# 2AC

## Platforms Adv

#### 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

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(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.

#### No internal link—long-term cost of intervention uncertain and offset by anticompetitive conduct

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(Hillary, “Muzzling Antitrust: Information Products, Innovation and Free Speech,” 95 B.U. L. Rev. 35)

Workability and Chilling Innovation. The judgment that *any* level of innovation should trump *any* anticompetitive effect reflects two debatable premises. First, the courts always have great difficulty distinguishing between very small innovations and larger innovations. Second, the overall effect on innovation decreases when one moves towards balancing and away from completely favoring innovation over any anticompetitive effect.

The first premise raises questions regarding the availability and reliability of evidence underlying key decision inputs. Innovation, as defined herein, includes product changes that may not embody technological advances, and one should be careful not to think of innovation solely in terms of such advances. Firms routinely redesign products and undertake marketing studies predicting the effects of such redesigns. Some of these changes are substantial, others are clearly incremental, and some may be so marginal that they would not seem worthy of special treatment. Internal documents as well as expert assessments can guide the court in making these distinctions. Furthermore, the difficulties in making such assessments may be overstated: administrative agencies, for example, have been making many such judgments in this and related contexts.257

The second premise raises questions regarding the full range of long-term effects, including chilling effects on future innovation. One concern is that antitrust interventions in these settings are counterproductive, because they reduce the global ex ante incentives for innovation.258 While antitrust interventions reduce a potential monopolist’s incentive to innovate in theory, questions remain regarding the size and overall impact of the interventions in practice. Many observers, for example, believe that the effect of small antitrust policy changes has no appreciable effect on innovation incentives and, in any event, has not been empirically established.259 Furthermore, anticompetitive effects also affect the innovation by their rivals, either by suppressing rivals’ actual innovation or by reducing rivals’ incentives to innovate.260 The innovation embodied in the product redesign, therefore, is not the only innovation effect at issue. Thus the link between anticompetitive conduct and rival innovation suggests that assessments regarding innovation effects that focus solely upon the defendant’s innovations may be incomplete.261

## Conduct Adv

No cards

## Adv CP

#### Negative inducements are key to prevent prolif, Iran will pocket concessions

Aviv Ezra 18, the Consul General of Israel to the Midwest, based in Chicago, “Massive sanctions will end Iran’s belligerence,” Chicago Sun Times, November 13, 2018, <https://chicago.suntimes.com/opinion/iran-sanctions-nuclear-archive-israel-jcpoa/>

Massive pressure and sanctions on Iran proved effective up to 2014. This is why renewed sanctions are expected to be effective now. Imposing sanctions on critical sectors of the Iranian economy is the right way to stop Iran’s path to the bomb and curb Ayatollah Ali Khamenei’s nefarious policies.

Since the Iran Deal in October 2015, Iran has continued its program to develop nuclear weapons, maintaining atomic archives while concealing warehouses and crucial equipment. In addition to failing to completely halt Iran’s nuclear path, the JCPOA did not address Iran’s aggressive ambitions beyond nuclear capabilities, such as Iran’s development of long-range ballistic missiles; its military involvement in the wars and support of proxies in Syria, Yemen, Lebanon and Iraq; sponsorship of Hamas in Gaza; and the regime’s terrorist activities in Europe.

In Lebanon, Hezbollah is building missile conversion sites — meters away from Beirut’s international airport — which will give the Iran-backed terror organization the capacity to send precision-guided missiles into Israeli towns. In Syria, Iranian missile factories, airfields and training compounds, under the auspices of the Islamic Revolutionary Guard Corps (IRGC), promote extremism and facilitate the killing of innocent Syrian civilians.

In Gaza, Iran continues sponsoring and producing rockets for Hamas, to advance its aspiration to wipe Israel off the map. Iran’s regional expansion and use of proxies, through the IRGC’s authority, are also detrimental to the local populations in Lebanon and Gaza, which are being used as human shields.

Iran’s tentacles extend far beyond the Middle East. In recent weeks, security forces arrested Iranian agents in several European countries, who were plotting terror attacks on European soil. The regime’s advanced technologies, paired with financial sponsorship of material and agents around the world, intensify the global threat the Iranian regime poses and endanger the fundamental freedoms and values of the West.

Iran’s continued support of terrorism and missile buildup highlights that the JCPOA was not a holistic agreement and created only the illusion of containment. Instead of becoming a more moderate and peaceful regime, Iran’s aggressive, imperialist tendencies have flourished in the last two years as the terror regime expands its hold.

The Iranian economy has plummeted — the Iranian lira has fallen to two-thirds of its value — due to the regime’s indifference to the wellbeing of its people. International money that was meant to solve critical water and energy issues, build schools and hospitals, and benefit the welfare of the Iranian people has instead been funneled into Iran’s military activities — funding global terror and proxy wars. The Iranian people have taken to the streets in mass protests against the oppressive government, and many activists have been jailed for speaking out against the cruel regime.

Iran, through its generation of proxy wars across the Middle East, bears far-reaching responsibility for provoking the migration crisis that has brought millions of displaced refugees to the shores of the Mediterranean. The refugee influx facing Europe is a worrisome result of Iran’s belligerent activity in the region and its disregard for human lives.

Unfortunately, the Iran Deal provided false hope and failed to change the regime’s hostile behavior, affecting each of us here and now. Failure to take action today means giving in to Iran’s current aggressions with disastrous consequences worldwide in the future.

One questions the wisdom of a policy that promotes mercantile relations with Iran while ignoring the regime’s belligerence and oppression of its people. Business interests must not take precedence over global security concerns. Iran continues enabling the horrors in Syria, arming Hezbollah and Hamas, plotting to murder dissidents in Europe, all while developing long-range ballistic missiles and nuclear capabilities.

The global threat posed by Iran must be addressed by the international community before it is too late.

#### 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.

#### Passive defenses fail

Craig et al 15 – Senior cybersecurity strategist at the Microsoft Corporation.

Amanda N. Craig, Scott J. Shackelford, and Janine S. Hiller, “Proactive Cybersecurity: A Comparative Industry and Regulatory Analysis,” *American Business Law Journal*, 6 March 2015, pp. 9-10, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2573787.

A. The Evolution of Active Cyber Defense

As cyber attacks have become progressively more troublesome and as governments and legal structures have oftentimes proven unhelpful to companies, the concept of active defense has increasingly entered the mainstream of private sector cybersecurity strategies. 26 The potential utility of proactive cybersecurity for the private sector started to gain traction in scholars’ and companies’ consciousness in the late 1990s and early 2000s. For instance, researchers began to explore the role of tools like honeypots, which are decoy servers or systems set up to gather information about intruders,27 as supplements to traditional network security since at least 2003. 28 By 2005, more researchers were arguing that passive defense was inadequate in cyberspace because it allowed attackers’ perceived risks to remain “nearly nil,” creating a cost-benefit imbalance that significantly favored attackers.29 Moreover, “[e]ven when passive defense technologies work correctly, they do not neutralize the costs incurred by an attack,”30 meaning that firms often must double pay—for both the defensive technologies and for the costs of a successful attack. And as Robert Anderson, Brian Lum, and Bhavjit Walha have argued, the applicable U.S. “law provides little recourse” because it operates and adapts relatively slowly, is jurisdictional, and requires the involvement of under-resourced enforcement agencies as is further discussed below. 31 These factors began to incentivize firms to seek a more effective “deterrent”—like proactive cybersecurity. 32.

#### “Create a democratic alliance” makes no sense as a plank – only antitrust creates a global digital alliance to counter Russia/China

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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.

#### Solves extinction

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.

## EU CP

No cards

## States CP

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

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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

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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.

## FDI DA

#### DA backwards—neg FDI study is limited—most recent broad study says increases in competition enforcement are GOOD for FDI

Sergio Mariotti, Politecnico di Milano, and Riccardo Marzano, Sapienza Università di Roma, December, 2021, The effects of competition policy, regulatory quality and trust on inward FDI in host countries, Internatoinal Business Review, Vol. 30, Iss. 6

\*CP = Competition policy

Studies on the relationship between variations in CP enforcement and inward FDI dating back to the early 2000s were predominantly practitioner-oriented publications (e.g., Clarke, 2003; Cooke & Elliott, 1999; Evenett, 2003; Kennedy, 2001; Noland, 1999). The subsequent literature has provided mixed empirical results. Some scholars found CP to favor inward FDI activity, arguing that CP strengthening creates a non-discriminatory business climate towards foreign competitors (e.g., Bris, Brisley, & Cabolis, 2008; Oliveira, Hochstetler, & Kalil, 2001; Seth & Moran, 2017). Other scholars have suggested an opposite view (e.g., Aktas, Bodt, & Roll, 2007; Conybeare & Kim, 2010; Clougherty & Zhang, 2020; Dinc & Erel, 2013), mainly arguing that CP is protectionist in intent and/or in effect, as it may encourage domestic ownership and deter foreign ownership of businesses, especially when the dominant interest of national government is to protect local players.

Methodological and empirical limits relevant to the above mentioned literature contribute to these mixed results. The bulk of studies focuses on mergers and acquisitions, thus resulting in two kinds of deficiencies. As Clougherty and Zhang (2020) acknowledge, the merger review is only one of the three CP pillars, the remaining two being controls on price collusion and abuse of dominance. Only looking at the full breadth of CP allows to properly evaluate its effect on the inward FDI activities. Second, FDI includes greenfield investments, which can complement or substitute mergers and acquisitions. For instance, increasing control on cross-border acquisitions may enhance greenfield activities. Again, the exclusion of this important FDI component may invalidate empirical findings.

Further, some prominent studies are limited to one country. Although the selected country can be particularly representative and/or at the forefront in applying CP, the extension to other national jurisdictions is necessary to generalize empirical results. Nowadays, more than one hundred and thirty countries have competition laws, out of which one hundred and twenty have functioning national competition authorities (NCAs) with different practices and outcomes (OECD, 2014). Finally, NCAs do not operate in a vacuum, but are embedded in a social context that influences their policies and practices along several dimensions (Motta, 2004). CP literature converges on recognizing that a country’s high-quality institutions are meaningful in executing a more legitimate CP and making its enforcement more effective. Econometric studies give evidence of this (Borrell & Jiménez, 2008; Buccirossi, Ciari, Duso, Spagnolo, & Vitale, 2013; Krakowski, 2005; Voigt, 2009). In parallel, IB studies highlight the important role played by the quality of institutions on the country attractiveness towards FDI (Bailey, 2018; Contractor, Dangol, Nuruzzaman, & Raghunath, 2020; Nielsen, Asmussen, & Weatherall, 2017). However, in both research fields, conceptualization has oscillated between generic approaches in which the label ‘institutional’ has become “a catch-all concept that ends up meaning everything and therefore nothing” (Aguilera & Grøgaard, 2019: 23), and additive approaches that have reduced the institutional context to the sum of single institutional dimensions in isolation from one another (Jackson & Deeg, 2019).

A major problem arises from the nature of the compound indicators used, which generally are highly correlated with each other (Borrell & Jiménez, 2008; De Francesco & Radaelli, 2010).3 To get around the problem, scholars often resort to ‘umbrella’ indicators (e.g., by using principal component analysis or taking the best card from the deck to put it into parsimonious specifications). Unfortunately, these approaches fail to serve either an interpretative or normative perspective, for which it is important to identify which specific institutions and interactive mechanisms are at work. Overall, the need emerges of going beyond vagueness and simplification by taking a more fine-grained approach (Aguilera & Grøgaard, 2019; Cuervo-Cazurra, Mudambi, & Pedersen, 2019).

With the above limits in mind, we attempt to fill the gap in the literature by studying the relationship between the pro-enforcement reform of CP regime and the inflow of FDI at host country level in a comparative institutionalist framework (Hotho & Pedersen, 2012; Kostova et al., 2020). In accordance with previous literature on economics of competition and regulation (Aghion, Algan, Cahuc, & Shleifer, 2010; Pinotti, 2012), we argue that the relationship is shaped by the interplay between ‘trust’ and the ‘regulatory institutional environment’ (RIE). We focus on these two informal and formal institutional dimensions for two reasons. First, they are two of the most important elements influencing the host country’s attractiveness towards foreign investors (Holmes, Miller, Hitt, & Salmador, 2013). Trust is a key variable affecting the performance of enterprises (Buckley, 2016) both by acting as a lubricant of market interactions and by supporting a stable set of enduring business relationships (Mondolo, 2019; Murphree & Breznitz, 2020; Seyoum, 2011). A high-quality RIE entails effective policies and regulations designed to enable and promote business activities, including inward FDI (Daude & Stein, 2007; Lu, Liu, Wright, & Filatotchev, 2014; Mariotti & Marzano, 2020; Nielsen et al., 2017; Pajunen, 2008; Rammal & Zurbruegg, 2006).

Second, and more importantly, they are the key traits of the host country institutional setting that explain the extent to which an increase in CP enforcement is perceived by business people, and in particular by foreign investors, as ‘needed’ and ‘credible’. Aghion et al. (2010) and Pinotti (2012) show that higher mistrust leads to higher demand for regulation. High-trust societies need less regulation, as trust substitutes for formal enforcement and/or complements weak regulation. On the other side, the RIE quality ultimately influences the CP effectiveness. A low-quality RIE introduces elements of inconsistency that undermine the CP credibility and add to the uncertainty of decision making, especially of foreign investors suffering from liability of foreignness.4 Overall, trust and RIE mutually interact (Carlin, Dorobantu, & Viswanathan, 2009), so as to define the boundaries is which CP enforcement is needed, credible and effective.

To address the interplay between these dimensions, we adopt the comparative institutionalist approach that Jackson and Deeg (2019) define as ‘interactive view’. Accordingly, the country institutional context is seen as a two-dimensional space (trust and RIE) and our framework focuses on the joint effects of these two key dimensions, which in principle vary independently of each other, on the CP regime–FDI relationship.

Our analysis refers to a sample of 63 countries and data spanning almost 40 years. Our findings indicate that a pro-enforcement reform of the CP regime has on average a positive effect on country attractiveness towards FDI. We establish the result controlling for country fixed effects (which absorb the constant unobserved heterogeneity) and for a wide array of economic and contextual factors. However, the relationship between CP enforcement and inward FDI is shaped by alternative configurations in the host country institutional setting. The positive effect of pro-enforcement reforms is statistically significant when a low level of trust within the society is concomitant with a high-quality RIE, whereas its significance vanishes in the remaining institutional configurations (generated by the other combinations of trust and RIE quality).

#### FTC merger enforcement now

Wilson, FTC Commissioner, ‘12/10/21

(Christine S., Dissenting Statement of Commissioner Christine S. Wilson

Annual Regulatory Plan and Semi-Annual Regulatory Agenda, https://www.ftc.gov/system/files/documents/public\_statements/1598839/annual\_regulatory\_plan\_and\_semi-annual\_regulatory\_agenda\_wilson\_final.pdf)

The context in which the Commission announces this ambitious and resource-intensive rulemaking agenda gives independent cause for concern. The “surge in merger filings” has been a central focus of Chair Khan since her arrival at the agency.2 To address the uptick in merger filings, staff from many non-merger divisions throughout the agency have been commandeered to review pre-merger notification materials.3 These filings are subject to statutory timeframes, but the FTC has struggled to meet its timing obligations.4 Consequently, the FTC’s Bureau of Competition is now sending warning letters to merging parties whose statutory timeframes have expired, warning that the agency’s investigations continue and threatening that if they proceed to consummate their transactions, they do so at their own peril.5 It is puzzling that we would unleash an avalanche of rulemakings while also confronting a tsunami of merger filings.

Merger wave or no merger wave, my Democrat colleagues have long aspired to a more expansive rulemaking agenda for the agency.6 This year, they began taking steps to implement that goal. Acting Chairwoman Slaughter created a new rulemaking group within the FTC’s Office of General Counsel to “help build [the] Commission’s rulemaking capacity and agenda for unfair or deceptive practices and unfair methods of competition.”7 She also launched a review of the Commission’s Rules of Practice to “streamline” rulemaking procedures under Section 18 of the FTC Act.8 Chair Khan then ushered those changes across the finish line.9 While the Annual Regulatory Plan and Semi-Regulatory Agenda characterize those changes to our Rules of Practice as “eliminating extra bureaucratic steps and unnecessary formalities,” in reality those changes fast-track regulation at the expense of public input, objectivity, and a full evidentiary record.10 The Statement of the Commission issued in conjunction with those rule changes confirmed a desire for an ambitious rulemaking agenda,11 which predictably is reflected in this plan.

The regulatory plan identifies many rulemakings that will be launched in the coming months, including a trade regulation rule on commercial surveillance “to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision making does not result in unlawful discrimination.”12 This rule may implicate competition as well as consumer protection issues, as the Statement of Regulatory Priorities notes that “surveillance-based business models” impact not just consumers but competition.13

And taking a big step into uncharted waters, the plan states that “the Commission will also explore whether rules defining certain ‘unfair methods of competition’ prohibited by Section 5 of the FTC Act would promote competition and provide greater clarity to the market.”14 In deference to President Biden’s recent Executive Order,15 the Commission may consider competition rulemakings relating to “non-compete clauses, surveillance, the right to repair, payfor-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.”16 As if this list is insufficiently lengthy, the plan observes that “[t]he Commission will explore the benefits and costs of these and other competition rulemaking ideas.”17 In the absence of further detail, the reader is left to daydream about the additional rulemaking adventures that await.

#### COVID caused one of the largest collapses of FDI ever – DA is pounded and proves no impact

UNCTAD 1/24 – United Nations Conference on Trade and Development.

January 24 2021, “Global foreign direct investment fell by 42% in 2020, outlook remains weak,” https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

Global foreign direct investment (FDI) collapsed in 2020, falling 42% from $1.5 trillion in 2019 to an estimated $859 billion, according to an UNCTAD [Investment Trends Monitor](https://unctad.org/system/files/official-document/diaeiainf2021d1_en.pdf) published on 24 January.

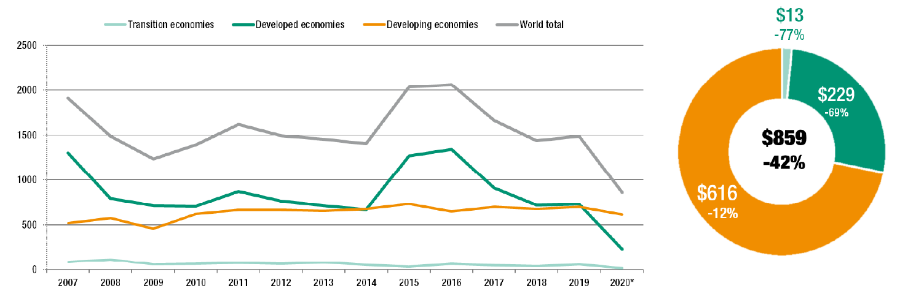
Such a low level was last seen in the 1990s and is more than 30% below the investment trough that followed the 2008-2009 global financial crisis.

Despite projections for the global economy to recover in 2021 – albeit hesitant and uneven – UNCTAD expects FDI flows to remain weak due to uncertainty over the evolution of the COVID-19 pandemic.

The organization had projected a 5-10% FDI slide in 2021 in last year’s World Investment Report.

“The effects of the pandemic on investment will linger,” said James Zhan, director of UNCTAD’s investment division. “Investors are likely to remain cautious in committing capital to new overseas productive assets.”

FDI inflows: global and by group of economies, 2007–2020 (billions of US dollars)

Source: UNCTAD (preliminary estimates)

Developed countries hardest hit

According to the report, the decline in FDI was concentrated in developed countries, where flows plummeted by 69% to an estimated $229 billion.

Flows to North America declined by 46% to $166 billion, with cross-border mergers and acquisitions (M&As) dropping by 43%. Announced greenfield investment projects also fell by 29% and project finance deals tumbled by 2%.

The United States recorded a 49% drop in FDI, falling to an estimated $134 billion. The decline took place in wholesale trade, financial services and manufacturing. Cross-border M&A sales of US assets to foreign investors fell by 41%, mostly in the primary sector.

## 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* specifically eats up agency resources

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

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

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

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

## 2AC – BizCon DA

#### Turn—legal uncertainty bad for innovation—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.

#### 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.

#### 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.

#### Turn—unchecked concentration net worse for innovation

Horton, Professor of Law and Heidepriem Trial Advocacy Fellow, the University of South Dakota Knudson School of Law, ‘21

(Thomas J., “Innovation and Antitrust: An Evolutionary and Historical Perspective,” in *The Dean of American Antitrust Law*, Concurrences)

A number of legal and business scholars have similarly attacked Schumpeter’s thesis that increased concentration enables and buttresses innovation. Professor Marina Lao, for example, argues that “economic theory does not clearly show that market concentration increases innovation, or that consistently resolving [antitrust] ambiguities in favor of dominant firms would enhance (rather than reduce) net industry innovation.”82

[Begin fn82]

Lao, supra note 35, at 194. Professor Lao adds:

Also, very little or no empirical data exists to support the argument that prohibiting exclusionary conduct with inconclusive efficiency effects would over-deter innovation. In fact, a recent commentator has persuasively argued the reverse: that in winner-take-all markets (as when network effects are important), a policy preventing dominant firm exclusion of fringe firms should increase net innovation, by encouraging fringe firm innovation while not deterring too much dominant firm innovation efforts. Dominant firms are unlikely to be discouraged by some antitrust constraints in these markets because of the potential winner-take-all prize.

Id. at 194–95 (citing Jonathon B. Baker, Promoting Innovation Competition Through the Aspen/Kodak Rule,

7 Geo. Mason L. Rev. 495, 511–15 (1999)).

[End fn82]

Professor Lao contends that in new technology markets, “protecting competition may be inseparable from protecting competitors in these markets.”83 Business Professor Gregory Day, citing to 60 years of merger analysis, similarly posits that “based upon these findings, the major conclusion is that antitrust’s most powerful means of promoting innovation and scientific progress is by preserving the number of firms competing in a market.”84 Numerous other recent commentators have presented similar arguments.85 In the words of John Mauldin of Mauldin Economics: “without competition, you end up with bloated monopolies that may be highly profitable for the owners, but don’t serve the greater cause of economic growth.”86

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## Platforms Adv

#### Tech edge key to manage China competition—losing it cases escalation

Heath and Thompson, 18

Timothy R. Heath is a RAND Senior Defense and International Analyst, William R. Thompson is a Political Science Professor Emeritus at Indiana University, “Avoiding U.S.-China Competition is Futile: Why the Best Option is to manage Strategic Rivalry,” Asia Policy; Vol 13 No 2; pg 91-120; April 2018.

This article argues that the structural drivers of U.S.-China competition are too deep to resolve through cooperative engagement and that policymakers must instead accept the reality of strategic rivalry and aim to manage it at a lower level of intensity. main argument Rising tensions between China and the U.S. have spurred fears that the two countries could end up in conflict or recreate the Cold War. To avoid these outcomes, analysts have proposed ways to defuse competition and promote cooperation. However, because these arguments do not address the structural drivers underpinning U.S.-China competition, such proposals are unlikely to end the rivalry. Conflict is not inevitable, however, and aggressive strategies that unnecessarily aggravate the sources of rivalry are likely to prove dangerously counterproductive. The best option at this point is, paradoxically, for the U.S. to accept the reality of the growing strategic rivalry and manage it at a lower level of intensity. policy implications • Maintaining a technological edge is critical for the U.S. to successfully manage the rivalry with China. Policies should be pursued to ensure that the U.S. continues to attract and nurture the best science and technology talent and retains its status as the global leader in technology. • To compete with China’s narrative about leading regional integration, the U.S. should both put forth a compelling vision for the region that encompasses widely held economic, security, and political values and continue to bolster its diplomatic and military positions in Asia. • To maintain the U.S.-China rivalry at a stable level, policymakers in both countries should prioritize measures that discourage the mobilization of popular sentiment against the other country and encourage cultural exchanges. • U.S.-China competition will likely become increasingly entwined with rivalries between China and U.S. allies and partners such as Japan and India. U.S. policymakers will need to take into account the independent dynamics of those separate rivalries when managing relations with China. The United States and China find themselves increasingly enmeshed in a strategic rivalry, the basic nature of which remains poorly understood in the United States. To be sure, disagreements between the two countries have gained widespread attention. Disputes involving Chinese confrontations with U.S. allies and partners such as Japan, the Philippines, and Taiwan have frequently grabbed the headlines. At other times, disagreements over Chinese trade practices and U.S. military activities in the South China Sea have occasioned discord. All these sources of conflict are genuine, but they mask the main drivers of rivalry, which are twofold. First, the United States and China are locked in a contest for primacy—most clearly in Asia and probably globally as well. The United States has been the dominant power, and China seeks to eventually supplant it. By definition, two different states cannot simultaneously share primacy at either the regional or global level. Second, economic, demographic, and military trajectories suggest that China has the potential to contend in a significant way for leadership at the global systemic level. At this level, the most decisive competition will be for technological leadership. Should China supplant the United States as the world’s premier country in terms of technology, its claim to regional and global supremacy will be difficult to deny. And once it has gained that supremacy, China will be well positioned to restructure institutional arrangements to privilege itself and disadvantage the United States. Although this competition is occurring simultaneously at both levels, observers have focused primarily on the struggle for primacy at the regional level and overlooked or downplayed the competition at the global systemic level.1 To counter China’s pursuit of regional primacy, the United States has bolstered its alliances in Asia (albeit inconsistently), expanded diplomatic outreach to China and rising powers in Southeast Asia, and revised its military posture—efforts captured by President Barack Obama’s “rebalance to Asia.” President Donald Trump may have abandoned the rebalance, but many of the related initiatives remain more or less in place.2 China’s challenge at the global systemic level, especially in the field of technology, has received less attention. Confidence in the proven U.S. ability to produce new technologies and facile assumptions about the difficulties China will face in promoting innovation in new industries have led many to dismiss the challenge posed by China. But the contest for technological leadership is actually even more consequential than that for regional primacy. Should China succeed in surpassing the United States as the world’s technological leader, U.S. diplomacy and military power will not suffice to hold the line either in Asia or around the globe. Under those conditions, countries throughout the world, including U.S. allies in Asia, will be forced to come to terms with the new leading economy. Military power projection could be far less relevant as China moves to consolidate its leading status at both the regional and global levels in such a scenario. Accordingly, although the United States cannot abandon its efforts to bolster its diplomatic and military position in Asia, the country must step up its efforts to strengthen its faltering lead in new technology development. While China clearly grasps the stakes, it is not clear that the United States does. For example, China’s government has promoted R&D into quantum computing. The investment appears to be paying off, as the country has leaped ahead of the United States in developing quantum communications.3 Similarly, the U.S. Congress has proposed to dispense with subsidies for the purchase of electric vehicles, even as China pushes ahead in its plan to become the lead producer of this technology.4 And while the U.S. government seeks to restrict immigration and discourage foreign students from attending U.S. universities (and staying after they receive their advanced training), China has revised its policies to welcome foreigners, prioritizing those with science and technology expertise. Moreover, Chinese investment in basic R&D is rapidly catching up to that of the United States.5 Studies have also noted a shrinking U.S. lead in science and technology as such investment is beginning to bear fruit.6 Similarly, the United States has lost its once-undisputed lead in the per capita number of engineers and scientists.7 Understanding the nature of the U.S.-China rivalry at the regional and global systemic levels, as well as how these two levels interact with one another, is essential if the United States is to successfully manage the challenge posed by China in a manner that avoids war. This study aims to contribute to that understanding. The article is organized into the following sections: u pp. 95–102 provide an overview of the growing rivalry between China and the United States, including a discussion of the meaning and role of strategic rivalry in interstate conflict and a comparison with the U.S.-China rivalry during the Cold War. u pp. 102–4 review the dynamics of the rivalry at the regional systemic level. u pp. 104–10 analyze the dynamics of the rivalry at the global systemic level. u pp. 110–15 examine why proposals to avoid rivalry through cooperation or aggressive competition are unlikely to succeed. u pp. 115–19 discuss the idea of strategic rivalry management and offer recommendations on ways to sustain the rivalry at a lower level of intensity the growing rivalry between the united states and china Strains between China and the United States have deepened in the past few years over a proliferating array of issues. President Trump has stepped up accusations against China of unfair trade practices and inadequate pressure on North Korea. He also provoked controversy early in his term when he floated the idea of increasing official contacts with Taiwan, which Beijing considers a renegade province.8 These disputes add to tensions that had expanded under President Obama, who moved to strengthen U.S. alliances in Asia, promote a regional trade pact, criticize Chinese behavior in the cyber and maritime domains, and shift more military assets to the Asia-Pacific as part of the rebalance to Asia strategy.9 China has in turn dismissed U.S. concerns about the construction of artificial islands in the South China Sea, intensified its criticism of U.S. security leadership in Asia, and tightened its grip on disputed maritime territories.10 The baleful state of bilateral relations has spurred plenty of finger-pointing. On the Chinese side, officials denounce the United States’ “Cold War mindset” and warn of conflict if Washington does not adjust its policies.11 A 2015 defense white paper described an “intensifying competition” between the great powers.12 Military officials and many Chinese analysts regard increasing tension between the two countries as unavoidable, although they do not regard war as likely. People’s Liberation Army (PLA) deputy chief of staff Qi Jianguo commented that “no conflict and no confrontation does not mean no struggle” between China and the United States.13 According to Chinese official media, polls in China suggest a large majority believes that the United States intends to pursue a containment policy.14 Reflecting this point of view, Niu Xinchun, a scholar at the China Institutes of Contemporary International Relations, argued that the “greatest obstacle to the further integration of emerging countries such as China into the international system comes from the United States.”15 Western officials and commentators tend to blame China for current strains. Senior U.S. leaders have criticized “assertive” Chinese behavior, while some analysts blame Xi Jinping for pushing a more confrontational set of policies.16 Other Western observers worry that a further souring of relations could lead to conflict.17 But even if war remains unlikely, the deepening tensions increase the risks of miscalculation, crises, and potential military clashes involving the world’s two largest powers. Echoing a view widely held among U.S. foreign policy experts and officials, former CIA director General Michael Hayden has warned that mishandling the U.S.-China relationship could be “catastrophic.”18 Rivalry at the Heart of the U.S.-China Relationship This widespread concern reflects a realistic appraisal of the dangers inherent in the U.S.-China relationship. But developing successful policies to manage an increasingly sensitive and complex situation requires an accurate assessment of the phenomenon of interstate rivalry that lies at the heart of that relationship. Rivalry is a concept that, while widely acknowledged, remains poorly understood. To be sure, most experts take for granted the idea that powerful nations compete for status and influence, and they acknowledge the danger posed by a rising power’s challenge to a status quo power. Yet investigation into the phenomenon of rivalry too often stops at these well-trodden findings. Less often discussed are the conclusions regarding the dynamics of rivalry that experts on conflict studies have arrived at within the past few years. Much of this scholarship draws from improvements to the analyses and data regarding interstate crisis and conflict.19 This research has generated useful and interesting insights regarding the start and conclusion of rivalries, crises, and war, although these remain largely unexplored outside academic circles. Analysts have established, for example, that rivalry is perhaps the most important driver of interstate conflict. As defined by political scientists, “rivals” are states that regard each other as “enemies,” sources of real or potential threat, and as competitors. At the root of rivalries thus lie disputes over incompatible goals and perceptions that countries possess both the ability (real or potential) and the intention to harm each other. Wars have historically tended to be fought by pairings of these states and their allies. Rivals have opposed each other in 77% of wars since 1816 and in over 90% of wars since 1945.20 Not only are rivals more likely to fight than non-rivals, but rivals also have a tendency to be recidivists because they are unable to resolve their political differences on the battlefield. Yet that does not always discourage them from trying to do so repeatedly. Rivals that cannot prevail due to parity frequently compete for advantage by building internal strength through arms racing or by leveraging external power through the strengthening of alliances and partnerships. Rivals are also prone to serial militarized crises. Mutual perceptions of each other as hostile enemies and the inconclusive outcome of previous militarized disputes typically fuel a pattern of recurrent crises characterized by deepening resentment, distrust, and growing willingness to risk escalation. Studies have also established that the risk of conflict increases sharply after three episodes of militarized crises.21 Rivalries do not progress in a linear direction, however. Their intensity can wax and wane in response to shocks and other important developments. Periods of relative stability can alternate with turbulent periods of tension and conflict. Similarly, cooperative activities can be interspersed with periods of acute tension and hostility. Nevertheless, the link between rivalry, crises, and interstate conflict is pervasive. Drawing from these sources, one can describe the Sino-U.S. relationship as a rivalry characterized as a competition between two major powers over incompatible goals regarding their status, leadership, and influence over a particular region—in this case principally the Asia-Pacific. The dynamics of this type of strategic rivalry differ in significant ways from the far more numerous rivalries over territory that have characterized conflict between so many countries, especially weaker and poorer ones. In contrast with rivalries over territories, strategic rivals do not necessarily share borders, although allies of one power may be engaged in a territorial dispute with the other major power. Strategic rivalries among major powers tend to be especially long-lived, with the average enduring for about 55 years.22 Strategic rivalries are incredibly complex phenomena that include overlapping and often reinforcing layers of disputes over leadership, status, and territory between the principal rivals and their allies. Such rivalries are almost always multilateral affairs that also involve allies and partners, some of which have their own rivalries with the other side. Competition in the economic, political, and military domains can serve as expressions as well as drivers of rivalry, as can sports and cultural competition. Strategic rivalries can be confined to one region, with the basic conflict reducible in some respects to which rival will occupy the top rung of the regional hierarchy. In other cases, however, a rivalry can span regional and global domains either sequentially or simultaneously. The U.S.-China rivalry, for instance, is already both a regional and, to a lesser extent, a global rivalry, but there is still considerable room for competition to expand. The complex and overlapping nature of the disputes makes strategic rivalries extremely crisis- and conflict-prone. Strategic rivalries come in a grim package deal that includes strained and hostile relations, serial crises, and in some cases wars. The comprehensive and multifaceted nature of the disputes also explains why such rivalries have proved so durable and why their wars have been so devastating. Conflict between strategic rivals has historically occasioned the most destructive wars, of which World Wars I and II are the most recent examples. The fact that experts at the time of each historic episode of systemic conflict consistently underestimated the duration or extent of war offers cold comfort to analysts today who seek to predict the trajectory of any conflict that might involve China and the United States. Comparisons of the Current Environment with the U.S.-China Rivalry during the Cold War How did the two countries arrive at this position? The most widely accepted narrative argues that China’s rapid economic growth has provided the resources with which it can press demands on long unresolved issues such as unification with Taiwan. China and the United States may have enjoyed stable relations in the 1980s when they cooperated on a limited basis against the Soviet Union, but that foundation of cooperation eroded considerably once the Soviet bloc dissolved in the early 1990s. Moreover, China’s rapid growth in economic power has given the country fresh resources to press its own demands on the United States and U.S. allies. By 2010, China’s economy had outpaced that of Japan to become the second-largest in the world.23 The persistence of long-standing sources of antagonism, such as the U.S. security partnership with Taiwan, has both reflected and aggravated a broader competition for leadership. For its own reasons, Washington has resisted Beijing’s demands, and the result has been growing fear and distrust.24 The intensifying rivalry between the rising power and the status quo leader is as old as antiquity itself. Indeed, Graham Allison coined the term “Thucydides trap” to describe such a situation, a term that he subsequently applied to the current U.S.-China situation.25 The popular narrative is not entirely incorrect, yet in some ways it remains incomplete. A closer look at history reminds us that antagonism between China and the United States is not unprecedented. In the 1950s and 1960s, the two countries engaged in an intense strategic competition for status and influence in Asia, one that occasionally burned hot, as it did when they clashed on the Korean Peninsula or more indirectly in Vietnam. This Cold War–era rivalry saw a complex network of competing alliances and partnerships, principally in Asia. The United States supported Taiwan and South Korea in bitter disputes with China and its allies, North Korea and the Soviet Union. This rivalry terminated in the 1970s primarily due to Beijing’s decision to counter a growing Soviet menace and the United States’ decision to pursue China as a potential partner for its own rivalry with the Soviet Union. But the existence of a period of intense U.S.-Chinese tension and competition provides a helpful baseline of comparison. What requires explanation is not the fact that the United States and China are engaged in a rivalry but the difference between today’s rivalry and that of the Cold War. What distinguishes the rivalry today from that of the earlier period is both the closer parity in relative power—albeit still more potential than real—between the two countries and the comprehensiveness, complexity, and systemic nature of the disputes between them. Paradoxically, these features make the current rivalry potentially far more threatening to the United States, despite the fact that so far U.S.-China relations have remained peaceful, and even though the U.S. and Chinese militaries fought each other in the Korean War. The dangerous potential of the current rivalry ultimately owes to the risk that China could rise to the position of global system leader and subordinate the United States accordingly. As has happened in previous power transitions, China as a system leader could exploit existing arrangements to its benefit and to the detriment of the outgoing leader, the United States. Due to the enormous rewards that accrue to a systemic leader and the high costs for the state that loses this position, struggles for global leadership have historically proved to be especially destructive. The possibility that China and the United States could find themselves in a similar struggle, while unlikely at this point, cannot be ruled out given the reality of the relative decline in U.S. power and the concomitant increase in Chinese comprehensive national power. At the most basic level, this fact may be measured superficially by the U.S. share of world GDP, which eroded from 40% in 1950 to 16% in 2014, adjusted for purchasing power parity. Over the same period, China’s share expanded from around 5% to 17%.26 An important consequence of the narrowing of the gap in comprehensive power has been an intensifying competition for leadership in the international economic and political order. In this way, the popular discussion of the Thucydides trap correctly recognizes the dangers of the U.S.-China competition. This feature contrasts sharply with the previous episode of rivalry. In the 1950s and 1960s, the asymmetry in power meant that the United States and China competed for influence and even clashed militarily in countries along China’s borders, but rarely elsewhere. As a largely rural, impoverished country, China had little stake in the system of global trade promoted by the industrialized West. Excluded from the United Nations, Maoist China also lacked the institutional ability to influence geopolitics and project power much beyond its immediate environs—and even that capability was sorely handicapped. Outside Asia, the United States faced minimal competition from China and generally regarded the Soviet Union as a more pressing threat. By contrast, the current competition features a China fully enmeshed in a political and economic order led by the United States. While generally supportive of this order, China is also seeking to revise aspects of the regional and international order that it regards as obstacles to the country’s revitalization as a great power. The main theater of this competition for influence and leadership is the Asia-Pacific, as it was in the Cold War, but U.S.-China rivalry increasingly is expanding globally. Moreover, unlike the largely military, regional, and ideological Cold War competition, the current contest is far more multifaceted and comprehensive in nature; it includes military, economic, technological, and political dimensions. The following two sections review the state of the competition at both the regional and the global systemic levels. the u.s.-china rivalry at the regional level At the regional level, U.S.-China competition spans the political, economic, and military realms. Politically, the two countries have feuded over the role of liberal values and ideals, a dispute that widened after the 1989 Tiananmen Square massacre. However, the 1996 Taiwan Strait crisis elevated the potential threat of conflict between the two countries and may therefore be regarded as the starting point of the current rivalry. Coinciding with impressive gains in China’s economic and military power following two decades of market reforms, the standoff saw Washington and Beijing deploy military assets to back up their respective positions regarding Taiwan’s right to hold a presidential election, elevating the risk of a clash. Since then, the competition for political influence and leadership has intensified. In 2011, the United States announced its rebalance to Asia, which was aimed in part at shoring up U.S. alliances, partnerships, and influence.27 Although on the surface Washington has abandoned the effort, the Trump administration has reintroduced a vision for Asia’s economic and security order premised on values favorable to U.S. interests.28 The 2017 National Security Strategy stated, for example, that the United States upholds a “free and open Indo-Pacific.”29 Beijing, by contrast, has increased its efforts to advance a vision for a regional order premised on Chinese leadership. In recent years, China has promoted major economic and geostrategic initiatives to deepen Asia’s economic integration through the Belt and Road Initiative, Asian Infrastructure Investment Bank (AIIB), and other initiatives.30 In 2017, China for the first time issued a white paper that outlined the government’s vision for Asia-Pacific security. The paper stated that China takes the advancement of regional prosperity and stability “as its own responsibility.”31 These policies build on directives issued by Xi Jinping in 2013, when he called for policies to bolster China’s attractiveness as a regional leader.32 Economically, the two countries are competing over the evolution of Asia’s economic future—a region anticipated to drive global growth in coming decades. Both countries are also competing to shape the terms of trade. President Trump may have abandoned the Trans-Pacific Partnership (TPP), but his advisers have advocated other measures to shape favorable trade terms.33 Meanwhile, China has stepped up advocacy of the Regional Comprehensive Economic Partnership, a proposed free trade agreement for the region that excludes the United States.34 China also has promoted the AIIB, while the United States and Japan continue to instead support the Asian Development Bank.35 Militarily, the growing arms race and the establishment of rival security institutions stand among the most obvious manifestations of an increasing competition in this domain. China and the United States have designed an array of military capabilities and doctrines partly aimed at each other. The PLA has developed weapons systems to counter potential U.S. intervention in any contingency along China’s periphery, which the United States has in turn sought to counter with its own innovations, such as the Joint Operational Access Concept.36 U.S. secretaries of defense Chuck Hagel and Ashton Carter outlined a “third offset” strategy to compete with China and Russia in military technology.37 To promote regional security, the United States has strengthened its military alliances and partnerships, while China has strengthened ties with Russia and argued that regional security is best protected through the Shanghai Cooperation Organisation, the Conference on Interaction and Confidence Building Measures in Asia, and other Chinese-led institutions. In 2014, Xi indirectly rebuked the United States for seeking to bolster its security leadership in the region, stating that “it is for the people of Asia to uphold the security of Asia.”38

## Adv CP

#### A] Information. It’s impossible for the state to aggregate enough data to effectively allocate resources.

**Karlson et al. 20** --- Ratio Institute, Linköping University, Stockholm, Sweden.

Nils, Christian Sandström, & Karl Wennberg, 2020, “Bureaucrats or Markets in Innovation Policy? – a critique of the entrepreneurial state,” The Review of Austrian Economics, vol. 34, pg. 81–95.

Information problems concern the difficulty a public actor face in collecting the information and acquiring the knowledge enabling correct decision-making regarding, for example, the allocation of resources. As Hayek (1945) showed, it is practically impossible to aggregate information and knowledge about production conditions, business opportunities, customer preferences, etc. to any central unit in society. Such information is dispersed, local, and time-bound in character, even in today’s modern digital economy. With regard to innovation policy and the results reviewed above, there are numerous implications of Hayek’s argument.

First, the existence of a market failure is empirically difficult to prove, or measure. The original argument by Arrow (1962) was of a theoretical nature and has not been validated. One could expect the potential size of such a market failure to vary greatly depending upon institutional characteristics, industrial context, regional and national setting. Such differences along with the fact that it is a very methodologically challenging task to locate and compute the size of a market failure means that policymakers are put in the awkward position of trying to solve a problem that is unknown both in terms of its existence, size and location. Needless to say, such a situation is almost bound to result in malinvestments.

The second implication concerns that a market economy is more compatible with the notion of dispersed knowledge than a public policy intervention. Industrial development in a market economy characterized by innovations is often described as a complex evolutionary process (Nelson and Winter 1982). Through experimental search characterized by failures and unpredictable breakthroughs, the economy develops over time (Aldrich 1999). Individual market actors make mistakes and invest in the wrong technical solution or the wrong business model for a new technology (Delmar et al. 2011). If the actors themselves who operate in a market are unable to know which technology or business model is optimal, there is reason to question how a public actor in the form of a government agency or a policymaker can perform this task satisfactorily. Government involvement in the form of “picking winners,” that is, attempts to generate growth through government selection of technologies or firms, risks becoming expensive for taxpayers (Lerner 2009). Previous research has shown that venture capital investments tend to be highly spatial and build on social networks (Hochberg et al. 2007). The price mechanism provides aggregate information about customers’ demand, and the firms’ profits and losses. Information and knowledge are thus conveyed and generated among market actors in competitive markets who are nested together through social, economic and technological interdependencies, and this information is hard to extract from its origin and locate in a central policy unit.

#### B] Incentives. Competition forces private firms to innovate to stay ahead. They translate R&D investments more quickly and effectively.

**Wu 16** --- Economic Analyst, Information Technology and Innovation Foundation

John, 11-29-16, “Despite China Favoring State-Owned Enterprises, Its Private Companies are More Innovative and Productive,” ITIF, <https://itif.org/publications/2016/11/29/despite-china-favoring-state-owned-enterprises-its-private-companies-are>

Private firms are not only more R&D intensive than SOEs, they too are better able to translate these R&D investments into productivity growth. Every 1¥ invested in R&D by a private firm returned an additional 0.16¥ in output, while every 1¥ invested in R&D by a SOE returned an additional 0.12¥ in output—[approximately a 30 percent difference](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570736).

China’s own experience with privatizing some SOEs since joining the WTO in 2001 should give them even more reason to fully embrace market-based economic trade policies. A separate [economic analysis](http://socialsciences.cornell.edu/wp-content/uploads/2015/03/Intellectual-Property-Protection.pdf) covering firm data between 1990 and 2013 shows that, on average, when a SOE switched to private ownership, R&D as a share of net assets doubled, or an increase of 0.14 percentage points. This surge in innovative activity also explains why patenting increased by 7.2 percent, which was accompanied by high-quality patents and more collaborative R&D with international companies.

Market dynamics explain most of this sizable difference in productivity and innovation outcomes between firm ownership types. Privately-owned firms tend to operate in more competitive industries, which forces them to make more effective R&D investments to stay ahead of other firms. Conversely, state-owned firms tend to operate in less competitive industries or are insulated from market competition induced through SOE-favoring policies that limit competition in such industries and create an uneven playing field for both domestic and international private companies.

#### Picking winners fails – subsidies are offset by required tax increases and governments empirically pick more losers than winners

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Adam Thierer, August 18 2021, “Government Planning and Spending Won’t Replicate Silicon Valley,” Discourse, https://www.discoursemagazine.com/economics/2021/08/18/government-planning-and-spending-wont-replicate-silicon-valley/

Unfortunately, the “if you build it, they will come” mentality surrounding tech clusters and regional innovation hubs doesn’t take into account many economic, political, cultural and geographic challenges. Indeed, the history of previous efforts proves that these things cannot simply be willed into existence through top-down industrial policies, big bureaucracies and a lot of new spending programs. Clusters tend to grow more organically, and efforts by the government to force them are unlikely to meet with any more success than past experiments.

Wishful Thinking About Economic Development Subsidies

“Economic theory offers little reason to think that targeted economic development subsidies benefit the broader communities that ultimately pay for them,” concluded a recent Mercatus Center study on “[The Economics of a Targeted Economic Development Subsidy](https://www.mercatus.org/publications/government-spending/economics-targeted-economic-development-subsidy).” The authors highlighted the extensive economic literature that finds that “the net effect of targeted economic development subsidies is likely to be negative” because “the taxes funding the subsidies will discourage more economic activity than will be encouraged by the subsidies themselves.”

That points to the first problem with governments trying to pick winners: There is no free lunch. Economic development and industrial policy efforts always sound great in theory, but in the end they rely on government-granted privileges—discriminatory tax or regulatory relief, cash subsidies, loans and loan guarantees, in-kind donations and the provision of other valuable goods and services. The costs of these targeted privileges are passed along to those firms and economic sectors without the political clout to get the favors, or just borne by taxpayers more generally.

The second problem with policymakers trying to pick winners is that they’re just not very good at it. Forecasting future market trends and the evolution of technology has always been notoriously difficult, even in the private sector. Lacking a profit motive and business acumen, governments have a much worse track record than investors, regularly picking more losers than winners. This problem has grown more acute today due to “[the pacing problem](https://www.mercatus.org/bridge/commentary/pacing-problem-and-future-technology-regulation),” which refers to the inability of government policies and programs to keep up with the ever-quickening pace of modern technological innovation.

These realities have not stopped policymakers from repeatedly trying to use both direct and indirect subsidies to attract high-tech sectors and talent to specific destinations. But there is no precise recipe for growing tech clusters. And as economists [William R. Kerr](https://www.hbs.edu/competitiveness/faculty/Pages/faculty-profile-details.aspx?profile=wkerr) and [Frédéric Robert-Nicoud](https://www.unige.ch/gsem/en/research/faculty/all/frederic-robert-nicoud/) [note](https://www.aeaweb.org/articles?id=10.1257/jep.34.3.50), “developing even a semi-formal definition is tricky.” Typically, however, a tech cluster includes “an important overall scale of local activity, complemented by spatial density and linkages amongst local firms.”

This is not easily replicated. Indeed, in the U.S. a huge amount of the nation’s high-tech startup activity and venture capital funding is concentrated only in Silicon Valley and eight other big-city areas: New York City, Boston, Los Angeles, Seattle, Washington, D.C., San Diego, Austin and Chicago. Of course, large cities have long possessed many advantages for attracting skilled labor and investors, and they often tend to have a high concentration of universities and research labs, making it far easier for tech clusters to develop in these large urban centers than in rural areas. Fine. But much of the nation is dotted with other large cities. Why can’t they become thriving tech clusters?

This kind of thinking is driving the latest push to create the next great innovation hub. “With federal support, the U.S. can recreate Silicon Valley success nationwide,” [says Steve Case](https://thehill.com/opinion/technology/550262-with-federal-support-the-us-can-recreate-silicon-valley-success-nationwide?rl=1), former head of America Online. [Others argue](https://www.brookings.edu/events/leveraging-regional-tech-hubs-to-advance-racial-equity/) regional tech hubs can help advance economic inclusion and racial equity.

## FDI DA

#### Even if a policy is limited, the uncertain environment triggers their link

Harry G. Broadman, Executive management consultant, Forbes, 7/31/21, Biden’s Antitrust Policy Mustn’t Throw Out The Baby With The Bathwater, <https://www.forbes.com/sites/harrybroadman/2021/07/31/bidens-antitrust-policy-mustnt-throw-out-the-baby-with-the-bathwater/?sh=5c80236311db>

This is because most will likely be administrative actions bound by existing law and thus open to challenge in court. Yet what is often under-appreciated under such scenarios, is that the policy uncertainty engendered during such a period may well affect decisions by investors, businesses, workers, and consumers that could run counter to those otherwise preferred.

There are two instances where antitrust policy actions during Biden’s administration could have a lasting effect.

The first is if the FTC or the DOJAD file lawsuits against certain firms charging them with anticompetitive practices. A recent example initiated toward the end of the Trump Administration was when the FTC and 46 states sued Facebook, accusing the firm of acquiring competitors WhatsApp and Instagram in order diminish competition in the social media industry. The objective was to force Facebook to divest the two entities. (While at present, the lawsuit has been rejected by the court, it is an open question as to whether Biden’s new FTC Chairwoman will refile the case.)

The second is if Congress passes new antitrust legislation that Biden signs. At present, there are three antitrust bills pending in the Senate, the two dominant ones being Senator Amy Klobuchar’s and Senator Josh Hawley’s bills. While not identical in several important dimensions, they are both focused on “big tech”. In parallel, the House is considering five antitrust bills, largely running in parallel with those being considered in the Senate.

**FTC enforcement is increasing now---Khan has begun her opening salvo**

**Carpenter 12/3** – journalist

Jacob Carpenter, "Lina Khan targets low-hanging fruit for first big antitrust move," Fortune, 12-3-2021, https://fortune.com/2021/12/03/nvidia-arm-lina-khan-antitrust/

Like any smart newbie looking to make a good first impression, Federal Trade Commission Chair Lina Khan is beginning her antitrust campaign with an easy case.

The FTC moved Thursday to block semiconductor maker Nvidia’s planned $40 billion acquisition of chip designer Arm, jumping ahead of counterparts in Europe who have all-but-guaranteed they would try to scuttle the largest-ever semiconductor deal. FTC officials argue that California-based Nvidia could undermine its competitors if it takes over Arm’s technology, which it licenses to Apple, Samsung, Intel, and dozens more of the industry’s largest manufacturers.

“This proposed deal would distort Arm’s incentives in chip markets and allow the combined firm to unfairly undermine Nvidia’s rivals,” FTC Bureau of Competition Director Holly Vedova said in a statement. “The FTC’s lawsuit should send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations.”

In a statement, a Nvidia spokesperson told Fortune that the company “will continue to work to demonstrate that this transaction will benefit the industry and promote competition.”

The FTC filing has, understandably, been cast as Khan’s opening salvo in her promised crusade to increase enforcement of antitrust law, which she and many Democrats argue has been ignored amid rapid Big Tech consolidation.

But Khan, perhaps smartly, isn’t exactly taking a big swing here.

From the moment that Nvidia announced its planned acquisition in September 2020, analysts and competitors have been skeptical the deal would go through. In subsequent months, some of the U.S.’ most prominent tech companies cried foul about the merger, including Google parent Alphabet, Microsoft, and Qualcomm, Bloomberg reported early this year.

Khan also has momentum at her back, with European Union and United Kingdom regulators already lining up an antitrust case. A top UK official teed up Thursday’s announcement by telling Bloomberg last month that “there is a lot of collaboration” on each side of the Atlantic with regard to Nvidia and Arm.

In addition, the FTC’s case has bipartisan support, with the organization’s two Republican commissioners joining their two Democratic counterparts in support of the case.

The true test of Kahn’s mettle lies farther down the road, as the FTC ponders whether to throw its weight behind challenges to acquisitions with more divided support and more complicated facts.

Among those cases: Amazon’s proposed $8.5-billion deal to buy Hollywood’s MGM Studios; defense giant Lockheed Martin’s looming $4.4 billion acquisition of Aerojet Rocketdyne; and the $43 billion merger of AT&T’s WarnerMedia division with Discovery.

#### Even if the pandemic resolves, its sparked distrust in U.S. instutions which causes a long term decline in FDI

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David Goldman, January 25 2021, “Foreign companies are giving up on the United States and betting big on China, report says,” CNN, https://www.cnn.com/2021/01/24/investing/us-china-foreign-direct-investment/index.html

New York (CNN Business)Foreign companies are turning their backs on the United States, taking advantage of China's booming economy and superior management of the Covid-19 pandemic.

Direct investment in the US by foreign companies plummeted 49% to $134 billion last year, according to a [report](https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak) released Sunday by the United Nations Conference on Trade and Development. By contrast, foreign direct investment in China grew by 4% to $163 billion in 2020.

2020 marked the first year in history that foreign direct investment in China overtook that of the US, according to the UN. China is now the world's largest recipient of foreign companies' investments.

Although Covid-19 was a large factor in foreign direct investment tumbling in the US -- and most places around the world -- the drop-off in foreign companies' American investments [began well before the pandemic](https://www.cnn.com/2019/08/13/economy/foreign-direct-investment-china-us/index.html).

After hitting a high of $440 billion in 2015, according to the US Commerce Department, foreign investment in the US has been on a sharp downward slide. Former President Donald Trump's go-it-alone trade policies hurt foreign investment -- particularly from China, which represented the sharpest drop in US investment over the past several years. Growing economic uncertainty around the globe also contributed to the decline.