see it for what it was — table-setting for the term to come. When the court resumes its work in October, it will have even more opportunities to reshape the landscape of American law, including on abortion rights and gun regulation. The question is whether the justices will do so explicitly, or in this term’s more slow and subtle fashion.

#### Texas disproves every level of the DA – not moderating now, don’t care about the law

Sarat and Aftergut 9/6 – Austin Sarat is the William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College. Dennis Aftergut is a former federal prosecutor who has successfully argued before the Supreme Court.

Austin Sarat and Dennis Aftergut, “Supreme Court trashed its own authority in a rush to gut Roe v. Wade,” *The Hill*, 6 September 2021, https://thehill.com/opinion/judiciary/570958-supreme-court-trashed-its-own-authority-in-a-rush-to-gut-roe-v-wade?rl=1.

But in addition to the harms to women’s rights in this law, the court’s Sept. 1 decision in Whole Women’s Health v. Jackson reveals something dangerous to lawful society writ large: the 5-4 ultra-partisan, conservative majority has, in its haste to gut Roe, eviscerated the rule of law it is supposed to stand for and diminished the court’s own authority.

The decision adds fuel to the already strong arguments for reforming the Supreme Court and urgency to the work of President Biden’s Commission on the Supreme Court.

It concedes, perhaps even celebrates, the fact that states, and individuals, can engage in legally questionable action and evade judicial scrutiny. By allowing Texas to flout Roe’s clear meaning, the court undermines an ordered society and may be paving the way for authoritarian rule.

The decision is a radical departure from the institutional history of the Supreme Court, which previously has been marked by efforts to assert and preserve the court’s exclusive prerogative to “say what the law is.” That was the crux of Chief Justice John Marshall’s famous 1803 opinion in Marbury vs. Madison, the case that established the Supreme Court as the ultimate arbiter of the Constitution’s meaning.

Over time, the court has jealously guarded its authority against those who have challenged it. It is the court’s right to have the last word on constitutional questions that has secured for it a central place in our system of government. As Supreme Court Justice Robert Jackson once explained, “We are not final because we are infallible. We are infallible only because we are final.”

And the court has time and again insisted that everyone abide by its rulings no matter how much they might disagree with them.

This was vividly demonstrated in the civil rights era during the middle of the last century when southern states refused to respect the court’s constitutional decisions and when demonstrators took to the streets to promote racial integration in defiance of court orders. The court responded by insisting to both sides: obey the laws first, and only then can you challenge our views of what the Constitution means.

When Dr. Martin Luther King and other civil rights activists ignored an Alabama state court injunction in the belief that the order to desist from a planned protest was unconstitutional, the Supreme Court upheld their arrest and conviction.

In his majority opinion in the 1967 case of Walker v. Birmingham, Supreme Court Justice Potter Stewart recognized the “substantial constitutional questions” that a challenge to that injunction would have raised. But he firmly rejected the marchers’ contention that they were free to ignore a law they believed to be unconstitutional and condemned their decision to take the law into their own hands:

“This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law…. [I]n the fair administration of justice, no man can be [the] judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.”

And the U.S. Supreme Court has not been alone in that view nor has it been alone in striking down attempts by citizens or governments to disobey existing law.

In 2004, the California Supreme Court invalidated then-San Francisco Mayor Gavin Newsom’s declaration that the city would marry same sex couples in defiance of an existing voter-approved law that declared “Marriage shall be restricted to a man and a woman.”

Justice Sotomayor’s dissent in Whole Women’s Health makes precisely the same point about courts’ exclusive role in deciding on the law’s meaning. Calling the Texas anti-abortion law a “breathtaking act of defiance,” she labelled the court’s failure to act “stunning.” In her view, it “rewards tactics designed to avoid judicial review and inflicts significant harm on the applicants and on women seeking abortions in Texas.”

Until last week, defense of the judiciary’s role in saying what the law is and insisting that others defer to its judgments has united conservative and liberal justices.

But, in Whole Women’s Health, only one conservative, Chief Justice Roberts, joined with the court’s three liberal justices in standing up for such nonpartisan jurisprudential principles. His five conservative colleagues seem so eager to gut Roe that they are willing to disembowel the judiciary’s own authority.

The risk of legal chaos from the Supreme Court’s inaction on Sept. 1 may soon be realized in a kind of Cold War between the states.

Imagine blue states reacting to Whole Women’s Health with laws permitting private lawsuits against anti-vaxxers who help someone evade a business’s COVID vaccination mandate, or against owners of banned guns whose prohibition is the subject of federal court challenges.

When the current conservative majority on the Supreme Court trashes its own authority to tilt the scales in the current culture wars, it endangers the liberty of all, no matter which side of the cultural wars they are on.

#### Court will already decide against the EPA now – conservative majority

**Millhiser 11/3** – Ian Millhiser is a senior correspondent at Vox, where he focuses on the Supreme Court, the Constitution, and the decline of liberal democracy in the United States.

Ian Millhiser, November 3 2021, “A new Supreme Court case could gut the government’s power to fight climate change,” Vox, <https://www.vox.com/2021/11/3/22758188/climate-change-epa-clean-power-plan-supreme-court>

So West Virginia is a monster of a case — **potentially the culmination of a conservative vision**[**incubated at the Federalist Society**](https://archive.thinkprogress.org/the-little-noticed-conservative-plan-to-permanently-lock-democrats-out-of-policymaking-9f776ad16635/)**for years**, and long cha**mpioned by conservative activists such as Justices**[**Neil Gorsuch**](https://www.vox.com/22431044/neil-gorsuch-nihilism-supreme-court-voting-rights-lgbt-housing-obamacare-constitution)**and**[**Brett Kavanaugh**](https://www.vox.com/2019/11/26/20981758/brett-kavanaughs-terrify-democrats-supreme-court-gundy-paul). Indeed**, a majority of the Court has already expressed sympathy toward Gorsuch’s plans to shrink the power of federal agencie**s, which is **a strong sign that the West Virginia petitioners are likely to prevail on at least some of their claims.**

In the worst-case scenario for the Biden administration, the West Virginia case could make President Joe Biden the [weakest president of the United States in over 80 years](https://www.vox.com/22276279/supreme-court-war-joe-biden-agency-regulation-administrative-neil-gorsuch-epa-nondelegation), and**it could give a Supreme Court dominated by Republican appointees a veto power over huge swaths of federal policy.**

## Econ DA

#### Competition is better for economic growth and resilience – transnational case studies and dozens of studies prove

OECD 20

OECD, “2: Insights from previous crises,” *The role of competition policy in promoting economic recovery*, 2020, pp. 11-13, https://www.oecd.org/daf/competition/the-role-of-competition-policy-in-promoting-economic-recovery-2020.pdf.

Suspension of antitrust laws holds back recovery

Some studies have shown that the suspension of some key provisions of antitrust laws may have prolonged the US Great Depression (Crane, 2010[5]). As a result, claims have been made that the depression may have lasted seven years longer than otherwise (Waller, 2004[6]; Cole and Ohanian, 2004[7])).

In the early 30s, the National Industrial Recovery Act (NIRA) was passed by the Roosevelt administration. The goal of the NIRA was to limit competition and restrict production in the expectation that it would keep prices at a reasonable level, sustain higher wages, stimulate consumer spending thus fostering business investment (Waller, 2004[6]; Cole and Ohanian, 2004[7]).

Industrial and trade associations were allowed to establish industry-wide minimum wage rates and other working conditions. Industries that abided by such codes would then be exempt from cartel prohibitions. This led to widespread collusion.7 Industries took advantage of the exemption to regulate prices and output, turning formerly competitive industries into cartels.

The NIRA policy continued to have consequences even after it was considered unconstitutional by the Supreme Court in 1935. Industries continued to follow the informal guidance set out in the codes and enforcement by the Department of Justice (DOJ) remained limited until 1938 (Waller, 2004[6]).

Wholesale prices in 1935 were estimated to be 24% higher than they would have been and remained 14% higher still in 1939. Collusive pricing as a result of NIRA contributed to inflation, at a time when output was substantially below trend resulting in an impact similar to a supply shock (Romer, 1999[8]). Real output remained 25% below trend (Cole and Ohanian, 2004[7]), (Taylor, 2002[9]) 8 and the policy may have reduced consumption and investment by approximately 14% compared to a competitive scenario.

The suspension of the antitrust rules under the NIRA policy can thus be said to have held back economic recovery following the US Great Depression. The permissive approach to cartels in the US during 1933 to 1939 was considered as the main cause of the weaker economic recovery during that period (Cole and Ohanian, 2004[7]), (Weinstein, 1982[10]).

Another example of the negative consequences from undue relaxation of competition enforcement is the Hawaiian airline market case in the aftermath of the 9/11 tragedy. A temporary exemption from the application of competition law was granted to allow for capacity rationalisation, through an agreement to co-ordinate capacity between two Hawaiian airlines. This led to price increases during and for two years after the end of the immunity period, see Kamita (2010[11]) quoted by Rose (2020[12]).

Lax merger control in times of crisis does not improve long-term resilience

The Global Financial Crisis led to massive state support for the banking industry and consolidation to high levels in certain markets and jurisdictions (Independent Commission on Banking, 2011[13]). Some of the findings from this period were that, for markets to work well, competition was considered to be part of the solution, including through a reduction in switching costs, together with a better and more solid regulatory framework. Competition can also contribute to financial stability.

In 2009, during the global financial crisis, the Lloyd’s and Halifax Bank of Scotland (HBOS) merger in the UK is an often–mentioned example of the risks entailed by waiving the application of merger control rules. The Office of Fair Trading (OFT) considered that the merger raised competition concerns and referred it to the Competition Commission. A new public interest consideration test relating to the ‘stability of the UK financial system’ was however introduced by the Secretary of State. This new test was introduced based on fears of collapse of HBOS, which was, at the time, the UK’s biggest mortgage lender and a big provider of current account services. The test enabled the government to allow the merger.9

However, the Lloyd’s and HBOS merger is seen as not having accomplished its role of achieving financial stability. A subsequent bail-out by the government was required, leading to severe losses in the share value of Lloyd’s. More importantly, the merger was seen to harm competition, by irreversibly creating a powerful player facing fewer rivals (Vickers, 2008, p. 9[14]; Lyons, 2009, p. 39[15]; Stephan, 2011[16]).

Similarly, the big banks mergers of the late 90s and 2000’s in Japan yielded limited efficiencies and in general did not improve the financial soundness of the banks involved (Harada and Ito, 2011[17]). In a crisis that led to a constant erosion of capital by losses from nonperforming loans (NPLs) and declining stock prices, mergers of very large banks were seen as a way to enhance capital by taking advantage of operational synergies and scale economies. Whilst some mergers were genuinely seeking to achieve scale economies, others were simply giving priority to getting bigger. In general, empirical evidence suggests that these mergers failed to achieve the intended scale economies and did not reduce the probability of failure

Anti-competitive policies can hinder economic recovery

During the economic crisis of the 1990s, Japan followed policies that contributed to restrict competition in some industries, with regulatory and import barriers as well as price controls, with wide-spread cartelisation (Porter and Sakakibara, 2004[18]). The targeted sectors were mainly those in which Japan was not successful internationally.

The depression in Japan in the 1990s highlights the importance of competition for productivity (Kehoe and Prescott, 2007[19]). In those sectors where domestic competition in Japan was strong, the Japanese firms were successful on the international level showing the importance of competition to exit a crisis (Hayashi and Prescott, 2002[20]; Porter and Sakakibara, 2004[21]). Government policies that restricted competition together with other policies with a negative impact on total factor productivity (Kehoe and Prescott, 2007[19]), were major factors in prolonging the recession in Japan (Fingleton in (UK House of Commons, 2009[22])) 10 .

Crises may strengthen the case for pro-competitive structural reforms

Many regulations are introduced in times of economic disruptions and crisis to deal with short-term issues, but leave a long term legacy. This strengthens the case for the role of competition advocacy to ensure that regulations adopted in times of crisis are pro-competitive or developed with the least negative impact on competition.

A cited example is the regulation of the aviation industry in the US in the 1930s during the Great Depression. Following the introduction of aircraft that allowed for the expansion of commercial passenger air service, following claims from the airline industry of protection from “the destructive competition”, the US Congress enacted regulation in 1938. This regulated entry, price and routes (Borenstein and Rose, 2014[23]). The industry only moved to a more market-based industry with the Airline Deregulation Act of 1978. The latter eliminated price and entry regulation of the domestic airline industry, delivering benefits to consumers.

In general, pro-competitive reforms can contribute to an economy’s resilience to economic shocks. The reforms implemented in Australia in the 1990s contributed to higher productivity and growth, but also to the economy‘s resilience to the Asia financial crisis of 1997-98. As the Australian Treasury noted: “(...) the ability of the Australian economy to adjust to the reduced export demand and lower commodity prices brought on by the Asian crisis illustrates the benefits of an economy made more responsive, flexible and resilient through microeconomic and regulatory reforms and a sound macroeconomic policy framework.” cited in (Corden, 2009[24]).

Following the Great Financial Crisis of 2008-2009, and in the context of an international financial assistance programme in 2010, Greece agreed to a comprehensive policy package aiming to restore fiscal sustainability and promoting sustainable growth.

Several wide-ranging initiatives were taken to reduce the barriers to competition created by product market regulation. These ranged across the main sectors of the economy, including the manufacturing, retail trade, wholesale trade, tourism and construction services sectors. The sectors were chosen for their contribution to help Greece recover from the crisis, because of their significant impact on employment or valued added on the economy.

The pro-competitive reforms were undertaken with the assistance of the OECD in co-operation with the Greek competition authority (HCC). Three competition assessment projects were undertaken in 2013, 2014 and 2016, following the methodology set out in the OECD Competition Assessment Toolkit (OECD, 2019[25]). The joint OECD-HCC projects resulted in more than 700 recommendations, the vast majority of them implemented by the Greek government. Economic benefits were estimated to amount to around EUR 5.2 billion, or about 2.5% GDP (OECD, 2014[26]).

Market forces left alone may not always lead to an efficient allocation of resources

Economic recovery can be much slower when the zombie firms11 are maintained operational. Zombie firms are less productive, more leveraged and not able to invest. Misdirected government support or additional bank lending to avoid write-offs which could impair banking institutions, can prevent the exit of these firms.

The significant presence of zombie firms also contributed to Japan’s “lost decade” in the 1990s. Research by (Ricardo Caballero et al., 2006[27]) shows that banks, not willing to recognise losses, given the implications on their regulatory capital limits, extended credit to these otherwise insolvent firms.

A similar story is also found following the global financial crisis. Research by (Fabiano Schivardi et al., 2017[28]) shows – on a basis of a bank-firm relationship database in Italy in the period 2008-2013 - that under-capitalised banks misdirected credit in a manner that contributed to the survival rate of zombie firms and to the bankruptcy of otherwise healthy firms.

Market forces may not guarantee that finance will necessarily flow to viable and efficient firms facing temporary financial difficulties. Well-designed state support may therefore be important in such instances.

#### Turn—legal uncertainty bad for business—aff increases predictability

Portuese, director of antitrust and innovation policy at ITIF, adjunct professor of law at the Global Antitrust Institute of George Mason University, ‘21

(Aurelien, “Principles of Dynamic Antitrust: Competing Through Innovation,” June 14, <https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation>)

First, the rule-of-law principles require enhanced legal certainty that provides for firms’ dynamic capabilities and enables firms to engage in the rivalrous process. Indeed, legal uncertainties and unintelligibility generate risk-averse attitudes that prevent innovative products and services from being produced. The legal loopholes and regulatory vagueness constitute the basis for market uncertainties. This entrepreneurial risk prevents more aggressive competition from taking place and a bolder, innovative culture to emerge. The principles are pivotal to the ability of our institutions to create growth. To generate minimal uncertainty constitutes the fundamental premise on which competition through innovation can thrive.

Antitrust rules must retain their generalities and principle-based approach in order to be adapted and avoid accusations of being obsolete. Simultaneously, antitrust rules need a case-by-case application of the very meaning of these rules. Therefore, the role of the courts remains crucial. Nothing can prevent courts from judicially reviewing and elaborating, in an evolutionary process, antitrust enforcement. The dynamic nature of antitrust enforcement also pares down to the beautiful work of the court. Precedents are not legal constraints; they are the basis for an evolutionary interpretation of antitrust laws.

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

Dashefsky, Co-Chair of Antitrust & Trade Practices Group, Bass Berry Sims, ‘8/9/21

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

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

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

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

#### B] Mechanism and internal link – recent court rulings, litigation, and reaffirmation of quick-look paradigm

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.

## 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.

#### Defense-friendly standards increases cost and reduces impact of agency enforcement

Alison Jones, Professor of Law at King's and a solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, George Mason University Foundation Professor at the George Mason University School of Law, former FTC Commissioner, 2020, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, The Antitrust Bulletin 2020, Vol. 65(2) 227-255

Measures to expand federal antitrust intervention dramatically—through the prosecution of lawsuits or the promulgation of trade regulation rules—will face arduous opposition from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (again, we assume that legislation to change the doctrinal status quo will not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies will create a serious gap between the teams assembled for the prosecution and defense, respectively. Although therefore the public agencies can match the private sector punch for the punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases, seeking powerful remedies upon global giants.

#### *Amex* requirement 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.

# 1AR

## States CP

#### Aggressive state enforcement spills over—leads to broad overdeterrence and undermines innovation

DOJ, U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, Updated June 2015, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1

Standards of section 2 liability that overdeter risk harmful disruption to the dynamic competitive process itself. Being able to reap the gains from a monopoly position attained through a hard-fought competitive battle, or to maintain that position through continued competitive vigor, may be crucial to motivating the firm to innovate in the first place. Rules that overdeter, therefore, undermine the incentive structure that competitive markets rely upon to produce innovation.(80) Such rules also may sacrifice the efficiency benefits associated with the competitive behavior.

Importantly, rules that are overinclusive or unclear will sacrifice those benefits not only in markets in which enforcers or courts impose liability erroneously, but in other markets as well. Firms with substantial market power typically attempt to structure their affairs so as to avoid either section 2 liability or even having to litigate a section 2 case because the costs associated with antitrust litigation can be extraordinarily large. These firms must base their business decisions on their understanding of the legal standards governing section 2, determining in advance whether a proposed course of action leaves their business open to antitrust liability or investigation and litigation. If the lines are in the wrong place, or if there is uncertainty about where those lines are, firms will pull their competitive punches unnecessarily, thereby depriving consumers of the benefits of their efforts.(81) The Supreme Court has consistently emphasized the potential dangers of overdeterrence. The Court's concern about overly inclusive or unclear legal standards may well be driven in significant part by the particularly strong chilling effect created by the specter of treble damages and class-action cases.(82) Many hearing panelists reiterated this concern.(83)

#### Balance key—overly aggressive action undermines global competitiveness

Robert D. Atkinson, president of the Information Technology and Innovation Foundation, Antitrust Can Hurt U.S. Competitiveness; Actions against RCA, AT&T and Xerox gave a leg up to European and Japanese firms, July 5, 2021, WSJ

When it comes to technology and the economy, the U.S. is grappling with two contradictory goals: competing with China in advanced technology industries and ramping up antitrust enforcement against leading U.S. tech companies.

Antimonopoly advocates argue that we can have our cake and eat it too. Go ahead and break up big tech, they say; we can still compete with China. But there is a long history of U.S. antitrust actions against technology companies, and the results suggest regulators should exercise caution.

Consider the case of Western Electric, AT&T's equipment subsidiary. By the early 1920s, it had factories in Austria, Belgium, Canada, China, Germany, France, Italy, Japan, the Netherlands, Russia and the U.K. But because AT&T relied on it exclusively for equipment, in 1925 the Justice Department threatened AT&T with breakup unless it divested Western Electric's foreign assets, creating International Telephone & Telegraph and ultimately giving birth to robust foreign-owned competitors.

Antitrust regulators also pressured AT&T's Bell Labs in the early 1950s to license its newly invented transistor technology. That spurred innovation because it helped emerging companies such as Texas Instruments and Fairchild. But because of government pressure, AT&T also licensed its technology, almost for free, to foreign companies. This eventually enabled Sony to take global leadership from the U.S. in consumer electronics, and it gave a major leg up to Europe's Ericsson and Siemens.

The U.S. also used to be the global leader in television technology thanks to the Radio Corp. of America, the pathbreaker in color television. But in the 1950s the Justice Department required RCA to let other U.S. companies use its patents at no charge. RCA had long relied on licensing revenue, so it started making money where it could—in Japan. "RCA licenses made Japanese color television possible," technology historian James Abegglen has written.

In 1972, the Federal Trade Commission brought a similar antitrust suit against Xerox, the world's then-leading producer of copier technology thanks in part to its Silicon Valley-based innovation incubator Xerox PARC. Evidently unimpressed, the head of the FTC's Bureau of Competition F.M. Scherer said he would be "dissatisfied if Xerox's market share isn't significantly diminished in several years." To that end, the FTC forced Xerox to give up its blueprints and other discoveries, allowing an estimated 1,700 patents to make their way to Xerox competitors. Sure enough, Xerox lost half its market share—mostly to Japanese firms such as Canon, Toshiba and Sharp. Xerox's only viable path to survival was to strengthen its alliance with Fuji, creating a new giant, Fuji Xerox.

Two years later in 1974, the Justice Department targeted AT&T again, forcing it to break up over the objections of Commerce Secretary Malcolm Baldridge that the suit jeopardized America's leadership position. This was the death knell for Bell Labs, arguably the most innovative organization that has ever existed.

None of this is to say that antitrust authorities should be passive or turn a blind eye to anticompetitive behavior. But they should recognize that firms' size can be an important factor in their ability to innovate. Rather than rely on market share as the alarm bell that signals the need for antitrust enforcement, regulators should focus more on firms' conduct, and they should look first to behavioral remedies, not structural ones. Antitrust analysis should also consider that tech companies compete globally, not nationally, so cutting them down to size usually has significant economic consequences.

The Federal Communications Commission has provided a model for the behavioral approach by conducting a series of inquiries starting in 1970 to investigate the convergence of telephone and computing services and establish rules enabling competition among established and upstart players across sectors that are increasingly intertwined. U.S. courts also provided a model in judgments against Microsoft, which compelled it to let other companies more easily integrate their software into Windows.

As policy makers now consider competition issues related to today's large technology firms, they would be well advised to learn from this history. With Chinese internet and tech companies waiting in the wings, aggressive antitrust actions against U.S. leaders run the risk of giving a new generation of foreign rivals the boost they need to dominate global markets, just as Japanese and European firms have benefited in the past.

#### Connects to 1AC impact – continued innovation is the only way to develop new FinTech capabilities – they won’t develop tech if they never know what business practices they’re liable for

Huddleston, JD, Director of Technology and Innovation Policy, American Action Forum, ‘20

(Jennifer, “Antitrust Actions Beyond the Federal Government: The Potential Impact of State and Private Litigation,” December 18, <https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/insight/antitrust-actions-beyond-the-federal-government-the-potential-impact-of-state-and-private-litigation/>)

States are once again taking an aggressive view on antitrust in the tech industry, but the divergence in arguments could lead to more confusion and disruption in an industry that has provided consumers with beneficial and free services. Currently, the attorneys general of many states disagree with one another and the federal government regarding the nature of anticompetitive behavior and consumer harm by the tech giants’ actions. As we are starting to see with the new claim led by Texas Attorney General Ken Paxton, this split is likely to result separate cases with different theories of antitrust that seek not to apply current standards but embrace more expansive policy uses of this powerful tool. Often the animus behind these claims is not clear evidence of anticompetitive behavior but a desire to solve other concerns regarding tech policy, such as data privacy or alleged anti-conservative bias. This desire to solve non-competition-related issues could give rise to divergent theories of antitrust action that are incompatible with one another and not based in the traditional elements of consumer welfare and competition policy.

With a growing number of likely divergent claims, the current tech antitrust battles could continue for some time and lead to more confusion around the application of antitrust to this dynamic sector of economy. This may appear to be a short term problem, but uncertainty around the application of competition policy could impact numerous sectors of the economy. Regulators already appear to be increasing scrutiny of acquisitions related to the technology sector well-beyond the tech giants. Multiple court cases with a wide-range of theories that do not follow traditional antitrust applications could further the uncertainty or thought that previously justified actions might be subject to greater scrutiny. If a court chooses to embrace the creative and expansive theories at the center of these state-led cases, it could set precedent that changes the application of antitrust law in the future not only for the technology industry, but in many other areas of the economy as well. Regardless of the impact of these cases—and there is reason to think that these antitrust actions would not remedy the underlying policy concerns—the uncertainty and broad reach created by these competing state cases would likely stifle economic growth and innovation.

## FTC Tradeoff DA

#### FTC will NEVER be able to solve privacy protections due to resource and staffing shortages

Chao, Null, and Park 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

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.

#### It would also mean that they lack the rulemaking authority necissary to do anything substantial on privacy

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Third, the FTC has limited rulemaking authority under the Magnuson-Moss Act. The Act requires the FTC to show “substantial evidence in the rulemaking record” that a practice is prevalent or widespread before it can be declared an unfair and deceptive act or practice.6 Since Magnuson-Moss was enacted in 1975, the FTC has rarely issued regulations under its rulemaking authority. As Getachew explained, “the key ingredient [the FTC is] missing is rulemaking authority, particularly for areas of concern [like] data processing [and] data practices that harm [members of marginalized communities or general consumers]. We’ve seen the Section 5 unfair and deceptive [authority] extend to as much as it can, but without clear rules, without strong rules, it’s hard to really go further than that.”

#### Court wins key to funding—squo ineffective enforcement diverts resources

Alison Jones, Professor of Law at King's and a solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, George Mason University Foundation Professor at the George Mason University School of Law, former FTC Commissioner, 2020, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, The Antitrust Bulletin 2020, Vol. 65(2) 227-255

In a striking number of instances, this pattern has emerged in discussions of antitrust policy.137 In current discussions about the future of the U.S. antitrust regime, advocates of fundamental reform sometimes portray the federal antitrust enforcement agencies as decrepit—perhaps to underscore the need for basic change.138 The proponents of root-and-branch transformation often suggest that only a complete makeover of the antitrust system will enable antitrust law to fulfill its intended role. The implication is that, because the antitrust system has failed so miserably, there are few, if any, positive lessons to be derived from experience since the retrenchment of U.S. policy began in the late 1970s, and certainly none since 2000.

This style of argument has several potential costs. One danger is that it overlooks genuine accomplishments and, in doing so, ignores experience that suggests how to build successful programs in the future. Consider three examples that deserve close study in building future cases that seek to expand the reach of the antitrust system. The first is the development of the FTC’s pharmaceutical and nonpharmaceutical health-care program from the mid-1970s forward; this initiative used the full range of the agency’s policy tools—cases, rules, reports, and advocacy—to change doctrine and alter business behavior.139 A second example is the FTC’s effort over the past two decades to restore the effectiveness of the quick look as an analytical tool in the wake of the Supreme Court’s decision in Federal Trade Commission v. California Dental Association. 140 A third example is the FTC’s successful litigation of three cases before the Supreme Court over the past decade.141

The programs that accounted for these results were not accidental. Each program began with a careful examination of the existing framework of doctrine and policy to identify desired areas of extension. This stock-taking guided the identification of potential candidates for cases and the application of other policy-making tools.142 Each program built incrementally upon the bipartisan contributions of agency leadership and the sustained commitment of staff across several presidential administrations headed by Democrats and Republicans.

If one assumes (as a number of reform proponents assert) that the FTC was a useless body in the modern era, there would be little purpose in studying these examples, or anything else it did, as there would be nothing useful to learn. The paint-it-black interpretation of modern antitrust history makes the costly error of tossing aside experience that might inform the successful implementation of new reforms.

A second notable cost of the catastrophe narrative, most relevant to the discussion of human capital, is its demoralizing effect on the agency’s existing managers and staff. To see one’s previous work portrayed as substandard, or worse, tends not to inspire superior effort.

It breeds cynicism and distrust, where managers and staff understand that the critique badly distorts what they have done. Proponents of basic change must realize that the success of their program to expand antitrust intervention will require major contributions from existing staff and managers.