# Northwestern Round 4

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Advantage 1 is platforms –

#### The *Amex* decisioncreated a *de facto* “platform exceptionalism” rule that prevents plaintiffs from challenging *any instance* of platform dominance

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

A. Against Platform Exceptionalism

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

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

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

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

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

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

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

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

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

[Begin fn76]

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

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

[End fn76]

The Court overlooked all of these problems. 77

#### *Amex*’s platform rule is theoretical nonsense—that spills over to stymie enforcement in numerous sectors

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

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

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

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

#### Inability to effectively contest platform conduct kills innovation

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

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

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

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

#### Tech concentration decks productivity growth – that ruins business dynamism and the economy

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(Ryan A., John Haltiwanger, Ron S. Jarmin, and Javier Miranda, “Changing Business Dynamism and Productivity: Shocks vs. Responsiveness,” June, <http://econweb.umd.edu/~haltiwan/Shocks_06_30_17.pdf>)

A hallmark of market economies is the continual reallocation of resources from less-valued or less-productive activities to more-valued or more-productive ones. Business dynamics—the process of business birth, growth, decline and exit—is a critical driver of the reallocative process. An optimal pace of business dynamics balances the benefits of productivity and economic growth against the costs associated with reallocation—which can be high for certain groups of firms and individuals. While it is difficult to prescribe what the optimal pace should be, there is accumulating evidence from multiple datasets and a variety of methodologies that the pace of business dynamism in the U.S. has fallen over recent decades and that this downward trend accelerated after 2000.1

Canonical models of firm dynamics and empirical evidence imply that there is a tight link between business dynamism and productivity growth. As highlighted by Hopenhayn and Rogerson (1993), increases in the dynamic frictions of adjustment on the extensive or intensive margins will reduce the pace of reallocation and lower productivity. Thus, a prima facie concern arising from these trends in business dynamism is that they may have had adverse effects on aggregate productivity growth. The question is particularly important in light of the growing body of evidence showing that aggregate productivity growth in the U.S. has been declining since the early 2000s (Fernald (2014)).2

At first glance, medium-run fluctuations in economywide productivity growth do not match up with patterns of declining business formation and business dynamism. Productivity growth accelerated in the 1990s through the early 2000s before slowing down after 2003, while aggregate startup activity and job reallocation fell throughout the 1980-2014 period. However, a more careful review of theory and evidence resolves the inconsistency: during the 1980s and 1990s, the decline in entrepreneurship and reallocation was dominated by the Retail Trade sector, where evidence suggests that falling dynamism was actually consistent with rising productivity growth.3

Fernald (2014) highlights that the surge in productivity from the late 1980s to early 2000s and the subsequent decline were both led by the ICT-producing and intensive ICT-using sectors. Interestingly, the High Tech sector exhibits a rise in business formation and job reallocation over the first period and a sharp decline in the post-2000 period, with the period since 2000 also being characterized by a decline in high-growth firm activity throughout the US economy more generally (Haltiwanger, Hathaway and Miranda (2014)). 4

In this paper, we find that changes in how businesses respond to their idiosyncratic productivity conditions are an important driver of the evolution of aggregate job reallocation and productivity in recent decades, especially in the High-Tech sector. We argue that the observed decline in responsiveness is consistent with models of firm dynamics in which increases in adjustment frictions can reduce the pace of reallocation and, consequently, productivity growth. As noted above, the canonical model is Hopenhayn and Rogerson (1993), but this theme is consistent with a wide class of firm-level adjustment cost models (e.g., Cooper and Haltiwanger (2006), Cooper, Haltiwanger and Willis (2007, 2016), and Elsby and Michaels (2013)). The core hypothesis is intuitive. An increase in adjustment frictions makes firms more cautious in responding to idiosyncratic productivity shocks. This yields a decline in the pace of job reallocation (as firms’ hiring and downsizing decisions become more sluggish), an increase in the dispersion of marginal revenue products and a decline in aggregate productivity.

#### Sustained productivity growth is the key determinant of great power conflict—power cycle theory confirms demonstrates relative decline is the critical point

Jacob L. Heim, Senior Policy Researcher, RAND, and Benjamin M. Miller, PhD, Economist; Professor, Pardee RAND Graduate School, 2020, Measuring Power, Power Cycles, and the Risk of Great-Power War in the 21st Century, https://www.rand.org/pubs/research\_reports/RR2989.html

Global Power Dynamics and Global Conflict

There are many models that link the distribution of global power to the prospects for major interstate war, according to different theories of why wars occur.27 Put broadly, when assessing whether one scenario is more stable than another, analysts apply a model (ranging from a heuristic to a formal model) to assess the prospects for crisis or war under different distributions of global power. One such approach would be to use a quantitative metric (such as the GPI) within a theoretical model that evaluates the likelihood of a war erupting under different distributions of global power.

There are many theoretical models that an analyst could use for this purpose.28 Among these models, power cycle theory represents an intriguing option due to its quantitative nature and its ability to operate on aggregated metrics, such as the GPI.

*Power cycle theory* relates the relative distribution of power in the international system to the likelihood of major wars—that is, large wars that will reorder the international system.29 For this reason, it focuses on *latent* indicators of military power. The theory concerns long-term shifts in power that take place over decades, rather than the year-to-year fluctuations in military capabilities that arise as states actualize their latent power by fielding new weapon systems, testing new technologies, or training their militaries in new concepts of operation. Power cycle theory posits that the largest wars—measured by duration and number of casualties—tend to occur when multiple great powers simultaneously experience *critical points* at which their relative rates of growth fundamentally shift. These major wars are also sometimes called extensive wars because they involve multiple major powers that fully mobilize, leading to a large number of casualties and restructuring of the international system. Scholars have found confirming evidence for the theory when testing it against the historical record as a whole and when examining case studies in specific major wars (such as WWI).30 By focusing on fundamental elements of national power and the risk of wars that could reorder the international system, these sorts of frameworks can help strategists step back and look for structural shifts in power that can destabilize the international system. Of course, destabilizing shifts represent only one concern out of many that national security strategists confront on a daily basis—from terrorism and power vacuums to nuclear proliferation and transnational crime—but they are a necessary concern that requires attention and foresight. Power cycle theory, like all models, is a simplification of reality, but we judge that it has value in helping analysts understand the balance of power and prospects for major wars in a systematic and quantifiable way. We do not view it as a replacement for critical thinking, the study of history, regional expertise, or other methods. We consider it to be a valuable tool to add to the larger toolbox used by national security analysts and those concerned about how future trends could affect great-power competition and war.

There are many theories of warfare involving cycles.31 While each differs in particulars, they share some broad characteristics because they emphasize long-term causes of war. In these theories, uneven rates of growth among states play an important role in creating systemic disequilibria. Theories differ on which rates of growth matter most; some focus exclusively on economic growth, while others focus on broader indexes that include population. Theories also differ on what configurations of powers are the most dangerous; for example, transition theories focus on when a rising power’s capabilities approach those of the leading power in absolute terms, while power cycle theory focuses on when the trend in a nation’s growth changes (peaks, bottoms out, or reaches an inflection point). All theories generally accept the argument that a discrepancy between a state’s perceived status and its desired status influences its behavior. We use power cycle theory in this report because of its unambiguous and quantifiable character (the theory leads to specific predictions tied to quantitative conditions). Although we apply power cycle theory, we do so mainly as an illustration of how one can combine international relations theory with future balance-of-power scenarios to consider which ones may be more unstable than others; we encourage strategists to consider many lenses when evaluating scenarios.

Power Cycle Theory

To answer questions about whether a balance of power in a given scenario makes a major war more or less likely, one needs to apply a theory that relates certain configurations of power to predictions about stability. Power transition theory, for example, might focus on the period around 2023, when China’s modified GPI score surpasses that of the United States. Power cycle theory, however, suggests that the risk of war is higher when several major powers go through critical points at similar times—not when their shares of global power cross each other. As mentioned earlier, critical points occur when the direction or acceleration of a state’s relative growth trend changes, such as when a state’s power falls after reaching its zenith or rises after reaching its nadir. Critical points may also occur when the *rate* of growth or decline accelerates or decelerates. For example, in our baseline scenario, Chinese relative growth experiences an inflection point around 2011.

Before 2011, Chinese relative growth was accelerating, in line with the economic trends that we discussed in the opening. After 2011, however, Chinese relative growth decelerates. While it is still growing in absolute and relative terms, its rate of relative growth slowed. Figure 10 highlights that, between 1990 and 2010, China’s relative power growth rate accelerated. After 2010, its relative power growth rate began decelerating. In the baseline scenario, its relative rate of growth continues to slow, but it does not peak. The point where China’s relative power growth rate stops accelerating and begins to decelerate (marked with the black dot in Figure 10) is a particular type of critical point called an inflection point, and it has special significance for a rising power.

**Competitiveness solves great power war**

**Baru 09**

(Sanjaya, Visiting Professor at the Lee Kuan Yew School of Public Policy in Singapore Geopolitical Implications of the Current Global Financial Crisis, Strategic Analysis, Volume 33, Issue 2 March 2009 , pages 163 – 168)

The management of the economy, and of the treasury, has been a vital aspect of statecraft from time immemorial. Kautilya’s Arthashastra says, ‘From the strength of the treasury the army is born. …men without wealth do not attain their objectives even after hundreds of trials… Only through wealth can material gains be acquired, as elephants (wild) can be captured only by elephants (tamed)… A state with depleted resources, even if acquired, becomes only a liability.’4 Hence, economic policies and performance do have strategic consequences.5 In the modern era, the idea that strong economic performance is the foundation of power was argued most persuasively by historian Paul Kennedy. ‘Victory (in war),’ Kennedy claimed, ‘has repeatedly gone to the side with more flourishing productive base.’6 Drawing attention to the interrelationships between economic wealth, technological innovation, and the ability of states to efficiently mobilize economic and technological resources for power projection and national defence, Kennedy argued that nations that were able to better combine military and economic strength scored over others. ‘The fact remains,’ Kennedy argued, ‘that all of the major shifts in the world’s military-power balance have followed alterations in the productive balances; and further, that the rising and falling of the various empires and states in the international system has been confirmed by the outcomes of the major **Great Power wars**, where victory has always

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

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

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

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

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

B. Private Sector Institutional Dynamics

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

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

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

Ii. The Competition Shortcomings

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

A. Entry Barriers

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

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

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

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

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C. International Competitiveness

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

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

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

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

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

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

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

Maintaining U.S. Leverage

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

#### Specifically, North Korea and Iran

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

Technology

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

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

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

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

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

The Problem is Growing North Korea raises money to support its nuclear and ballistic missile programs in various ways. Some methods are relatively new, even for seasoned North Korea watchers, and exploit countries and economic areas where there is very little, or absolutely no, awareness about their exposure to North Korean illicit activity. The Kim regime maintains a sophisticated offensive cyber capability, which it uses to steal financial resources and move money around the global banking system. In the past, hacking groups credibly linked to North Korea have successfully penetrated central banks, cryptocurrency exchanges, and some of the largest corporate banks in the world. The United Nations North Korea Panel of Experts has accused North Korea of stealing up to $81 million from Bangladesh’s Central Bank and laundering the money through casinos in the Philippines. These North Korean criminals have also hacked ATMs in more than 11 countries, stealing hundreds of millions of dollars. Other North Korean–linked entities have sold information technology services, including website and application development services, to firms around the world as a strategy to covertly raise funds for Pyongyang’s illicit aims. Financial institutions are often reluctant to admit that they have been hacked, which makes it difficult for the financial community to absorb lessons learned and harden institutions from future intrusions. Conversely, governments, including the United States, suffer from poor interagency coordination and a lack of institutional knowledge and awareness of North Korea’s malicious cyber activities. Most high-level U.S. policymakers and members of Congress lack basic familiarity with the underlying technology and North Korea’s cyber heist and hacking activities, which makes developing policy and regulatory proposals to counter it difficult. This ignorance is coupled with a government aversion to share useful information with the private sector. North Korea conducts illicit ship-to-ship transfers of energy resources in violation of United Nations sanctions. The transfers include the import of refined petroleum products, which serves as essential inputs for North Korea’s domestic economy. North Korea also exports coal, including to United Nations Security Council members China and Russia, in violation of the sanctions. An international network of shipbrokers, trading companies, and maritime operators aids North Korea in these efforts. Much of this activity takes place in international waters, making it difficult for the United States and its partners to shut down completely such activity. North Korean laborers have long operated worldwide, in violation of United Nations Security Council Resolutions enacted in 2017 to curtail such activities. At the peak of North Korean laborers working abroad, 100,000 workers generated about $2 billion a year for the regime. The majority of workers had been concentrated in Russia and China, which the United States has frequently accused of lax enforcement. A deadline for repatriating all North Korean laborers came and went in December 2019, with reports suggesting that these workers continued to be employed in these countries. Future United Nations Panel of Experts reports will likely highlight continuing violations of the rules against employing North Korean overseas laborers. All told, these strategies potentially deliver hundreds of millions to billions of dollars to North Korea. (United Nations estimates of cyberactivity alone state the total proceeds could be “up to 2 billion,” although the methods North Korea uses makes it difficult for analysts to say with certainty that North Korea’s hackers have been able to move all of that money back to Pyongyang). Through organized and persistent sanctions evasion, this rogue nation has shown the world that it is possible to sustain and continue to develop its nuclear weapons capability in the midst of severe economic constraints. Indeed, the broad nature of the sanctions regime is moving Pyongyang to successfully invest significantly more resources to improve and diversify its revenue generating and financial movement strategies. North Korea is gaining major ground in its use of cyber technologies to finance and conduct illicit operations because the international community is so weak at developing countermeasures in the cyber sector. As for the tradecraft North Korea uses to stay miles ahead of global banks, companies, and regulators, the regime relies on technological tools of the trade as well as networks of trusted agents that constantly update aliases, shell companies, and front men. The Office of Foreign Assets Control (OFAC), the agency that leads sanctions implementation and enforcement for the U.S. government, works hard to keep up. It regularly discloses new aliases for North Korean proliferation agents, as well as new individuals engaged in this activity. The Financial Crimes Enforcement Network (FinCEN), the Financial Intelligence Unit of the United States, has also distributed advisories on North Korean typologies for illicit fundraising. But it is impossible for federal offices to collect, declassify, and publicly disclose the full array of North Korean sanctions evaders and proliferation fundraisers. Also, by the time that the U.S. government names them in formal sanctions actions, the North Korean agents have changed aliases, locations, and front companies. Nevertheless, this information disclosure is important, not least because it makes painfully clear that North Korea never paused aggressively fundraising for its nuclear and missile programs when Chairman Kim and President Trump met in Singapore in June 2018. Though they may have committed to a diplomatic process, which included pledges to temporary freezes in bomb and missile testing, North Korea’s track record over the last few years demonstrates that it never intended to halt its race for a bigger and more lethal nuclear arsenal. A significant problem in the current environment is the inadequate international control regime to spot and stop North Korea’s money trail, particularly its blind spot on North Korea’s malicious, highly active, and unfortunately very successful cyber and information technology activities. Given all of these challenges, is it even possible to halt the financing of proliferation by this dangerous nuclear state? As a theoretical legal and regulatory matter, the answer is yes. However, such an effort would require two exceedingly difficult-to-achieve goals for every country. It must be every country because universal enforcement is essential to avoid circumvention and dodging by North Korea. The requirements are: real, high-level political will, and greater technical capacity to implement and enforce U.N. sanctions and other financial controls on North Korea and North Korean-linked entities. The international community cannot allow the daunting challenge of making true progress to impede North Korea’s illicit money trail be an excuse for inaction. A small cadre of innovative thinkers from the financial industry and law enforcement community are figuring out targeted strategies for better catching North Korean financing of proliferation, notwithstanding today’s deficit of political will and technical capacity. Scaled up, these strategies could have an outsized impact in catching North Korean criminals and proliferators. Moreover, a handful of well-placed policy shifts in leading economies, starting in Washington, D.C., can also have a big effect. What’s the Plan? We know that the challenges are large. So, what’s the plan? First, the international community must more accurately diagnose the problem. How is North Korea raising and moving money right now? Some bank compliance officials describe the effort to answer this question as looking for a needle in a stack of needles. Essentially, they suggest that scanning hundreds of millions of financial transaction records and pieces of client data against sanctions blacklists, and the known aliases for the blacklisted North Koreans, is a fool’s errand. But other compliance officials in banking, global shipping, manufacturing, and insurance think the way to spot North Korean footprints lies in getting away from list-checking. They are pioneering approaches to create big lakes of data and sophisticated algorithmic methods, improved by machine learning and overseen by expert humans, to hunt down, and ultimately spot in real time, North Korean patterns of activity. Policymakers can augment these with declassified intelligence and produce shareable reports to inform other governments and companies also tracking proliferation finance. Analysts describe these efforts as exercises in behavioral analytics, trained on tracking North Korean financial footprints. And this work can create a feedback loop for national governments and the private sector to respond to the threats. A few pathbreaking global firms are putting into practice these behavioral analytic models for tracking North Korean proliferation. They run into significant problems coping with data privacy rules that make it difficult to share data across borders and between institutions. Also, they cope with the skepticism of financial regulators and supervisors who are slow to get comfortable with these new analytics and require a lengthy process to validate computer models. This slow and skeptical approach can be a drag on innovation and creative strategies to catch North Korean proliferators. Regulators are right to be cautious and to demand that companies to rigorously protect themselves and their customers from North Korean abuse. No global company should let up on sanctions pressure on North Korea for as long as the rogue regime presents a proliferation and regional destabilizing threat. But tough regulation and compliance should be compatible with innovative approaches to catching and halting North Korean proliferators. Along with better understanding the problem, a second element to undercut North Korean financing of proliferation is for policymakers to embrace innovative approaches to tracking illicit finance as a top and public priority. Only through an evident sense of urgency can policymakers make it a top priority for companies. Companies will take their cue from clear, unambiguous law and regulation. Furthermore, if done right, policymakers will create the space for safe information sharing and a culture of collaboration to identify and halt the money trail for the nuclear threats emanating from North Korea. Dialing up the ingenuity through new policy approaches for identifying and sharing information on financing of proliferation is essential to stop North Korea’s money trail. In fact, it might be the only real path for progress when the diplomatic process between the United States and North Korea has stalled out and against the backdrop of Kim’s threats of renewed provocations.

#### Continued North Korean missile development will result in attempts at forced reunification

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North Korean Nuclear and Missile Capabilities Pyongyang’s evolving nuclear and missile forces increasingly provide the regime with the ability to conduct a surprise preemptive first-strike, retaliatory second-strike, and battlefield counter-force attacks. Pyongyang has: • Produced 30–60 warheads,11 can create fissile material for 7–12 warheads per year,12 and successfully tested a hydrogen (thermonuclear) weapon at least 10 times as powerful as the Hiroshima and Nagasaki bombs; • Expanded and refined manufacturing facilities for fissile material, nuclear weapons, missiles, mobile missile launchers, and reentry vehicles;13 • Created a new generation of more advanced, accurate, and survivable missiles for all ranges that escalates the nuclear threat against South Korea, Japan, US bases in Okinawa and Guam, and the continental United States; • Developed mobile land-based and sea-based missile systems that are harder to detect and target; • Produced several different solid-fueled missiles that reduce the time necessary for launch, thereby constraining warning time for the US and its allies; and • Practiced missile launches under wartime conditions by firing multiple missiles from numerous locations throughout the country, simulated nuclear airburst attacks over South Korea and Japan, and conducted salvo launches of several missiles simultaneously. Pyongyang has an extensive and diversified missile force to attack targets in South Korea, Japan, US bases in the Pacific, and the continental United States. South Korean Ports and Airfields To prevent the US from augmenting forces in South Korea during a conflict, North Korea would use nuclear weapons on South Korean ports and airfields. In 2016, Kim Jong-un oversaw several successful surface-to-surface (SCUD) and Hwasong-7 (No Dong) mobile missile launching exercises that simulated preemptive nuclear airburst strikes against South Korean ports and airfields to be used by the US military.14 South Korean Leadership and Military Targets Pyongyang vowed to initiate a preemptive nuclear attack against the South Korean leadership, including the presidential Blue House, if the regime perceived even a “slight sign” of US or South Korean preparations for a decapitation strike on the North Korean leadership.15 North Korea warned that it could turn South Korea into a “sea of flames” with its long-range artillery force and “reduce all bases and strongholds of the US and South Korean warmongers…into ashes.”16 The regime has deployed SCUD missiles, Pukguksong-2 (KN-15), and Hwasong-7 (No Dong) medium-range missiles. North Korea achieved breakthrough successes with several short-range missile systems in development that emphasized survivability, accuracy, and ability to defeat allied missile defenses. Defeating Ballistic Missile Defenses (BMD) North Korea is developing several systems and tactics that would be more effective in degrading or defeating allied missile defenses. Pyongyang has launched missiles to a higher altitude and shorter range which could allow a warhead to arrive at a steeper angle of attack and faster speed which could exceed BMD interception capabilities. The KN-18 and KN-21 SCUD variants have maneuverable reentry vehicles and the KN-23 has a flight profile that showed evasive characteristics instead of a typical ballistic parabola. The KN-23 was flown at depressed trajectories, potentially between the upper reach of Patriot missiles and below the minimum intercept altitude for Terminal High Altitude Area Defense (THAAD), with a final pull-up maneuver that provides a steep terminal descent.17 The KN-23 could also be used in a first strike against leadership, hardened command and control, or high-value military targets. North Korea demonstrated the ability to fire several missiles at once which could enable salvo attacks by less accurate SCUD missiles to overwhelm BMD systems.18 SLBM Threat North Korea has successfully tested the Pukguksong-1 (KN-11) and Pukguksong-3 (KN-26) submarine-launched ballistic missiles (SLBM) which could target South Korea and Japan, potentially with a nuclear warhead. South Korea does not currently have defenses against SLBMs. The THAAD BMD system radar is limited to a 120-degree view that is directed toward North Korea, precluding it from protecting against SLBMs arriving from either the East or West Seas.19 The SM-2 missile currently deployed on South Korean destroyers only provides protection against anti-ship missiles. Establishing North Korean Area Denial Pyongyang could use theater nuclear strikes against US bases in Japan and Guam to prevent the flow of forces and logistics to the peninsula that are planned in the time phased force deployment data (TPFDD) plan. Pyongyang has repeatedly threatened US bases throughout the Pacific, often citing Guam.20 The regime has developed the Hwasong-10 (Musudan) and Hwasong-12 (KN-17) intermediate-range missiles to hit US bases on Okinawa and Guam. Threatening the US Mainland Pyongyang has threatened to “reduce the US mainland to ashes and darkness.”21 Kim was photographed in front of a map labelled “US Mainland Strike Plan,” with missile trajectories aimed at Washington, DC, Indo-Pacific Command in Hawaii, San Diego (a principal homeport of the Pacific Fleet), and Air Force Global Strike Command at Barksdale Air Force Base in Louisiana.22 In 2017, North Korea conducted three successful tests of the Hwasong-14 (KN-20) and Hwasong-15 (KN-22) ICBMs to replace the earlier, less capable KN-08 and KN-14 ICBMs. General Terrence O’Shaughnessy, commander of North American Aerospace Defense Command (NORAD), testified that North Korea demonstrated the capability to threaten the US homeland with thermonuclear-armed ICBMs capable of ranging most, or all, of North America.23 US Forces Korea assessed that the Hwasong-15 ICBM has a range of 8,000 miles and is capable of reaching anywhere on the US mainland.24 New War Plan After assuming power, Kim Jong-un directed the North Korean military to develop a new strategy to invade and occupy Seoul within three days and all of South Korea within seven days. North Korea had studied US operations in Afghanistan and Iraq and concluded it must prevail quickly before US reinforcements arrived. This would necessitate early use of nuclear weapons.25 The Korean People’s Army General Staff declared that “the first combined task units stationed in the eastern, central, and western sectors of the front will [carry] out the preemptive retaliatory strike at the enemy groups with ‘an ultra-precision blitzkrieg strike of the Korean style.’ ”26 North Korea has warned that “any military conflict on the Korean Peninsula is bound to lead to an all-out [nuclear] war, an ultra-harsh war of reaction targeting the entire US mainland.”27 Future Capabilities Open Dangerous Doors North Korea’s continually advancing proficiencies suggest additional and more worrisome evolutions in its nuclear doctrine. Pyongyang may be on the path to developing capabilities that go beyond deterrence to a viable offensive warfighting strategy. In a few years, North Korea could have 100–200 nuclear warheads, dozens of mobile ICBMs, and hundreds of improved, survivable short-, medium-, and intermediaterange missiles, as well as submarine-launched missiles. North Korea possessing a more formidable military threat would put allied forces at greater risk, augment the danger to the continental United States, and degrade military responses to North Korean actions. Greater nuclear capabilities could undermine the effectiveness of existing war plans. For example, rather than fully implementing all phases of OPLAN 5015 after a North Korean attack, the allies may strive only for returning to the status quo ante rather than fully liberating North Korea. North Korea’s ability to target American cities with thermonuclear weapons could inhibit US responses or exacerbate growing allied concerns about the viability of the US extended deterrence guarantee. South Korea and Japan have already questioned US willingness to risk its cities for theirs. The defense of the continental US is currently provided by 44 ground-based interceptors in Alaska and California. Several interceptors would likely be fired at each incoming North Korean missile since the current North Korean ICBM arsenal is small. However, continued North Korean ICBM production could overwhelm US missile defenses. A more survivable North Korea nuclear force could create first-strike uncertainty for the United States of not being able to get all of Pyongyang’s North Korea’s nuclear weapons. Coupled with the risk of numerous American cities attacked by hydrogen bombs, Washington might be perceived as being hesitant to respond to North Korean actions. As the fictional nuclear strategist Dr. Strangelove opined, “Deterrence is the art of producing in the mind of the enemy, the fear to attack.” If North Korea believes the US is unwilling to risk catastrophic civilian losses, the regime could feel emboldened to act more belligerently in pursuing its strategic objectives. A former North Korean official testified before Congress in 1997 that “Kim Jong-il believes that if North Korea creates more than 20,000 American casualties in the region, the US will roll back and that North Korea will win the war.”28 Pyongyang may even conclude that nuclear weapons provide the ability to fulfill its oft-stated goal of reunifying the Korean Peninsula on regime terms. Kim Jong-un declared that North Korea “should not allow the national split to persist any longer but reunify the country in our generation without fail.”29 The regime has repeatedly pledged to achieve the “final victory in a great war for national reunification.”30 Deterrence and Diplomacy: Two Sides of the Same Coin The arms control community argues that deterrence maintains the nuclear problem but does not solve it. They suggest that there is a need for the US to engage with North Korea to reach a diplomatic resolution to the long-standing nuclear problem. The international community, including the United States, has repeatedly attempted to do so, having concluded eight denuclearization agreements with North Korea. All failed due to Pyongyang’s cheating or leaving obligations unfulfilled. During these and subsequent negotiations, Washington offered economic benefits, developmental assistance, humanitarian assistance, diplomatic recognition, declarations of non-hostility, turning a blind eye to violations, not enforcing US laws, and reducing allied defenses. Despite these concessions, North Korea still has an insatiable list of security, diplomatic, and economic demands. These include the conclusion of allied military exercises, withdrawal of all US troops from South Korea, abrogation of the US–South Korea defense treaty, ending the US extended deterrence guaranty, signing a peace treaty to end the Korean War, a security guarantee, non-criticism of the regime, and removal of all US and United Nations (UN) sanctions. Currently, North Korea rejects all working-level diplomats as well as summit meetings with the United States. It is impossible to negotiate with a nation that will not pick up the phone. Until Pyongyang is willing to comply with 11 UN resolutions that require it to abandon its nuclear and missile programs, the US must maintain a comprehensive strategy of diplomacy, upholding UN resolutions, US law, and deterrence. Washington and its allies must keep their eyes open, their shields up, and their swords sharp. Airmen must remain ever vigilant to maintain the decades long deterrence that has kept the peace on the Korean Peninsula. As George Orwell reportedly opined, “People sleep peacefully in their beds at night only because rough men stand ready to do violence on their behalf.”

#### Causes global draw-in and goes nuclear— even if the U.S. doesn’t respond!

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David S. Maxwell, “The ROK-US Alliance: One American’s Perspective Now and for the Future,” Pathways to Peace: Achieving the Stable Transformation of the Korean Peninsula, The Hudson Institute, April 2020, <https://www.hudson.org/research/15845-pathways-to-peace-achieving-the-stable-transformation-of-the-korean-peninsula>, pp. 62-63

The United States has a vital national interest to deter war on the Korean Peninsula. If hostilities resume, Korea’s geostrategic location ensures that the economic effects would not be confined to the peninsula. China and Japan are the second- and third-largest economies in the world, respectively, and the ROK is around the eleventh. A war involving these powers will have a direct impact on the US homeland. Furthermore, conflict is likely to escalate because of the proximity of two nuclear powers, China and Russia, and one of the highest concentrations of military forces anywhere in the world. The size and proximity of the forces, from North Korea, South Korea, China, Russia, and Japan, will likely cause miscalculations and responses with significant global repercussions. Even if the United States chooses not to support its Korean and Japanese allies, it might not be able to avoid conflict, and it certainly will not avoid the economic effects of war in Northeast Asia.

Therefore, deterrence is a vital interest. The question is what deters North Korea from attack. In 1997, Hwang Jong Yop, North Korea’s highest-ranking defector and the father of its juche ideology, told interrogators from the South and the United States that it is the presence of US forces that deters the Kim family regime. Kim Jong-il and his father Kim Il-sung before him knew the NKPA could not win a war against the South if the United States fought on its ally’s side. Kim Jong-un likely knows this as well. In addition, Hwang said that Kim Jong-il believed the United States would use nuclear weapons if North Korea attacked the South.213 This helps explain why the regime has been pursuing nuclear weapons since the 1950s. It is also an indication that US declaratory policy works. On the other hand, the regime believes that if it possesses nuclear weapons, the United States will be deterred from using its nuclear weapons because a nuclear power will not attack another nuclear-armed country.

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

#### That solves –it enables tailored remedies that promote competition but maintain efficiency

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

More Creative Alternatives

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

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

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

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

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

a. Enabling Competition Within the Platform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

over 15,500 members.357

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

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

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

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

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

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

C. Plaintiffs Already Bear the Burden on Balancing

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

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

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

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

### acquisition adv – 1ac

Advantage 2 is Acquisition –

#### The full scope of *Amex* is unclear—companies will exploit it to misuse their platforms—that’s effectively impossible to police

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

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

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

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

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

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

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

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

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

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

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

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

#### This is accelerating—recent Circuit decisions doubled down on *Amex* – to expand it to new sectors, and mergers

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

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

Antitrust in tech markets after American Express

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

Sabre/Farelogix

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

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

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

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

Qualcomm

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

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

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

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

Down the competitive effects rabbit hole

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

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

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

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

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

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

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

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

A modern antitrust in peril

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

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

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

#### First, mergers—*Amex* undermines enforcement against nascent acquisitions

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

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

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

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

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

#### Prospect of big tech acquisition dampens innovation

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

E. Whither Innovation?

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

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

CONCLUSION: “ANTITRUST IS GREEDY”

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

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

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

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

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

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

TECH GIANTS LEAD IN AI ACQUISITIONS

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

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

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

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

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

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

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

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

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

Foster and Arnold ’20 – Researchers at ***Georgetown’s*** Center for Security and Emerging Technology [Dakota; Visiting Researcher at Georgetown’s Center for Security and Emerging Technology, graduate student in the Department of War Studies at King’s College London, conducted research on terrorism and U.S. national security policy for the U.S. military, the House Foreign Affairs Committee, and the Washington Institute; Zachary; Research Fellow at Georgetown’s Center for Security and Emerging Technology, where he focuses on AI investment flows and workforce trends, J.D. from Yale Law School; 2020; "Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI"; Center for Security and Emerging Technology at Georgetown University; https://www.geopolitic.ro/wp-content/uploads/2020/05/CSET-Antitrust-and-Artificial-Intelligence.pdf; accessed 8-10-2021]

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

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

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

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

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

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

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

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

NEW TECHNOLOGIES, OLD PROBLEMS

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

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

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

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

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

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

THE MILITARIES OF TOMORROW

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

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

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

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

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

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

A LOSING GAME

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

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

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

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

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

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

#### Second, platform misuse—that enables a host of bad practices—undermines cyber security

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

So, the divergence in antitrust enforcement may reflect differences over these data-opolies’ perceived harms. Ordinarily the harm from monopolies are higher prices, less output, or reduced quality. It superficially appears that data-opolies pose little, if any risk, of these harms. Unlike some pharmaceuticals, data-opolies do not charge consumers exorbitant prices. Most of Google’s and Facebook’s consumer products are ostensibly “free.” The data-opolies’ scale can also mean higher quality products. The more people use a particular search engine, the more the search engine’s algorithm can learn users’ preferences, the more relevant the search results will likely be, which in turn will likely attract others to the search engine, and the positive feedback continues. As Robert Bork argued, there “is no coherent case for monopolization because a search engine, like Google, is free to consumers and they can switch to an alternative search engine with a click.” How Data-opolies Harm But higher prices are not the only way for powerful companies to harm their consumers or the rest of society. Upon closer examination, data-opolies can pose at least eight potential harms. Lower-quality products with less privacy. Companies, antitrust authorities increasingly recognize, can compete on privacy and protecting data. But without competition, data-opolies face less pressure. They can depress privacy protection below competitive levels and collect personal data above competitive levels. The collection of too much personal data can be the equivalent of charging an excessive price. Data-opolies can also fail to disclose what data they collect and how they will use the data. They face little competitive pressure to change their opaque privacy policies. Even if a data-opoly improves its privacy statement, so what? The current notice-and-consent regime is meaningless when there are no viable competitive alternatives and the bargaining power is so unequal. Surveillance and security risks. In a monopolized market, personal data is concentrated in a few firms. Consumers have limited outside options that offer better privacy protection. This raises additional risks, including: Government capture. The fewer the number of firms controlling the personal data, the greater the potential risk that a government will “capture” the firm. Companies need things from government; governments often want access to data. When there are only a few firms, this can increase the likelihood of companies secretly cooperating with the government to provide access to data. China, for example, relies on its data-opolies to better monitor its population. Covert surveillance. Even if the government cannot capture a data-opoly, its rich data-trove increases a government’s incentive to circumvent the data-opoly’s privacy protections to tap into the personal data. Even if the government can’t strike a deal to access the data directly, it may be able to do so covertly. Implications of a data policy violation/security breach. Data-opolies have greater incentives to prevent a breach than do typical firms. But with more personal data concentrated in fewer companies, hackers, marketers, political consultants, among others, have even greater incentives to find ways to circumvent or breach the dominant firm’s security measures. The concentration of data means that if one of them is breached, the harm done could be orders of magnitude greater than with a normal company. While consumers may be outraged, a dominant firm has less reason to worry of consumers’ switching to rivals. Wealth transfer to data-opolies. Even when their products and services are ostensibly “free,” data-opolies can extract significant wealth in several ways that they otherwise couldn’t in a competitive market: First, data-opolies can extract wealth by getting personal data without having to pay for the data’s fair market value. The personal data collected may be worth far more than the cost of providing the “free” service. The fact that the service is “free” does not mean we are fairly compensated for our data. Thus, data-opolies have a strong economic incentive to maintain the status quo, in which users, as the MIT Technology Review put it, “have little idea how much personal data they have provided, how it is used, and what it is worth.” If the public knew, and if they had viable alternatives, they might hold out for compensation. Second, something similar can happen but with the content users create. Data-opolies can extract wealth by getting creative content from users for free. In a competitive market, users could conceivably demand compensation not only for their data but also their contributions to YouTube and Facebook. With no viable alternatives, they cannot. Third, data-opolies can extract wealth from sellers upstream. One example is when data-opolies scrape valuable content from photographers, authors, musicians, and other websites and post it on their own platform. In this case, the wealth of the data-opolies comes at the expense of other businesses in their value chain. Fourth, data-opolies can extract our wealth indirectly, when their higher advertising fees are passed along in the prices for the advertised goods and services. If the data-opolies faced more competitors for their advertising services, ads could cost even less — and therefore so might the products being advertised. Finally, data-opolies can extract wealth from both sellers upstream and consumers downstream by facilitating or engaging in “behavioral discrimination,” a form of price discrimination based on past behavior — like, say, your internet browsing. They can use the personal data to get people to buy things they did not necessarily want at the highest price they are willing to pay. As data-opolies expand their platforms to digital personal assistants, the Internet of Things, and smart technologies, the concern is that their data advantage will increase their competitive advantage and market power. As a result, the data-opolies’ monopoly profits will likely increase, at our expense. Loss of trust. Market economies rely on trust. For online markets to deliver their benefits, people must trust firms and their use of the personal data. But as technology evolves and more personal data is collected, we are increasingly aware that a few powerful firms are using our personal information for their own benefit, not ours. When data-opolies degrade privacy protections below competitive levels, some consumers will choose not “to share their data, to limit their data sharing with companies, or even to lie when providing information,” as the UK’s Competition and Markets Authority put it. Consumers may forgo the data-opolies’ services, which they otherwise would have used if privacy competition were robust. This loss would represent what economists call a deadweight welfare loss. In other words, as distrust increases, society overall becomes worse off. Significant costs on third parties. Additionally, data-opolies that control a key platform, like a mobile phone operating system, can cheaply exclude rivals by: steering users and advertisers to their own products and services to the detriment of rival sellers on the platform (and contrary to consumers’ wishes) degrading an independent app’s functionality reducing traffic to an independent app by making it harder to find on its search engine or app store Data-opolies can also impose costs on companies seeking to protect our privacy interests. My book with Ariel Ezrachi, Virtual Competition, discusses, for example, Google’s kicking the privacy app Disconnect out of its Android app store. Less innovation in markets dominated by data-opolies. Data-opolies can chill innovation with a weapon that earlier monopolies lacked. Allen Grunes and I call it the “now-casting radar.” Our book Big Data and Competition Policy explores how some platforms have a relative advantage in accessing and analyzing data to discern consumer trends well before others. Data-opolies can use their relative advantage to see what products or services are becoming more popular. With their now-casting radar, data-opolies can acquire or squelch these nascent competitive threats. Social and moral concerns. Historically, antitrust has also been concerned with how monopolies can hinder individual autonomy. Data-opolies can also hurt individual autonomy. To start with, they can direct (and limit) opportunities for startups that subsist on their super-platform. This includes third-party sellers that rely on Amazon’s platform to reach consumers, newspapers and journalists that depend on Facebook and Google to reach younger readers, and, as the European Commission’s Google Shopping Case explores, companies that depend on traffic from Google’s search engine. But the autonomy concerns go beyond the constellation of app developers, sellers, journalists, musicians, writers, photographers, and artists dependent on the data-opoly to reach users. Every individual’s autonomy is at stake. In January, the hedge fund Jana Partners joined the California State Teachers’ Retirement pension fund to demand that Apple do more to address the effects of its devices on children. As The Economist noted, “You know you are in trouble if a Wall Street firm is lecturing you about morality.” The concern is that the data-opolies’ products are purposefully addictive, and thereby eroding individuals’ ability to make free choices. There is an interesting counterargument that’s worth noting, based on the interplay between monopoly power and competition. On the one hand, in monopolized markets, consumers have fewer competitive options. So, arguably, there is less need to addict them. On the other hand, data-opolies, like Facebook and Google, even without significant rivals, can increase profits by increasing our engagement with their products. So, data-opolies can have an incentive to exploit behavioral biases and imperfect willpower to addict users — whether watching YouTube videos or posting on Instagram. Political concerns. Economic power often translates into political power. Unlike earlier monopolies, data-opolies, given how they interact with individuals, possess a more powerful tool: namely, the ability to affect the public debate and our perception of right and wrong. Many people now receive their news from social media platforms. But the news isn’t just passively transmitted. Data-opolies can affect how we feel and think. Facebook, for example, in an “emotional contagion” study, manipulated 689,003 users’ emotions by altering their news feed. Other risks of this sort include: Bias. In filtering the information we receive based on our preferences, data-opolies can reduce the viewpoints we receive, thereby leading to “echo chambers” and “filter bubbles.” Censorship. Data-opolies, through their platform, can control or block content that users receive, and enforce governmental censorship of political or religious information. Manipulation. Data-opolies can promote stories that further their particular business or political interests, instead of their relevance or quality. Limiting the Power of Data-opolies Upon closer examination, data-opolies can actually be more dangerous than traditional monopolies. They can affect not only our wallets but our privacy, autonomy, democracy, and well-being. Markets dominated by these data-opolies will not necessarily self-correct. Network effects, high switching costs for consumers (given the lack of data portability and user rights over their data), and weak privacy protection help data-opolies maintain their dominance. Luckily, global antitrust enforcement can help. The Reagan administration, in espousing the then-popular Chicago School of economics beliefs, discounted concerns over monopolies. The Supreme Court, relying on faulty economic reasoning, surmised that charging monopoly prices was “an important element of the free market system.” With the rise of a progressive, anti-monopoly New Brandeis School, the pendulum is swinging the other way. Given the emergence of data-opolies, this is a welcomed change.

#### Platform monopoly ensures any breach cascades, collapses society

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

#### Ensures cyberattacks go nuclear

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

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

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

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

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

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

#### Removing Amex’s special rule for platforms solves – leads to a strong rule of reason approach

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

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

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

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

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

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

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

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

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

#### This is the least intrusive mechanism—it only punishes bad practices and allows innovative conduct to continue

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

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

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

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

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

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

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

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

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

#### Which creates clear, enforceable guidelines

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

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

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

Fine-tuning the proper aims of a nonpredictive antitrust

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

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

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

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

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

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

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

Nonpredictive antitrust enforcement in practice

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

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

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

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

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

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

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

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

## 2AC

### Platforms

#### Blanket opposition to U.S. military force sanctions atrocities – their critique is a conceptual shortcut that forces us to draw dangerous conclusions about war. The solution is pragmatic examination of ethical responses to particular conflicts—turns their Parmar evidence

Walzer 14 – Professor emeritus at the Institute for Advanced Study and editor emeritus of Dissent Magazine.

Michael Walzer, “A Foreign Policy for the Left,” *Dissent*, Spring 2014, <https://www.dissentmagazine.org/article/a-foreign-policy-for-the-left>.

There are other examples of leftist support for the use of force—even by capitalist countries like the United States. Some Marxist militants argue that any war fought by a capitalist country is, by definition, an imperialist war. But the war in Korea, which was fought by an alliance of capitalist countries, was supported by most people on the American and European democratic left. A war against aggression, approved by the UN, could plausibly be called a just war. Nonetheless, there was left opposition: Michael Harrington (as a Catholic Worker) and David Dellinger (with the War Resisters League) marched against the war; I. F. Stone called it unjust, bravely and (I think) wrongly. The future editors of Dissent (breaking with many of their fellow Shachtmanites) supported the war, no doubt critically, which was the right way to do it.

In his history of the American left, Michael Kazin writes that ever since Woodrow Wilson’s administration, “liberals had ardently promoted wars to preserve and advance democracy. The conflict over Vietnam put an end to that tradition for decades to come.” But by the 1990s, a more minimalist liberal and left defense of war had emerged—heralded by the Black Book on Bosnia produced by the editors of the New Republic in 1995 and given full intellectual legitimacy by Samantha Power’s A Problem from Hell in 2002. The aim of what was called “humanitarian intervention” was not to promote democracy but to stop mass murder, rape, and ethnic cleansing.

NATO’s Kosovo war of 1999, driven in part by the Srebrenica massacre, was a near-left war: the Labour Party was in power in Britain, the Socialists in France, a coalition of Social Democrats and Greens in Germany, and the Democratic Left in Italy. The Clinton administration was a weak version of this left politics, but it provided the leadership essential to the war effort. Military intervention in Kosovo was opposed by people on the farther left, who could not credit its humanitarian motive. I remember being told by a “reconstructed” communist at the Gramsci Institute in Turin, Italy in March 1999 that NATO “must be” aiming to seize control of the Black Sea from the Russians. There was no other explanation for the “imperialist” war.

The more persuasive far left critique came later: that left interventionism in Kosovo made the war in Iraq easier to plan and defend. But that can’t be an argument against the use of force for urgent humanitarian reasons. It is rather an argument for making distinctions, which is always necessary in politics. The Iraq War was not a humanitarian intervention; it was (according to one of its justifications) a war to overthrow a brutal dictator and promote democracy. There were left arguments and precedents for a war of that sort, as I’ve already suggested, but there was also a very strong left argument against it—an argument made, perhaps for the first time, by the Socialist Party in 1917: “Democracy can never be imposed upon any country by a foreign power by force of arms.”

The Labour Party’s David Miliband was right when he said in 2008 that during the previous decades “the neoconservative movement seemed more certain about spreading democracy around the world” than the left did. The left, he argued, was “conflicted between the desirability of the goal and its qualms about the use of military means.” The qualms are reasonable when it comes to democracy promotion, but not, I think, when it comes to stopping a massacre. The campaign for intervention in Darfur, not the invasion of Iraq, was the closest continuation of the near-left’s Kosovo war.

5. National Liberation

Left internationalists don’t only argue about whether “we” should use force, but also about whether other people should do so. With regard to imperial powers, the answer is generally negative, which is generally right. Wars of national liberation, by contrast, are almost always supported, which, again, is almost always right. It is hard to remember, but in the 1940s the Zionist struggle for a Jewish state in Palestine was enthusiastically supported by most American and even most European leftists. W.E.B. Du Bois, for example, argued in 1944 for a post-imperial Middle East where the Jewish people would be able “to achieve its own national liberation in its own way and in line with its own culture and traditions.” Leftists also supported the partition of Palestine, when the UN voted for it in 1947—this was the first version of the “two-state solution.” For different reasons, British imperialists and Trotskyists everywhere were hostile to the idea.

But the best case with which to think about national liberation is the Algerian war for independence, where the struggle was led by the National Liberation Front (FLN), a secular left political movement whose militants had defeated other liberation movements, mostly by killing their members. The FLN’s war was just, but it was fought in murderous ways, which many French leftists defended—though these same people rightly condemned the murderous ways of the French oppressors. The oppressed, not for the first or last time, were awarded a right to be murderous. This is a typical leftist award, though I believe that it cannot be justified.

Consider Jean-Paul Sartre’s defense of FLN terrorism: “To shoot down a European is to kill two birds with one stone, to destroy an oppressor and the man he oppresses at the same time: there remains a dead man and a free man.” As I argued in Just and Unjust Wars, the claim that it takes one dead European to produce one free Algerian is ominous. There weren’t enough Europeans in Algeria in the late 1950s; more would have had to be brought over if the Algerians were to liberate themselves by Sartrean means. Needless to say, Sartre himself did not volunteer to be the bird that gets killed so that the other can be reborn. Arguments of this sort suggest a manipulative view of morality, which is fairly common among right-wing “realists” but clearly has its left-wing version.

6. Shortcuts

Arguments about the use of force for humanitarian or liberationist purposes are complicated; they require close attention to local circumstance and particular histories. We have to think hard about the relation of means to ends. All this is difficult, and doing it right will produce judgments that seem, though they are not, radically inconsistent—like supporting Algerian independence but rejecting FLN terrorism. So ideological shortcuts have been worked out to make the judgments easier, shortcuts that are popular among many leftists and that require a left critique.

I have already alluded to one common shortcut, which is to support oppressed men and women, whatever they do. The difficulty is that the phrase “the oppressed” does not name an actual agent politically engaged in the world. The agents we encounter are organizations and movements that claim to be acting on behalf of the oppressed. Sometimes that claim is justified, but sometimes it isn’t; sometimes these groups are simply a new elite, the future oppressors of the oppressed. What is going on is a replacement at the top, not an uprising from below. Solidarity with oppressed men and women requires us to figure out what these people really want and need and then to look critically at the groups that claim to be acting in their name: Are they representative? Are they responsive? But there is no shortcut for doing that; it takes hard work and intellectual honesty.

The second shortcut, perhaps even more popular than the first, is to stand up always against “imperialism”—or, a shortcut inside the shortcut, always to oppose American policies abroad. Anti-Americanism is a common left politics, which, again, sometimes gets things right, and sometimes doesn’t. I believe that it got things right in Vietnam in 1967; it mostly got things right from the beginning of the twentieth century to the end in Central and South America; it got Iran right in 1953 (when leftists criticized the anti-Mossadegh coup), and Iraq in 2003; it gets NAFTA right, and the IMF, too. But that’s still not enough to make it a reliable shortcut. Remember that the defeat of Nazism and Stalinism, the two most brutal political regimes in world history, was in significant ways American work. This was work that many people on the left supported, as we should have.

In 1967 Dwight Macdonald wrote to Mary McCarthy that the American war in Vietnam proved “that despite all the good things about our internal political-social-cultural life, we have become an imperialist power, and one that, partly because of these domestic virtues, is a most inept one.” We have continued to be inept: in December 2005, with 100,000 American soldiers in Iraq, we organized an election—and our man came in third. This is a result, I think, without precedent in imperial history. Macdonald’s understanding of U.S. imperialism reflects a political intelligence and a moral balance that is mostly missing in contemporary anti-American writing.

The anti-American shortcut sometimes produces a short-circuited politics—as in the Syrian case where leftist writers predicted terrible consequences if the Americans intervened on the side of the anti-Assad forces. The predictions have come true even though the United States didn’t intervene, but once it was clear that the awfulness was not America’s fault, many leftists simply lost interest—except for an ongoing but not very effective engagement on behalf of the war’s victims.

Who was responsible for the ongoing war, for the killing, the terror, and the refugee crisis; what social forces were involved; what should we (on the left) make of them and how should we respond to them? This kind of analysis, standard in left critiques of imperialism, has mostly been missing. One reason for its absence is that it offers no opportunity to criticize America; a second reason is that it would require a close reading and sharp critique of Islamist politics.

Another much-used shortcut (though it doesn’t work in the Syrian case) is to oppose everything Israel does and to blame it for much that it hasn’t done, since it is the “lackey” of American imperialism or, alternatively, the dominant force in shaping American foreign policy. The policies of the current Israeli government require radical criticism—the occupation, the settlements, the refusal to suppress Jewish hooliganism on the West Bank. Nonetheless, the anti-Israel shortcut is an example, to paraphrase August Bebel, of the leftism of fools.

The last shortcut is simply to support every government that calls itself leftist or anti-imperialist and sets itself against American interests. This is different from the old Stalinist shortcut: support the Soviet Union whatever it does because it is the first proletarian dictatorship and the first workers’ paradise. That kind of politics is, I think, definitively finished, though it had a brief afterlife, focused on China and then, with very few believers, on Albania and North Korea. The more recent version celebrates Maximal Leaders like Nasser, Castro, or Hugo Chávez—along with occasional short-lived infatuations, as in the case of Michel Foucault and the future Ayatollah Khomeini. Leftist enthusiasm for populist dictatorships is one of our sad stories, which ends when resources run out, the failure to build the economy is suddenly apparent, and the military takes over. But often the Maximal Leader is a military man himself, and the repressive role of the army simply becomes more obvious over time. In Latin America today, the better left is represented by socialists and social democrats who reject demagogic populism and struggle to produce economic growth, greater equality, and a stronger welfare state—and who attract less enthusiasm from American leftists than they deserve.

7. The Politics of Pretending

Most leftists are idealists, and so we tend to idealize other people and to imagine that the world is more hospitable to our ideas than it actually is. At the same time, we know better; so I call this the politics of pretending. Consider the response of many leftists to the al Qaeda attack of 9/11. They argued that the United States should call the attack a crime and look to the UN and the International Criminal Court to deal with the criminals. That was the “Dial 911” response to 9/11 (it has been repeated again and again in response to later terrorist attacks), and it would have made sense if we lived in a world that was actually run by the UN and the ICC. But, as I argued in Dissent at the time, there was no one answering the phone at 911. Self-help isn’t, indeed, the only effective and justified response to criminal attacks; different forms of mutual assistance and collective security are possible, and the left should take a forward position in exploring them. But self-help has to be part of the story, given the world we live in, and it isn’t a good idea to pretend otherwise.

Another example: some leftists who opposed the Kosovo intervention argued that it didn’t have what every legal and justified use of force requires: UN authorization. Indeed, it didn’t. The UN Security Council is incapable, almost all the time, of acting in a timely way. Think of the Vietnamese invasion of Cambodia to shut down the killing fields; or the Indian invasion of East Pakistan, now Bangladesh, to end the terror there; or the Tanzanian invasion of Uganda to overthrow the murderous regime of Idi Amin. None of these had or could have gotten UN approval. Many leftists opposed each of these interventions, pretending that the UN was already what leftists want it to be, an effective political agent. It isn’t that, and so the unilateral use of force is often, as Jürgen Habermas said of the Kosovo case, “illegal but morally necessary.”

The best and last example of leftist pretending is the insistence on the reasonableness of people who give no sign of being reasonable. Paul Berman writes of the large numbers of French socialists who supported the Munich Agreement that “they gazed across the Rhine and simply refused to believe that millions of upstanding Germans had enlisted in a political movement whose animating principles were paranoid conspiracy theories [and] blood-curdling hatreds. . . .” In the same spirit, many leftists were eager to describe the Chinese communists as “agrarian reformers.” And many today have been quick to grant the legitimacy of Islamist opposition to American bases in Saudi Arabia, say, or to the existence of Israel—and to ignore the demand for a shari’a state and the radical subordination of women. I am fairly sure that most of the people involved in all these cases knew, deep down, that they were pretending.

### T Per Se

#### CI—prohibitions are enacted via legal tests—the threshold of the test determines how much conduct gets prohibited

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

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

#### By LOWERING the threshold for plaintiffs, the aff makes MORE CONDUCT illegal

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(“Defining Exclusionary Conduct: Section 2, The Rule Of Reason, and the Unifying Principle Underlying Antitrust Rules,” Antitrust Law Journal , 2006, Vol. 73, No. 2 (2006), pp. 435-482)

The first step in detecting an underlying principle for crafting Section 2 legal tests is to examine the comparatively few circumstances in which the legality of conduct under Section 2 is relatively clear.30 What is striking is that courts do not implement Section 2 through a single legal test. Rather, Section 2 courts often apply different liability tests to different conduct. Moreover, these liability tests (either express or implied) are "interventionist" to varying degrees. Certain conduct is unlawful only in very specific circumstances or not at all; the applicable doctrine is relatively less interventionist. For other conduct, the applica- ble test allows for illegality in a broader set of circumstances, and the test is more interventionist. At the extreme, certain conduct is virtually per se illegal under Section 2.

#### The Sherman, Clayton and FTC Acts are the three core antitrust laws.

Hammond 16 – Phil and Bobbie Sanfilippo Chair and Professor of Law, Santa Clara University School of Law, Director of the Broadband Institute of California

Allen S. Hammond IV, “Tripartite Regulation in the Public’s Interest: The Overlapping Roles of the DOJ, FCC, and FTC in Consolidation of the Communications Industry,” The Communication Crisis in America, And How to Fix It, October 2016, https://link.springer.com/chapter/10.1057/978-1-349-94925-0\_10

The Sherman, Clayton, and FTC Acts are the three core antitrust laws still in effect (Federal Trade Commission 2015b). The three agencies—DOJ, FTC, and FCC—derive shared antitrust authority from the Clayton Act. The FCC has eschewed the exercise of its antitrust authority under the Clayton Act in favor of the measure of antitrust authority it enjoys via the Communications Act’s public-interest standard which subsumes antitrust considerations. 6 The agencies avoid duplicated effort by coordinating their activities pursuant to interagency agreements.

### T Private

#### C/I: “Expand the scope of its core antitrust laws” requires modifying the applicability of the antitrust laws by a part of the private sector

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

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

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

#### The term “prohibition” includes indirect coercion and penalties.

Whyte 19 – Former Chief Legal Counsel, Montana Department of Revenue

Daniel J. Whyte, Brief of Respondents, Espinoza v. Montana Department of Revenue, 2019 U.S. Supreme Court Briefs Lexis 6391, Supreme Court of the United States, November 2019, LexisNexis

I.A The Free Exercise Clause bars laws "prohibiting the free exercise" of "religion." This Court has held that the term "prohibition" covers not only direct bans on religious practice, but also "indirect coercion or penalties on the free exercise of religion." Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (internal quotation marks omitted). Thus, in Trinity Lutheran, this Court held that when a church was barred from receiving a generally available benefit, it was penalized for being a church, in violation of the Free Exercise Clause.

### K Cap

#### It’s key to a nuanced critical stance – none of the claims in the 1ac are an indelible commitment to certain logics and the alt encourages refutation for its own sake

**Austin et al.**, Graduate Institute of International and Development Studies, **‘19**

(Jonathan Luke, Rocco Bellanova, University of Amsterdam, the Netherlands, Mareile Kaufmann, University of Oslo, Norway, “Doing and mediating critique: An invitation to practice Companionship,” Security Dialogue, 2019, Vol. 50(1) 3–19)

The **‘symmetry’ principle** has been the most common way of dealing with controversies and the **opposed critical capacities** they contain. This sociological principle declares that **all propositions** made in the world (i.e. knowledge claims, practices) about a specific state of affairs should ***initially*** be held **equally relevant** for a researcher. In this view, no particular knowledge claim or practice should be **discarded** from the scope of the analysis just because they have been socially abandoned, proved scientifically untenable, or because we **ethically** or **politically** disagree with them. The view was developed most prominently within the sociology of critical capacity and science and technology studies (Bijker, 1995), where it was operationalized as a means of analytically, ethically, and **ontologically ‘flattening’** the reading of any given situation to avoid the **a priori privileging** of any particular claim or phenomena. This flattening occurs under the analytical intuition that multiple perspectives and disagreements are crucially important to understanding social life.

This is a controversial viewpoint. For many, such an ‘equality of positioning’ is often taken to be ‘a denial of responsibility and critical inquiry’ (Haraway, 1991b: 191). More recently, it has been argued that the symmetrical approach has major political consequences. It appears, for example, that such an embrace of symmetry can unnecessarily offer credence to populist, racist, or misogynistic political viewpoints (Fuller, 2016). Likewise, the concept risks being ‘weaponized’ so as to demote or promote specific forms of expertise in ways that benefit particular political or economic interests (Collins et al., 2017). However, what is often **forgotten** when the symmetry principle is translated **into critical security studies** is that a symmetrical approach is part of a social scientific **research design**, and **not a necessary result** of research itself (Callon and Latour, 1992). Symmetrical research designs provide a **baseline** on which to begin studying **complex social phenomena**: understanding how political or social asymmetries come about requires **tracing** them from the point of their emergence as well as their continuous reinforcement. Accordingly, this principle **does not deny** that actors are different from each other, in **diverse positions** and with different resources, nor does it deny that controversies themselves **are not politically neutral**. It merely states that understanding (or indeed supporting) such **normative**, **ethical**, or **political** asymmetries requires that we first and foremost **develop a fuller descriptive understanding** of how they emerge and are solidified. To put it in the language of this article’s argument: the companions that critique engages with will **inevitably differ** in their commitments, and this disagreement must be fully considered. But this does not mean – **in the final analysis** – that the critic cannot **adjudicate between their claims** but, rather, that each of these companions is given an **initial equality of weighting**, and it is recognized that **none can be ignored** if an adequate critical position-taking **is ever to take place**.

#### Consequentialism is the only coherent framework for evaluation –you can’t determine if the alt is ethical without assessing the implications of adopting that approach to the world

Isaac, 2 – Professor of Poli Sci @ U Indiana, Bloomington

(Jeffrey, Ends, Means and Politics, Dissent, Vol 49, Iss. 2, Spring)

As writers such as Niccolo Machiavelli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness undercuts political responsibility. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one’s intention does not ensure the achievement of what one intends. Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of complicity in injustice. This is why, from the standpoint of politics--as opposed to religion--pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that politics is as much about unintended consequences as it is about intentions; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with “good” may engender impotence, it is often the pursuit of “good” that generates evil. This is the lesson of communism in the twentieth century: it is not enough that one’s goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

#### Existential threats outweigh – all life has infinite value and extinction eliminates the possibility for future generations – err negative, because of innate cognitive biases

GPP 17 (Global Priorities Project, Future of Humanity Institute at the University of Oxford, Ministry for Foreign Affairs of Finland, “Existential Risk: Diplomacy and Governance,” Global Priorities Project, 2017, <https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf>,

1.2. THE ETHICS OF EXISTENTIAL RISK In his book Reasons and Persons, Oxford philosopher Derek Parfit advanced an influential argument about the importance of avoiding extinction: I believe that if we destroy mankind, as we now can, this outcome will be much worse than most people think. Compare three outcomes: (1) Peace. (2) A nuclear war that kills 99% of the world’s existing population. (3) A nuclear war that kills 100%. (2) would be worse than (1), and (3) would be worse than (2). Which is the greater of these two differences? Most people believe that the greater difference is between (1) and (2). I believe that the difference between (2) and (3) is very much greater. ... The Earth will remain habitable for at least another billion years. Civilization began only a few thousand years ago. If we do not destroy mankind, these few thousand years may be only a tiny fraction of the whole of civilized human history. The difference between (2) and (3) may thus be the difference between this tiny fraction and all of the rest of this history. If we compare this possible history to a day, what has occurred so far is only a fraction of a second.65 In this argument, it seems that Parfit is assuming that the survivors of a nuclear war that kills 99% of the population would eventually be able to recover civilisation without long-term effect. As we have seen, this may not be a safe assumption – but for the purposes of this thought experiment, the point stands. What makes existential catastrophes especially bad is that they would “destroy the future,” as another Oxford philosopher, Nick Bostrom, puts it.66 This future could potentially be extremely long and full of flourishing, and would therefore have extremely large value. In standard risk analysis, when working out how to respond to risk, we work out the expected value of risk reduction, by weighing the probability that an action will prevent an adverse event against the severity of the event. Because the value of preventing existential catastrophe is so vast, even a tiny probability of prevention has huge expected value.67 Of course, there is persisting reasonable disagreement about ethics and there are a number of ways one might resist this conclusion.68 Therefore, it would be unjustified to be overconfident in Parfit and Bostrom’s argument. In some areas, government policy does give significant weight to future generations. For example, in assessing the risks of nuclear waste storage, governments have considered timeframes of thousands, hundreds of thousands, and even a million years.69 Justifications for this policy usually appeal to principles of intergenerational equity according to which future generations ought to get as much protection as current generations.70 Similarly, widely accepted norms of sustainable development require development that meets the needs of the current generation without compromising the ability of future generations to meet their own needs.71 However, when it comes to existential risk, it would seem that we fail to live up to principles of intergenerational equity. Existential catastrophe would not only give future generations less than the current generations; it would give them nothing. Indeed, reducing existential risk plausibly has a quite low cost for us in comparison with the huge expected value it has for future generations. In spite of this, relatively little is done to reduce existential risk. Unless we give up on norms of intergenerational equity, they give us a strong case for significantly increasing our efforts to reduce existential risks. 1.3. WHY EXISTENTIAL RISKS MAY BE SYSTEMATICALLY UNDERINVESTED IN, AND THE ROLE OF THE INTERNATIONAL COMMUNITY In spite of the importance of existential risk reduction, it probably receives less attention than is warranted. As a result, concerted international cooperation is required if we are to receive adequate protection from existential risks. 1.3.1. Why existential risks are likely to be underinvested in There are several reasons why existential risk reduction is likely to be underinvested in. Firstly, it is a global public good. Economic theory predicts that such goods tend to be underprovided. The benefits of existential risk reduction are widely and indivisibly dispersed around the globe from the countries responsible for taking action. Consequently, a country which reduces existential risk gains only a small portion of the benefits but bears the full brunt of the costs. Countries thus have strong incentives to free ride, receiving the benefits of risk reduction without contributing. As a result, too few do what is in the common interest. Secondly, as already suggested above, existential risk reduction is an intergenerational public good: most of the benefits are enjoyed by future generations who have no say in the political process. For these goods, the problem is temporal free riding: the current generation enjoys the benefits of inaction while future generations bear the costs. Thirdly, many existential risks, such as machine superintelligence, engineered pandemics, and solar geoengineering, pose an unprecedented and uncertain future threat. Consequently, it is hard to develop a satisfactory governance regime for them: there are few existing governance instruments which can be applied to these risks, and it is unclear what shape new instruments should take. In this way, our position with regard to these emerging risks is comparable to the one we faced when nuclear weapons first became available. Cognitive biases also lead people to underestimate existential risks. Since there have not been any catastrophes of this magnitude, these risks are not salient to politicians and the public.72 This is an example of the misapplication of the availability heuristic, a mental shortcut which assumes that something is important only if it can be readily recalled. Another cognitive bias affecting perceptions of existential risk is scope neglect. In a seminal 1992 study, three groups were asked how much they would be willing to pay to save 2,000, 20,000 or 200,000 birds from drowning in uncovered oil ponds. The groups answered $80, $78, and $88, respectively.73 In this case, the size of the benefits had little effect on the scale of the preferred response. People become numbed to the effect of saving lives when the numbers get too large. 74 Scope neglect is a particularly acute problem for existential risk because the numbers at stake are so large. Due to scope neglect, decision-makers are prone to treat existential risks in a similar way to problems which are less severe by many orders of magnitude. A wide range of other cognitive biases are likely to affect the evaluation of existential risks.75

#### Net benefit is contingent use of market logics – those are key to growth and innovation, but avoid the totalizing political economy they criticize

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

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

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

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

#### Turn—aff rejects ossified Chicagoan economics and allows antitrust to contest power and inequality—plaintiff burdens and the *Amex* decision are essential

Newman, Associate Professor, University of Miami School of Law, ‘21

(John, “Racist Antitrust, Antiracist Antitrust,” The Antitrust Bulletin, Sagepub)

The AmEx litigation thus yielded two bright spots: the Antitrust Division's decision to bring the case and Judge Garaufis's sophisticated decision. Both closely attended to structural power and inequity. Like Knights of the KKK, these were examples of antitrust directly confronting a power imbalance and seeking to redress its harmful effects.

But that success was short-lived. On appeal, the Second Circuit issued a sloppily reasoned decision for the defendant. (During oral arguments, one of the judges implied that the relevant market must also include cardholders because he personally received frequent credit card applications in the mail. 84 ) A disappointed Antitrust Division decided not to pursue the case further. A group of states led by Ohio, however, proceeded to appeal to the U.S. Supreme Court.

The majority opinion in Ohio v. AmEx carries all of the hallmarks of bad antitrust analysis, and poor-quality appellate review more generally. 85 It placed enormous weight on the "vertical vs. horizontal" dichotomy without appearing to recognize the horizontal nature of the restraints' effects. 86 Instead of analyzing the factual record before it, the majority simply ignored-and sometimes outright changed-inconvenient truths. 87 Instead of evaluating the relevant effects, the majority insisted on proof of one particular type of effect: an output reduction. 88 As to the regressive forced-subsidization effect-which was, again, part of the factual record-the majority opinion was silent. Instead, the majority conjured up a novel effect, positing without support the idea that AmEx's restraints were actually beneficial for "low-income customers. " 89

Today, the widely felt and regressive effects of AmEx's rules continue unabated. Given the racialized nature of wealth and income inequality in the United States, 90 those effects contribute to historically rooted structural inequity. A case that had begun so promisingly ended in ignominy-after something of a zenith at the trial-court level, AmEx now stands as a nadir of modem antitrust.

D. A Path Forward

As bookends for the turbulent 1980s, Knights of the KKK and SCTLA represent two paths for antitrust. AmEx offers a contemporary view of what traveling each of those paths can look like. The antitrust enterprise might take a flexible approach, cognizant of real-world power structures, always seeking to protect the relatively powerless against the more powerful. On the other hand, antitrust might ossify, placing more weight on assigning categorical labels than on assessing actual effects and narrowing the analytical lens until concentrated power-antitrust law's raison d'etre 91-becomes largely irrelevant.

Cases like SCTLA and *AmEx*, though troubling, may nonetheless offer useful insights. Set upon the right path, antitrust can serve as a useful tool in moving toward a more just society. Toward that end, four normative suggestions follow.

First, do not place undue weight on the "horizontal versus vertical" distinction. Some horizontal restraints are harmful, but not every horizontal agreement deserves hasty condemnation. The SCTLA majority allowed a label ("horizontal") to obscure a lack of power. Similarly, Justice Thomas's defendant-friendly reasoning in AmEx hinged in part on his statement that "vertical restraints are different" from horizontal ones. 92 But such broad pronouncements elide the fact that vertical restraints-like the ones at issue in AmEx-can cause effects identical to those caused by harmful horizontal restraints. 93

Second, do not place undue weight on categorizing conduct as "price-fixing," "a restraint on output," and the like. A classification system can offer value. But, like any other tool, it can be pushed far beyond its usefulness. Labeling the lawyers' strike "price-fixing" ( or, alternatively, a "naked restraint on output") was essentially the beginning and end of the SCTLA Court's analysis. Yet not all price-setting agreements are equally likely to cause harm, as most of those very same Justices had previously recognized. 94 A strike functions by temporarily disrupting the internal workings of a specific buyer of labor, 95 whereas the archetypical price-fixing cartel agreement functions by indefinitely controlling the market for a product. 96 From an economic perspective, it makes little sense to treat the two as analytically identical. Classification systems can obscure important nuance, in addition to posing the obvious risk of misclassification. 97

Third, do not artificially narrow the analytical lens by insisting on proof of a particular type of effect. Leading treatises, 98 law-school casebooks, 99 amicus briefs, 100 and journal articles 101 suggest that all of antitrust can be boiled down to simple analysis of output effects. 102 As Bork put it, "The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental. " 103 Antitrust law's output obsession may well have played a role in the SCTLA decision-recall the majority's characterization of the strike as a "naked restraint on price and output." The AmEx majority clearly fell into this trap, insisting that the plaintiffs demonstrate an output reduction despite abundant evidence of actual anticompetitive effects. This makes little analytical sense. Output reductions can be harmful or beneficial to consumers. Conduct can simultaneously push the output of multiple products in different directions. And anticompetitive conduct can be harmful without affecting output levels at all. 104 All of this counsels against overreliance on a single type of effect.

Like most disciplines, antitrust has developed a variety of labels and heuristics. But when analytical tools begin to consume the analysis, antitrust can lose sight of its target. An analytical tool is just that: a tool, to be used when it is helpful and set aside when it is not. To be clear, this is not a call for the abandonment of economic methodology. It is instead a call for better economics, tailored to suit the task at hand. And what is that?

Fourth, antitrust analysis must center the overarching purpose of the law itself: countering concentrated power. 105 Amid the complexity of contemporary markets, it can be easy to lose sight of that goal. This may help to explain the SCTLA and AmEx opinions, both of which were regressive in nature. It may also help to explain the federal enforcement agencies' otherwise-puzzling decisions to weigh in against efforts by rideshare drivers-disproportionately people ofcolor 106 -to organize. 107 Through a narrow lens, collective organizing by workers can be viewed as "horizontal price-fixing" or "outputreducing," as it was in SCTLA. 108 But, stepping back for a moment, is there any reason to worry that rideshare drivers will exercise dominance over Uber and Lyft, even if they receive limited collective bargaining rights? Keeping antitrust's goal in view is appropriate not only on deontological grounds but also on utilitarian ones: It allows scarce enforcement resources to be more helpfully allocated.

Divergent paths lay open. The first leads to ossification and erroneous outcomes. 109 When antitrust analysis is overly constricted, it risks exacerbating systemic inequality and becomes prone to harming those whom the laws were meant to protect. The alternative is a more flexible, robust approach attuned to economic realities, one that allows enforcers and judges to maintain focus on furthering the law's fundamental purpose. If-but only if-the antitrust enterprise does so, it can play a vital role in helping to correct structural imbalances of power.

#### Tech and adaptation prevent apocalyptic collapse – reject pessimistic fear mongering

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Ronald. March 12. “Climate Change Problems Will Be Solved Through Economic Growth” <https://reason.com/blog/2018/03/12/climate-change-problems-will-be-solved-t>

"It is, I promise, worse than you think," David Wallace-Wells wrote in an infamously apocalyptic 2017 New York Magazine article. "Indeed, absent a significant adjustment to how billions of humans conduct their lives, parts of the Earth will likely become close to uninhabitable, and other parts horrifically inhospitable, as soon as the end of this century."

The "it" is man-made climate change. Temperatures will become scalding, crops will wither, and rising seas will inundate coastal cities, Wallace-Wells warns. But toward the end of his screed, he somewhat dismissively observes that "by and large, the scientists have an enormous confidence in the ingenuity of humans....Now we've found a way to engineer our own doomsday, and surely we will find a way to engineer our way out of it, one way or another."

Over at Scientific American, John Horgan considers some eco-modernist views on how humanity will indeed go about engineering our way out of the problems that climate change may pose. In an essay called "Should We Chill Out About Global Warming?," Horgan reports the more dynamic and positive analyses of two eco-modernist thinkers, Harvard psychologist Steven Pinker and science journalist Will Boisvert.

In an essay for The Breakthrough Journal, Pinker notes that such optimism "is commonly dismissed as the 'faith that technology will save us.' In fact, it is a skepticism that the status quo will doom us—that knowledge and behavior will remain frozen in their current state for perpetuity. Indeed, a naive faith in stasis has repeatedly led to prophecies of environmental doomsdays that never happened." In his new book, Enlightenment Now, Pinker points out that "as the world gets richer and more tech-savvy, it dematerializes, decarbonizes, and densifies, sparing land and species." Economic growth and technological progress are the solutions not only to climate change but to most of the problems that bedevil humanity.

Boisvert, meanwhile, tackles and rebuts the apocalyptic prophecies made by eco-pessimists like Wallace-Wells, specifically with regard to food production and availabilty, water supplies, heat waves, and rising seas.

"No, this isn't a denialist screed," Boisvert writes. "Human greenhouse emissions will warm the planet, raise the seas and derange the weather, and the resulting heat, flood and drought will be cataclysmic. Cataclysmic—but not apocalyptic. While the climate upheaval will be large, the consequences for human well-being will be small. Looked at in the broader context of economic development, climate change will barely slow our progress in the effort to raise living standards."

Boisvert proceeds to show how a series of technologies—drought-resistant crops, cheap desalination, widespread adoption of air-conditioning, modern construction techniques—will ameliorate and overcome the problems caused by rising temperatures. He is entirely correct when he notes, "The most inexorable feature of climate-change modeling isn't the advance of the sea but the steady economic growth that will make life better despite global warming."

Horgan, Pinker, and Boisvert are all essentially endorsing what I have called "the progress solution" to climate change. As I wrote in 2009, "It is surely not unreasonable to argue that if one wants to help future generations deal with climate change, the best policies would be those that encourage rapid economic growth. This would endow future generations with the wealth and superior technologies that could be used to handle whatever comes at them including climate change." Six years later I added that that "richer is more climate-friendly, especially for developing countries. Why? Because faster growth means higher incomes, which correlate with lower population growth. Greater wealth also means higher agricultural productivity, freeing up land for forests to grow as well as speedier progress toward developing and deploying cheaper non–fossil fuel energy technologies. These trends can act synergistically to ameliorate man-made climate change."

Horgan concludes, "Greens fear that optimism will foster complacency and hence undermine activism. But I find the essays of Pinker and Boisvert inspiring, not enervating....These days, despair is a bigger problem than optimism." Counseling despair has always been wrong when human ingenuity is left free to solve problems, and that will prove to be the case with climate change as well.

#### The world is getting better—COVID represents an opportunity to rebuild a better world, but an orientation toward global political engagement is key—the alt forecloses that possibility

Bates Ramirez 3/22 – Senior editor of Singularity Hub, a publication that covers news related to technology and global problems.

Vanessa Bates Ramirez, “After Coronavirus the World Will Never Be the Same. But Maybe, It Can Be Better,” *Singularity Hub*, 22 March 2020, https://singularityhub.com/2020/03/22/after-coronavirus-the-world-will-never-be-the-same-but-maybe-it-can-be-better/

But what if life never fully goes back to how it was pre-coronavirus? What if this epidemic is a turning point, and after it the world is never the same?

More importantly—or, at least, more optimistically—what if the world could come out of this crisis better than it was before?

Jamie Metzl, technology and healthcare futurist, geopolitical expert, entrepreneur, author of Hacking Darwin: Genetic Engineering and the Future of Humanity, and Senior Fellow of the Atlantic Council, thinks this is possible—but it all depends on what we do and how we behave right now. In a talk at Singularity University’s virtual summit on COVID-19 last week, Metzl explained why he believes that we’re never going “back to normal”—and what we should be doing now to make the new normal a good one.

Marks of History

For many of us, the most impactful geopolitical event that’s happened during our lifetime was the terrorist attacks of September 11, 2001. The world changed that day, and it’s never returned to how it was before.

A flu-like pandemic with a relatively low mortality rate may seem minor compared to the deliberate murder of thousands of innocent people. But, Metzl said, “It’s my contention that this isn’t a 2001 moment, this is something much bigger. I think of this as a 1941 moment.”

1941 was the thick of World War II. Nobody knew what the outcome of the war was going to be, everybody was terrified, and the US and its allies were losing the war. “But even in the height of those darkest of times,” Metzl said, “people began imagining what the future world would look.”

It was 1941 when President Roosevelt gave his famous Four Freedoms speech, and when American and British leadership issued the Atlantic Charter, which set out their vision for the post-war international order. To this day, our lives exist within that order.

The situation we’re in right now is, of course, different; it’s not a war. It is, in Metzl’s words, “a convergence of the worlds of science and biology and the world of geopolitics.” And as the coronavirus crisis continues to play out, its geopolitical implications are going to become much greater.

The Old World Is Dying

Metzl shared a quote from Italian Communist theorist Antonio Gramsci, written in the 1930s: “The old world is dying and the new world struggles to be born. Now is the time of monsters.”

Oof—that’s a big statement.

Metzl deconstructed it. For starters, he said, the post-WWII order that we’ve all grown up with was dying before this virus appeared.

Post-WWII planners envisioned a world that shared sovereignty and curbed nationalism. But we’re now in a period of dramatic re-nationalization of the world, with populist, extremist, or authoritarian leaders in power from Brazil to the US to China, and many countries in between.

Institutions intended to foster global cooperation (like the World Bank, the International Monetary Fund, the United Nations, and the World Health Organization) have been starved in the context of this re-nationalization, and as a result we don’t have effective structures in place to address global crises—and not just coronavirus. Think of climate change, protecting the oceans, preparing for a future of automation and AI; no country can independently take on or solve these massive challenges.

Not all is lost, though. “There are some positive pieces of this globalization story that we also need to be mindful of,” Metzl said.

When the Spanish flu pandemic hit in 1918, there were only 2 billion people on Earth, and of those 2 billion only 30 percent were literate; the “brain pool” for solving problems was about 600 million people.

Now we have a global population of 7.5 billion and an 86 percent literacy rate, which means over 6.5 billion people can be part of the effort to fix what’s broken. Just as crucially, we’re more connected to each other than we’ve ever been. It used to take thousands of years for knowledge to transfer; now it can fly across the world over the internet in minutes. “The pandemic moves at the speed of globalization, but so does the response,” Metzl said. “The tools we’re bringing to this fight are greater than anything our ancestors could have possibly imagined.”

But at the same time we’re experiencing this incredible bottom-up energy and connectivity, we’re also experiencing an abysmal failure of our top-down institutions.

Now Is the Time of Monsters

Have you felt afraid these last few days and weeks? I sure have. The stock market has plummeted, some people are losing their jobs, others are getting sick, and we don’t know the way out or how how long it’s going to last. In the meantime, a lot of unexpected things will happen.

There will be an economic slowdown or recession, and there will be issues with our healthcare systems—and these are just the predictable things. Metzl believes we’ll also see significant second and third-order effects. If the poorer parts of the world get hit hard by the virus, we may see fragile states collapsing, and multi-lateral states like the European Union unable to support the strain. “Our democracies are going to be challenged, and there may be soft coups even here in the US,” Metzl said. Speaking of challenges to democracy, there are actors whose desires and aspirations are very different from our own, and this could be a moment of opportunity for them.

“The world is not going to snap back to being exactly like it was before this crisis happened,” Metzl said. “We’re going to come out of this into a different world.”

The New World Struggles to Be Born

We don’t know exactly what that world will look like, but we can imagine some of it. Basically, take the trends that were already in motion and hit the fast-forward button. Virtualization of events, activities, and interactions. Automation of processes and services. Political and economic decentralization.

But for the pieces of the future that we’re unsure of, now is 1941. “Now is the time when we need to think about what we would like the new world to look like, and start planning for it and building it,” Metzl said.

In hindsight, it’s easy to picture a far better response and outcome to the COVID-19 outbreak. What if, three months ago, there’d been a global surveillance system in place, and at the first signs of the outbreak, an international emergency team led by the World Health Organization had immediately gone to Wuhan?

“We—all of us—need to re-invigorate a global system that can engage people inclusively across differences and across countries,” Metzl said. “We need to be articulating our long-term vision now so that we can evaluate everything against that standard.”

There’s not a total lack of a positive long-term vision now; the UN sustainable development goals, for example, call for gender equality, no poverty, no hunger, decent work, climate action, and justice (among other goals) around the world.

The problem is that we don’t have institutions meaningful enough or strong enough to effect realization of these principles; there’s a mismatch between the global nature of the problems we’re facing and the structure of national politics.

Building the New Normal

Just as our old normal was the new normal for our grandparents in the mid-1900s, this new normal that feels so shocking to us right now will simply be normal for our children and grandchildren. But there are some critical—and wonderful—differences between the mid-1900s and now.

We have more educated people, stronger connections, faster sharing of information, and more technological tools and scientific knowledge than ever before in history. “The number of people who can be part of this conversation is unprecedented,” Metzl said. “We couldn’t have done this in the industrial age or even the nuclear age. There’s never been this kind of motivation combined with this capacity around the world.”

In 1941, the global planning process was top-down: a small group of powerful, smart people decided how things would be then took steps to make their vision a reality. But this time will be different; to succeed, the new global plan will need to have meaningful drive from the bottom up.

“We need to recognize a new locus of power,” Metzl said. “And it’s us. Nobody is going to solve this for us. This is our moment to really come together.”

#### Financialization’s self-sustaining

Konings, 18

Martijn Konings, Associate Professor of Political Economy at the University of Sydney, author of *The Emotional Logic of Capitalism* and *Capital and Time: For a New Critique of Neoliberal Reason*, series editor for the Stanford University Press book series, Currencies. 02-07-18. “A Critique of the Critique of Finance.” Stanford University Press Blog. https://stanfordpress.typepad.com/blog/2018/02/a-critique-of-the-critique-of-finance.html

Critics of neoliberal capitalism rarely recognize the productive power of speculation. If there is one theme that unites the various critiques of contemporary finance, it is the emphasis on its speculative character. Financial growth is said to be driven not by the logic of efficient markets, but rather by irrational sentiment, “animal spirits” that do not respect fundamental values. Emphasizing the role of volatility in contemporary capitalism (evident at the time of writing, as the stock market is experiencing a downturn) is important as an antidote to notions of market efficiency and equilibrium. But it is a mistake to think that it provides a sufficient basis for effective critique. Predictions regarding the limits or collapse of neoliberal finance have simply not enjoyed a good track record. Over and over, the contemporary financial system has proven capable of sustaining higher levels of speculative activity than anticipated. This has certainly been true of the past decade. Capital and Time: For a New Critique of Neoliberal Reason is my attempt to make sense of this—that is, to understand what might be wrong or missing in the existing heterodox critique of speculation, and to advance a more accurate understanding of the role of uncertainty, risk, and speculation in contemporary capitalism. At the heart of the critique of speculation we find a distinction between real and fictitious forms of value. Although “essentialist” (or “foundationalist”) modes of explanation have been under fire across the social sciences for several decades now, when it comes to the critique of finance they have had considerable staying-power: without a notion of real value, it often seems, we lose any objective standard against which to assess the speculative gyrations of capitalist markets. Capital and Time asks what kind of critical theory we might develop if we bracket the anxious attachment to a notion of fundamental value. To that end, it turns to the work of economist Hyman Minsky. Although Minsky has been popularized precisely as a critic of speculation, he in fact insisted that almost all value judgments and investments were to some degree speculative—their success or failure would be determined in an unknown future. For him, the key economic question is how order emerges in a world that offers no guarantees, how more or less stable standards and norms arise amidst uncertainty. Of course, the “endogenous” origin of financial standards is a well-rehearsed theme in heterodox economics—indeed, it is a staple of the “post-Keynesian” literature that claims Minsky’s legacy. But such perspectives have never been able to break with the idea that financial stability is at its core dependent on external interventions that suppress speculative impulses. For Minsky, however, this is to miss the point about endogeneity. To his mind, there was no clear dividing line between financial practices and their governance: central banks and other public authorities are no more able to see into the future and to transcend uncertainty than private investors are. Minsky was therefore highly skeptical about official claims of discretionary precision management: financial governance is always embroiled in the very risk logic that it is charged with managing. That also means that financial policy can appear quite ordinary, even banal: at the heart of capitalist financial management is a logic of backstopping and bailout that responds to the possibility that the failure of an institution may take down wider financial structures. The stability of the post-New Deal financial system is often attributed to the Glass-Steagall separation of the stock market and commercial banking. But Minsky tended to view Glass-Steagall as one of several measures to direct bank credit away from the stock market towards other, no less speculative ends, notably consumer and mortgage financing. To his mind, the stability of the post-war period derived rather from the creation of an extensive financial safety net (which included, for instance, deposit insurance, which removed the rationale behind bank runs) that served to socialize risk. This institutional arrangement turned out to have a significant drawback: a pattern of chronic inflation emerged that, by the late 1970s, was widely perceived as a major problem. Minsky’s lack of faith in the possibility of cleanly staged external interventions led him to feel that that there was no real way out of this predicament. Monetarist doctrines, ascendant during the 1970s under the influence of Milton Friedman, relied on exactly the belief in an arbitrarily defined monetary standard that Minsky rejected as naïve. Muddling through, it seemed, was the price of avoiding another financial crash and depression. The Volcker shock of 1979 changed this dynamic in a way that Minsky had not foreseen but that is comprehensible when seen through the lens he provided us with. Paul Volcker looked to monetarism not as a means to enforce an external limit or standard on the financial system, but as a politically expedient way to break with accommodating policies and to proactively engage the endogenous dynamics of finance. The consequences of the Volcker shock were predictable (which is exactly why the Federal Reserve had been reluctant to pursue similar policies in previous years): inflation gave way to instability and crisis. Inflation was conquered as jobs were lost and wages stagnated. And, far from money being returned to its neutral exchange function, opportunities for speculation multiplied. The American state was never going to sit idly by as the financial system returned to dynamics of boom and bust: when instability took the form of systemic threats, authorities would bail out the institutions that had overextended themselves. Of course, Volcker would not have been able to predict the specific features of the too-big-to-fail regime as it emerged during the 1980s and evolved subsequently; but the very point of the neoliberal turn in financial management that he had overseen was to create a context where risk could be socialized in ways that were more selective and therefore did not entail generalized inflation. The inflation of asset values that has been such a marked feature of the past four decades has always been premised centrally on the willingness of authorities to view the “moral hazard” of the too-big-to-fail logic as a policy instrument—even if they may have decried it officially as a regrettable corruption of market principles. Spectacular bailouts, mundane policies to protect the key nodes of the payment systems, the “Greenspan put”, the different iterations of quantitative easing—these are all variations on that basic too-important-to-fail logic. Existing critical perspectives tend to view crisis and the need for bank bailouts as manifesting the essential incoherence of neoliberal finance, its lack of solid foundations and the irrationality of speculation. Capital and Time breaks with such moralistic assessments. The way deepening inequality and the speculative growth of asset values continue to feed off each other is troubling for any number of reasons, but there is nothing inherently “unsustainable” about it—the process does not have a natural or objective limit. At this point in time, the critique of speculation does little more than lend credibility to official discourses that present crises as preventable and bailouts as one-off, never-to-be-repeated interventions. In that way, it prevents us from critically relating to a neoliberal reality that has been shaped to its core by the speculative exploitation of risk and uncertainty, and in which regressive risk socialization serves as the everyday logic of financial governance.

#### No transition/alt fails—it’s vague and undefined—can’t generate coherent way to contest neoliberal concentration

Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Law School and the Wharton School, ‘18

(Herbert, “Whatever Did Happen to the Antitrust Movement?” Faculty Scholarship at

Penn Law. 1964)

As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output, and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.17

Nevertheless, mantras such as “industrial concentration” or “big business” have great political force. These terms provide almost nothing in the way of administrable rules while yet evoking an image of something big, bad, and powerful that government must bring under control. For example, here is the plank of the 2016 Democratic Party’s platform on antitrust:

Large corporations have concentrated their control over markets to a greater degree than Americans have seen in decades—further evidence that the deck is stacked for those at the top. Democrats will take steps to stop corporate concentration in any industry where it is unfairly limiting competition. We will make competition policy and antitrust stronger and more responsive to our economy today, enhance the antitrust enforcement arms of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and encourage other agencies to police anti-competitive practices in their areas of jurisdiction.

We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy. We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce. We support President Obama’s recent Executive Order, directing all agencies to identify specific actions they can take in their areas of jurisdiction to detect anticompetitive practices—such as tying arrangements, price fixing, and exclusionary conduct—and to refer practices that appear to violate federal antitrust law to the DOJ and FTC.18

The antitrust plank never references low consumer prices, or anything having to do with product quality. That is not because Democrats are not interested in low consumer prices.19 Rather, they apparently believe that antitrust has little to do with it. The references to prices occur in other sections of the platform, devoted to such subjects as health and safety and the high price of pharmaceutical drugs. Those sections make no reference to antitrust law.20 The only references to “consumers” occur in planks pertaining to unionization, affordable housing, Wall Street, banks and Dodd-Frank, and clean energy.21 So according to the platform, while legal policy generally is concerned with high consumer prices, antitrust policy apparently is not. By contrast, the 2016 Republican platform never references antitrust, although it does contain a plank promoting a “competitive America,” but focused entirely on lowering tax rates.22

The antitrust plank in the 2016 Democrat platform is actually one of the most detailed to appear in any platform by a major political party.23 The catchphrases that it uses, however—“corporate concentration,” “unfairly limiting competition,” or “abusive behavior by dominant companies”—can mean practically anything depending on assumptions. The platform is peppered with references to “fair” or “fairness,” including the antitrust plank, but with no reference point indicating how fairness should be assessed. Is it “fair” that consumers be asked to pay high prices in order to accommodate the shortcomings of some businesses; or conversely, is it “fair” that small businesses suffer simply because they are not able to compete with larger firms on price or quality; or is it “fair” that firms heavily invested in old brick-andmortar distribution lose out to more technologically entrepreneurial firms? “Fairness” as an antitrust concern means nothing without a reference point or set of measurement tools.

As for specific practices, the antitrust plank in the Democrat platform singles out “tying arrangements, price fixing, and exclusionary conduct,” saying nothing about mergers, other vertical restraints, or anticompetitive patent practices. In fact, the platform never mentions patents, although it makes frequent references to innovation, largely in the context of proposed government intervention to stimulate production24 or to finance research and development and educate people for more technically demanding jobs.25 Of the three anticompetitive practices that it singles out, “price fixing” is completely uncontroversial and has always been a central focus of nearly every articulation of antitrust policy, left, center, and right—including in Bork’s The Antitrust Paradox. 26 The term “exclusionary conduct” is so vague that it is meaningless. Both socially harmful and socially beneficial conduct can be “exclusionary.” The inclusion of “tying arrangements” is mystifying. Tying is ubiquitous in modern economies and is an essential characteristic of networks and technology.27 Further, the vast majority of it is procompetitive because it increases output without excluding anyone. Finally, the number of antitrust tying cases is small in comparison with merger cases, which make up a large portion of antitrust enforcement activity. A major party platform that identifies “tying arrangements” but not “mergers” as a fundamental concern requires an explanation. Most importantly, it seems to miss the whole point of competitive markets, which is to produce a high output of quality, competitively priced goods.

At least in part, the Democratic Party platform reflects the reappearance of movement antitrust. While it is hardly the only expression, and certainly not the most extreme, it represents a troublesome development—namely, the idea that America needs higher prices in order to give smaller firms a fair chance. The platform also gives a reader the strong impression that its slogans were selected in order to achieve maximum political traction with the illiterati, and perhaps that is all that can be expected of a political platform. In the process, however, it does antitrust policy a great disservice by making its legitimate targets almost impossible to define and not providing ammunition for attacking them when they are defined. Its supporters generally disparage the use of economics, sometimes suggesting that antitrust policy should be governed by political theory instead.28 Exactly how political theory gets one to specific antitrust rules is not completely clear, but it involves excluding the opinions of antitrust experts concerning the public’s interest.29

Movement antitrust argues variously for abandoning the measurement of competition by reference to output and price,30 or even abandoning consumer welfare as an antitrust proscription altogether.31 It accuses retailers such as Amazon of engaging in “predatory pricing” without providing a coherent definition of the practice.32 It never explains how a nonmanufacturing retailer such as Amazon could ever recover its investment in belowcost pricing by later raising prices, and even disputes that raising prices to higher levels ever needs to be a part of the strategy, thus indicating that it is confusing predation with investment.33 Charging low but profitable prices indefinitely is not unlawful “predatory pricing”‘ nor is forcing suppliers to price competitively.

## 1AR

### Platforms

#### Consensus of the best theoretical and empirical research concludes US military primacy deter great power war – that is net better for global peace

Brooks and Wohlforth ’16 – Professor of Government at Dartmouth College, PhD from Yale University

Stephen Brooks, William C. Wohlforth is Daniel Webster Professor of Government in the Dartmouth College Department of Government, America Abroad: Why the Sole Superpower Should Not Pull Back from the World (Oxford, New York: Oxford University Press, 2016): 103-110.

Consistency with influential relevant theories lends credence to the expectation that US security commitments actually can shape the strategic environment as deep engagement presupposes. But it is far from conclusive. Not all analysts endorse the theories we discussed in chapter 5. These theories make strong assumptions that states generally act rationally and focus primarily on security. Allowing misperceptions, emotions, domestic politics, desire for status, or concern for honor into the picture might alter the verdict on the strategy’s net expected effects. And to model the strategy’s expected effects we had to simplify things by selecting two mechanisms— assurance and deterrence—and examining their effects independently, thus missing potentially powerful positive interactions between them.

This chapter moves beyond theory to examine patterns of evidence. If the theoretical arguments about the security effects of deep engagement are right, what sort of evidence should we see? Two major bodies of evidence are most important: general empirical findings concerning the strategy’s key mechanisms and regionally focused research.

General Patterns of Evidence

Three key questions about US security provision have received the most extensive analysis. First, do alliances such as those sustained by the United States actually deter war and increase security? Second, does such security provision actually hinder nuclear proliferation? And third, does limiting proliferation actually increase security?

Deterrence Effectiveness

The determinants of deterrence success and failure have attracted scores of quantitative and case study tests. Much of the case study work yields a cautionary finding: that deterrence is much harder in practice than in theory, because standard models assume away the complexities of human psychology and domestic politics that tend to make some states hard to deter and might cause deterrence policies to backfire.1 Many quantitative findings, meanwhile, are mutually contradictory or are clearly not relevant to extended deterrence. But some relevant results receive broad support:

• Alliances generally do have a deterrent effect. In a study spanning nearly two centuries, Johnson and Leeds found “support for the hypothesis that defensive alliances deter the initiation of disputes.” They conclude that “defensive alliances lower the probability of international conflict and are thus a good policy option for states seeking to maintain peace in the world.”2 Sechser and Fuhrmann similarly find that formal defense pacts with nuclear states have significant deterrence benefits.3

• The overall balance of military forces (including nuclear) between states does not appear to influence deterrence; the local balance of military forces in the specific theater in which deterrence is actually practiced, however, is key.4

• Forward-deployed troops enhance the deterrent effect of alliances with overseas allies.5

• Strong mutual interests and ties enhance deterrence.6

• Case studies strongly ratify the theoretical expectation that it is easier to defend a given status quo than to challenge it forcefully: compellence (sometimes termed “coercion” or “coercive diplomacy”) is extremely hard.7

The most important finding to emerge from this voluminous research is that alliances—especially with nuclear-armed allies like the United States— actually work in deterring conflict. This is all the more striking in view of the fact that what scholars call “selection bias” probably works against it. The United States is more inclined to offer—and protégés to seek—alliance relationships in settings where the probability of military conflicts is higher than average. The fact that alliances work to deter conflict in precisely the situations where deterrence is likely to be especially hard is noteworthy.

More specifically, these findings buttress the key theoretical implication that if the United States is interested in deterring military challenges to the status quo in key regions, relying only on latent military capabilities in the US homeland is likely to be far less effective than having an overseas military posture. Similarly, they lend support to the general proposition that a forward deterrence posture is strongly appealing to a status quo power, because defending a given status quo is far cheaper than overturning it, and, once a favorable status quo is successfully overturned, restoring the status quo ante can be expected to be fearsomely costly. Recognizing the significance of these findings clearly casts doubt on the “wait on the sidelines and decide whether to intervene later” approach that is so strongly favored by retrenchment proponents.

### K

#### No risk of ABR – phage therapy is becoming commercially viable now and solves

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[Majid Taati Moghadam](https://www.ncbi.nlm.nih.gov/pubmed/?term=Taati%20Moghadam%20M%5BAuthor%5D&cauthor=true&cauthor_uid=32021319), [Nour Amirmozafari](https://www.ncbi.nlm.nih.gov/pubmed/?term=Amirmozafari%20N%5BAuthor%5D&cauthor=true&cauthor_uid=32021319), [Aref Shariati](https://www.ncbi.nlm.nih.gov/pubmed/?term=Shariati%20A%5BAuthor%5D&cauthor=true&cauthor_uid=32021319), [Masoumeh Hallajzadeh](https://www.ncbi.nlm.nih.gov/pubmed/?term=Hallajzadeh%20M%5BAuthor%5D&cauthor=true&cauthor_uid=32021319), [Shiva Mirkalantari](https://www.ncbi.nlm.nih.gov/pubmed/?term=Mirkalantari%20S%5BAuthor%5D&cauthor=true&cauthor_uid=32021319), [Amin Khoshbayan](https://www.ncbi.nlm.nih.gov/pubmed/?term=Khoshbayan%20A%5BAuthor%5D&cauthor=true&cauthor_uid=32021319), and [Faramarz Masjedian Jazi](https://www.ncbi.nlm.nih.gov/pubmed/?term=Masjedian%20Jazi%20F%5BAuthor%5D&cauthor=true&cauthor_uid=32021319), January 7 2020, “How Phages Overcome the Challenges of Drug Resistant Bacteria in Clinical Infections,” Dovepress, https://www.dovepress.com/how-phages-overcome-the-challenges-of-drug-resistant-bacteria-in-clini-peer-reviewed-fulltext-article-IDR

However, the production of new antibiotics is no longer cost-effective, because of the development of resistance to antibiotics immediately after their production.[33](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0033),[34](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0034) So, the available options for treatment of major MDR bacteria, such as Enterococcus faecium, S. aureus, K. pneumoniae, A. baumannii, P. aeruginosa, and Enterobacter were so limited that an urgent need for discovery of alternative antibiotics to fight antibiotic-resistant infections was felt.[27](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0027) Using of bacteriophage as a **natural and non-conventional antimicrobial agent** in this period of progressive spread of MDR, XDR and PDR bacteria with a paucity of new antibiotics presents a new solution. Today it may be possible to successfully use bacteriophages as described in various cases including food safety, agriculture, veterinary applications, detection and control of foodborne pathogens, industry, the therapeutic use of phage, and clinical diagnostic, such as detection and typing of bacteria in human infection. They have special characteristics, such as bactericidal effect, l**ow inherent toxicity, high selectivity, lack of cross-resistance** with antibiotic classes as well as **self-multiplication** in the presence of the bacterial host that distinguish them from conventional antibiotics.[18](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0018),[27](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0027),[33](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0033),[35](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0035)–[37](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0037) Also, unlike broad-spectrum antibiotics, phage **spare the commensal microbiota** due to their strain-specific activity, which is particularly important for malnourished and immunodeficient people. Eventually, they can be prepared in dry powder formulations that do not require a cold chain.[38](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6954843/#CIT0038) According to the aforementioned features, it seems that **phage therapy provides the greatest hope for infectious diseases compared to antibiotics in the future.**

#### Completely rejection competition is bad and breeds instability – prefer nuanced forms of competition

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(Joseph V., “Economizing the Totalitarian Temptation: A Risk-Averse Liberal

Realism for Political Economy and Competition Policy in a Post-Neoliberal Society,” 59

Santa Clara L. Rev. 703)

Progressivism, by contrast, sees powerful administrative and welfare states as necessary to protect the interests of the working classes, and is hostile to the existence of both plutocratic and concentrated corporate power. In the United States, the paradigmatic progressive political program was the New Deal. Whereas the first part of the New Deal included a host of regulations empowering the administrative state and placing regulatory obligations on business, the second part of the New Deal included Social Security and tax increases.77 Even though progressivism might therefore provide an adequate check against the imposition of fascism by an alliance of private power, the elimination of any substantial checks against the abuse of public power risks progressive institutions being utilized by intellectual elites rousing the working classes to bring about, and achieve power in,78 a socialist political economy.79

In addition to this risk aversion to totalitarian political economy, a certain realism about the present historical moment represents another basis for critiquing some of the theories of competition policy discussed above. While Burke's "age of chivalry" may be lost and utopia never to come, humanity lives better than it once did, and that should count for something. This is to say that, in lieu of believing that a liberal and democratic end of history remains the birthright of all mankind, or attempting to turn back globalization, policymakers should be concerned about losing what unprecedented but fragile progress modernity has actually made in improving the lives of many, many millions who were once in poverty both in the West and around the world.

The hyper-neoliberal approach-namely, that increased technological progress will prove a sufficient condition for sustaining the neoliberal order-can be faulted on these realist grounds, as the full implications of the New Economy and on liberal economic order are not yet fully understood. It may be that the golden age of technological progress and economic growth is already gone and therefore of little promise toward continued middle class expansion. ° It may be that the social consequences of rapid innovation in the Internet economy are in large part increased group polarization and extremism that, in a heterogeneous society, ultimately leads to fragmentation, violence, and the breakdown of liberal economic order.8' Finally, it may be that even notwithstanding a liberal effect of democratizing access to ideas, goods, and people, a reinvigorated bureaucracy concerned about me- quality chills continued technological progress.82 All of these possibilities, and still many more, make the hyper-neoliberal paradigm too speculative for policymakers to stake the future of liberal economic order on.

An unabashed program of industrial policy, by contrast, suffers from a more subtle form of idealism. On the one hand, the recognition of nation states as self-interested actors in competition with one another within a sovereignty-based framework has long been a dominant view for thinking about international order in "realist" terms.83 Over the neoliberal period, however, the immersion of the contemporary nation state within a globalized economy of ideas, goods, people and supply chains has resulted in not only unprecedented economic growth and prosperity around the world, but relative peace.84 A turn toward industrial policy, even in the limited case of antitrust, risks contributing to the undermining of not only economic growth and neutral rules-based legal frameworks-such as antitrust as an apolitical, value neutral, and technocratic enterprise 8 5 -but also global peace and stability, with potentially destructive consequences for humanity similar to those that obtained prior to the advent of the liberal international order.