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

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

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

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

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

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

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.

## 2AC

### Aquisition

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

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

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

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

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

### T Expand

#### C/I: “Expand the scope of its core antitrust laws” requires modifying the applicability of the antitrust laws such that they are applicable to conduct that would otherwise not violate—the plan does that in the context of platforms

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).

### T Prohibit

#### 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.

### CP States

#### CP is a de facto patchwork—majority of states bound by federal precedent – doesn’t solve any of the aff

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

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

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

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

State Levels of Adherence

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

#### Rogue state DA—CP creates mass uncertainty that chills all business – that crushes innovation - our competitiveness impact on the case

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

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

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

#### CP impliedly preempted—conflicts with federal precedent

Victoria Graham, Bloomberg Law, Ohio Rethinks State Antitrust Laws to Confront Facebook, Google (1), October 17, 2019, <https://news.bloomberglaw.com/antitrust/ohio-rethinks-state-antitrust-laws-to-confront-facebook-google>

Ohio Rethinks State Antitrust Laws to Confront Facebook, Google (1)

Ohio legislators are considering whether to rewrite antitrust laws to reflect the growth of big tech in the latest sign of growing bipartisan state-level interest in confronting Alphabet Inc.’s Google and Facebook Inc.

Most state antitrust laws directly mirror U.S. competition law and Ohio could only go so far with antitrust revisions before they potentially conflict with federal law or interfere with how companies do business.

“Given the global and national footprints for the digital technology companies, state legislative carve-outs for the sector could affect companies’ ability to do commerce across states and regions,” said Diana Moss, president of the American Antitrust Institute.

States do have some room to maneuver in areas where the U.S. Congress hasn’t expressly enacted legislation, similar to how California enacted its own privacy law in the absence of a federal statute.

“Just because certain conduct is legal under federal law doesn’t mean the state couldn’t outlaw it,” Ralph Breitfeller, of counsel at Kegler, Brown, Hill & Ritter Co. in Columbus, Ohio, said.

State Scrutiny

Ohio lawmakers discussed a possible rethink of the state’s antitrust laws Oct. 17 during a legislative hearing in Cleveland examining the impact of Google and Facebook. The hearing featured several academics and Yelp Inc. executive, Luther Lowe, who has emerged as an outspoken critic of Google’s power to control the internet.

Legislators should consider changing state antitrust laws to allow regulators to assess factors other than price, such how much data one firm controls, when reviewing a merger, Dennis Hirsch, a professor at The Ohio State University Moritz College of Law, said during the hearing.

Current merger analysis, at both the state and federal level, doesn’t factor in data aggregation since it’s mostly concerned on how consumer prices are impacted by a merger.

A second hearing will follow in Cincinnati on Oct. 28.

The probe—the first of its kind by any U.S. state legislature—is led by state Sen. John Eklund, a Republican who represents a district east of Cleveland and practiced competition law for more than 40 years.

Ohio’s Attorney General Dave Yost (R) is among state attorneys general in both parties that have emerged as some of the most vocal critics of big tech’s power. Multi-state investigations into Facebook and Google’s dominant market power have positioned the states as potentially more aggressive enforcers than federal regulators.

At the federal level, Justice Department and Federal Trade Commission officials have been hesitant to call for new antitrust legislation, while Congress contemplates whether modifications need to be made to address the unique challenges of big tech.

The antitrust laws that date back as late as 1890 during the breakup of Standard Oil don’t need major changes since they are flexible enough to deal with new technology changes, such as the rise of Amazon.com Inc. and Apple Inc., most federal enforcers argue.

Yost, who is involved in both a Google and Facebook multi-state antitrust investigation, said during a September press conference that these hearings will “help inform” the state’s investigation and the discovery it conducts into both tech companies.

Ohio has played a pivotal role in shaping the history of U.S. antitrust law.

The nation’s first antitrust legislation which is still the current federal statute that prohibits monopolistic conduct, the Sherman Antitrust Act, was introduced by Senator John Sherman (R-Ohio).

After the Sherman Act’s passage, it was then Ohio’s Attorney General David Watson who first sued Standard Oil, which eventually lead the U.S. Supreme Court to force a breakup of the corporate trust in 1911.

Workarounds

States have to ensure that any new antitrust statutes don’t directly conflict with existing federal law since courts generally strike state laws as invalid if they clash with the federal government, John Newman, a former attorney at the DOJ’s antitrust division, who is now an antitrust professor at The University of Miami School of Law, said.

#### Even if the CP results in uniform LAW, patchwork ENFORCEMENT kills solvency

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2004, The Case for Federal Preemption in Antitrust Enforcement, 18 Antitrust 79

State-to-State Conflicts

When states file antitrust cases under their own statutes, rather than under the Clayton or Sherman Acts, the likelihood the cases will be governed by Inconsistent or even conflicting antitrust precedents runs high. Even if state laws were uniform, with enforcers in each state coming from different backgrounds and holding divergent philosophies, legal Interpretations are bound to differ. While diverse views can be helpful in some areas of law-for example, varying state rules can provide a natural test for the efficacy of new regulations at the federal level-this kind of experimentation is likely to be wasteful in the antitrust arena.

A Case Study

The problems cataloged above are not mere theoretical possibilities, United Stales v. Microsoft provides a real-world example. Throughout the course of the lawsuit, the parties lobbied state attorneys general, federal antitrust authorities, and even the courts ." Thus, California Attorney General Bill Lockyor chose to reject an early settlement attempt, noting that "his resolve was hardened after listening over the weekend to advice from technical technical experts and officials from Microsoft's competitors, such as IBM, AOL Time Warner Inc., Sun Microsystems Inc., and Novell Inc. "24 California subsequently took the lead in continuing the litigation on behalf of the non-settling states and even provided the bulk of the funding."

Comments made by officials at the Justice Department suggest that federal authorities are a much tougher sell for lobbyists. Assistant Attorney General for Antitrust Charles James emphasized his concern over special Interests. "The number of requests for meetings with me immediately after my nomination but before my confirmation became so daunting," he wrote, "that I adopted the posture of refusing to meet personally with any third parties in the Microsoft case. . ."?n While lobbying on Individual antitrust cases certainly occurs at the federal level, the magnitude of Issues and the probability that competing views will neutralize arguments make it far more costly to gain influence.

In addition to derailing early settlement talks,;" the states created uncertainty that the settlement finally reached by the Department of Justice would stick. Nine states agreed to settle along with the DOJ, but nine others proposed a radically different remedy. Those nine states, which included California and Massachusetts are home of some of Microsoft's most vocal rivals,'6 Not surprisingly, their remedy proposal neatly dovetailed with the Interests of Microsoft's competitors.

For example, the states that refused to settle demanded that Microsoft license large amounts of valuable intellectual property for little or no compensation." The Initial effect of weakening the protection of intellectual property after It has been developed Is always positive for consun'ers, who need not compensate the innovator to get the benefit. The long-term effects, however, are decidedly negative, even for consumers: Innovation could decline because firms will have less Incentive to Invest in R&D if they cannot prevent others from using the fruits of their efforts and will not receive any compensation for the expropriation." Under the litigating states' remedy, competitors would have gained access to Microsoft's software code at no cost, but consumers could have suffered In the long term because the disclosure requirements would have left Microsoft with little incentive to improve Windows or many of the company's software applications.

One of the litigating states' requirements would have forced Microsoft to auction off the right to adapt its Office business applications suite to three non Windows operating systems. In return, Microsoft would have received only the one-time auction fees and no royalty payments. As part of the auction, Microsoft would have had to provide the winning bidders with code for any future upgrades to Office, plus access to any Windows source code (the program's "blueprints") at no charge.

Another of the litigating states' proposals would have required Microsoft to release its Web browser software (Internet Explorer and MSN Explorer) under "open source" licenses. To comply, Microsoft would have had to publish the underlying source code, making it available at no charge to all (that is, not just to three winners of the Office auction). Indeed, most of the Intellectual property disclosure rules proposed by the litigating states seemed designed to prevent Microsoft from recouping the value of R&D investments through licensing. Thus, under the states' alternative remedy, technology companies stood to gain a great deal of Microsoft's Intellectual property at little or no cost. Still other provisions would have raised Microsoft's costs with little apparent benefit to consumers.

### CP Uncoop Fed

#### Courts don’t listen to states– they only care about precedent

Widiss ’20 - Professor of Law, Associate Dean for Research and Faculty Affairs, and Ira C. Batman Faculty Fellow at the Indiana University Maurer School of Law

Deborah Widiss, “Communication Breakdown: How Courts Do - and Don't - Respond to Statutory Overrides” 104 Judicature 50 (2020), <https://www.repository.law.indiana.edu/facpub/2938/>

Note: Courts overturn precedent – Congress overrides precedent

Earlier commentators, including many well-respected judges, have offered thoughtful suggestions for facilitating communication from courts to Congress about problems in statutes that Congress might want to address.2 My research explores the opposite question. How effective is communication from Congress back to courts? The answer is: Not very.3 Even when Congress enacts overrides, courts frequently continue to follow the prior judicial precedent. This is likely due more to information failure than willful disregard of controlling law. Nonetheless, a key aspect of the separation of powers is broken.

My research shows that when the Supreme Court overrules a prior decision, lower courts quickly decrease their reliance on the old precedent and begin to apply the new rule. By contrast, when Congress enacts an override, citation patterns to the prior precedent change very little. Even a decade later, many overridden precedents, or what I have called “shadow precedents,” are still routinely cited as controlling precedent.

#### Terror groups won’t choose bioweapons – they’re too unpredictable and weapons don’t jive with their political goals

Pfluke 19 – MSU Graduate Thesis.

Courtney Pfluke, Spring 2019, “An Examination of the Potential Threat of a State-Sponsored Biological Attack Against the United States: A Study of Policy Implications,” MSU, https://bearworks.missouristate.edu/cgi/viewcontent.cgi?article=4366&context=theses

Terrorist organizations have been around for years now, and most groups have, at one point or another, expressed interest in obtaining and using biological weapons. However, no terrorist group has yet to launch a biological attack against the United States. This does not mean hat a bioterrorist attack is an impossibility; it just says that there are significant disadvantages to using biological agents as weapons. This section will serve to analyze some of the reasons why terrorist groups might not choose biological weapons, including the possibility of **asymmetric retaliation, possible ineffectiveness, general dislike**, and maybe most important **diseases are uncontrollable.** Pathogenic warfare shares similarities to cyber and space warfare. All three seem to be new domains in which fighting wars are becoming more and more possible. Now, if the United States were attacked in space or over the internet, the United States might have more trouble responding than it would to a conventional attack. This is not because the United States is incapable of responding, but rather because there is not internationally accepted escalation ladder for unconventional warfare. The same applies to bioterrorism. Since bioterrorism is a relatively unused type of warfare, the world has not yet established a set escalation ladder for how to respond to biological attacks. The lack of escalation ladder could lead to **confusion among victimized nations** in how to respond and delay an appropriate response or prevent nations from responding altogether. Officially, the United States does not have a biological weapons program, so if its population was attacked using pathogens, the United States does not have the option to respond symmetrically as it would in the case of other types of attacks. Normally, if the United States was attacked, it would respond in a symmetric fashion, but it cannot do that during a biological attack. Instead, the United States would likely have to respond using an asymmetric form of warfare, possibly an escalatory one. Dr. Edward Eitzen says, A major disadvantage to the use of biological weapons is that, since they are widely viewed as weapons of mass destruction and out of the ordinary, their use may bring about the escalation of military conflict (i.e., in the type of a retaliatory attack). Since there are no biological weapons in the current arsenal of the United States, and since the effect of chemical weapons is so much more limited in scale and area covered, we can only speculate on the response of the United States if our military forces or civilian populations were attacked with biological weapons. Such concerns may be one reason why Iraq elected not to use chemical or biological weapons in the Persian Gulf War.269 The threat of retaliation, if an attack can be attributed, may be enough to act as a deterrent for bio- and agroterrorism. However, some terrorist organizations may continue a path that uses biological weapons because of the impact of a successful attack outweighs possible retaliation. However, fear of retaliation is only one of many disadvantages of biological weapons. Another reason counters a previous advantage of effectiveness. As with any attack, there is a chance that biological weapons **may not have the desired effect** when used against adversaries. Pathogens are live, active viruses and bacteria, which makes them inherently unpredictable. It is possible the disease could die when released because of an inhospitable environment. However, it is possible that it might not infect enough people or gain enough traction to spread prolifically. Research even found that between 1 and 10 percent of the world’s population has a natural immunity to many of the compounds found in biological weapons, which means that it is possible that the disease may not even take depending on where the infection was supposed to start.270 If terrorist organizations want a ‘sure bet’ type of weapon, biological weapons are not the best choice. Next, there is a possibility, albeit a small one, that international stigma may act as a deterrent against the use of biological weapons. This is a strong argument when it comes to recognized nations in the world, but substantially weaker when it refers to terrorist organizations. Currently, the Biological Weapons Convention has 182 States Parties and five Signatory States. There are only ten states that have neither signed nor ratified the Convention.271 This unity signifies that there is an almost unanimous agreement that using biological weapons is unacceptable. However, terrorist organizations are unlikely to hold themselves to the same standard as nations because they are not afforded the same status as nations are in the international order; it is likely this unity will not matter to them. Still, **global stigma can be a strong deterrent**. Bioterrorism and agroterrorism are usually done to accomplish a political goal, so it is possible that terrorist organizations will hold their political purposes higher than their desire to cause a large amount of destruction. Some organizations may be more likely to keep to international standards because they desire recognition as a state, i.e., Hamas, or because they believe the stigma will take away from their overall message. In this case, international aversion could serve as an effortless deterrent. Lastly, and possibly most importantly in deterring bio- and agroterrorism is **unpredictability**. Biological weapons are not like conventional weapons. They are not one explosion, one impact type of weapon. It does not just explode, cause damage, and then stops. Pathogens are live bacteria and viruses that can continue to spread past the original target until it becomes nearly impossible to contain. In the past, there have been examples of countries attempting to use biological weapons to cause harm and instead causing outbreaks among their troops, essentially providing instant karma to the attacker. Science Clarified says, “Biological warfare is among the least commonly used military strategies. Most military leaders have been **reluctant to release microorganisms** that might cause an uncontrolled outbreak of disease, affecting not only the enemy but friendly populations as well.”272 Even though there is plenty of terrorists willing to die for their cause, some terrorist organizations’ goals are less in line with ‘total annihilation’ than others, so this uncontrollable aspect of germ warfare might be off-putting to terrorist leaders.

### DA Reconciliation

#### No link—Courts Shield

Keith E. **Whittington 5**, Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

Political leaders in such a situation will have reason to support or, at minimum, tolerate the active exercise of judicial review. In the American context, the presidency is a particularly useful site for locating such behavior. The Constitution gives the president a powerful role in selecting and speaking to federal judges. As national party leaders, presidents and presidential candidates are both conscious of the fragmented nature of American political parties and sensitive to policy goals that will not be shared by all of the president’s putative partisan allies in Congress. We would expect political support for judicial review to make itself apparent in any of four fields of activity: (1) in the selection of “activist” judges, (2) in the encouragement of specific judicial action consistent with the political needs of coalition leaders, (3) in the **congenial reception** of judicial action after it has been taken, and (4) in the public expression of generalized support for judicial supremacy in the articulation of constitutional commitments. Although it might sometimes be the case that judges and elected officials **act in** more-or-less **explicit** **concert** to shift the politically appropriate decisions into the judicial arena for resolution, it is also the case that judges might act independently of elected officials but nonetheless in ways that elected officials find congenial to their own interests and are **willing** and able **to accommodate**. Although Attorney General Richard Olney and perhaps President Grover Cleveland thought the 1894 federal income tax was politically unwise and socially unjust, they did not necessarily therefore think judicial intervention was appropriate in the case considered in more detail later (Eggert 1974, 101– 14). If a majority of the justices and Cleveland-allies in and around the administration had more serious doubts about the constitutionality of the tax, however, the White House would hardly feel aggrieved. We should be equally interested in how judges might exploit the political space open to them to render **controversial decisions** and in how elected officials might anticipate the utility of future acts of judicial review to their own interests.¶ [CONTINUES]¶ There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to **circumvent a paralyzed legislature** and **avoid the political fallout** that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, **shifting blame** for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### Moderate dems support antitrust reform that maintains the consumer welfare standard but clarifies shitty case law

Markham 2/17 – William Markham is a trial attorney based in San Diego. He obtained his law degree from [Harvard Law School](http://www.law.harvard.edu/) in 1987 and has litigated cases in California for the past thirty-three years.

William Markham, February 17 2021, “Welcome Antitrust Reform Now Pending in Congress,” Markham Law Firm, https://www.markhamlawfirm.com/antitrust-reform-now-pending-in-congress/

Senator Klobuchar’s Bill Really Might Become Law. Senator Amy Klobuchar (D-Minn.) has proposed a landmark antitrust bill, entitled the “Competition and Antitrust Law Enforcement Reform Act,” which after negotiation and modification might well receive bipartisan support and become part of our federal [antitrust law](https://www.markhamlawfirm.com/antitrust-litigation/). The bill is the handiwork of moderate Democrats and includes various measures long supported by leading Republicans, including Senator Mike Lee of Utah, who is the ranking Republican on the Senate Antitrust Subcommittee, and Congressman Ken Buck of Colorado, who is the ranking Republican on the House Antitrust Subcommittee. The Biden Administration supports the bill, as do many economists, jurists, and commentators, ranging from arch-conservative Texas Republicans to bluer-than-the-bluest Massachusetts Democrats. This bill might well become law, as well it should. It therefore deserves close review.

Rather than overhauling our antitrust jurisprudence and introducing new, controversial antitrust standards, as some progressives have championed, the bill is notable for its practical usefulness, workable aims, and long overdue clarifications and reaffirmations of classical antitrust doctrines. It is the kind of measure that can be enacted in the present Congress and signed into law by President Biden.

#### Manchin is a hard no for reconciliation – 0 scenario for passage

Brown 9/12 – Matthew Brown is a White House NOW Reporter at USA TODAY, where he covers breaking news coming out of the Biden administration. Originally from Georgia, Matthew is a graduate of Dartmouth College.

Matthew Brown, September 12 2021, “Manchin won't support $3.5T reconciliation package; Sanders calls that 'not acceptable',” USA Today, https://www.usatoday.com/story/news/politics/2021/09/12/joe-manchin-wont-vote-3-5-t-reconciliation-bill/8308213002/

WASHINGTON — Sen. Joe Manchin, D-W.Va., reiterated Sunday that he opposed the Democrats' $3.5 trillion budget reconciliation package as the party pushes to pass it and a bipartisan infrastructure bill[amid packed September negotiations](https://www.usatoday.com/story/news/politics/2021/09/07/bidens-agenda-hits-crucial-moment-amid-priorities-emergencies/5751441001/).

Senate Majority Leader Chuck Schumer, D-N.Y., "will not have my vote on the 3.5," Manchin said during a Sunday interview with CNN's "State of the Union."

Manchin confirmed he is a "hard no" on supporting the package during an interview with NBC News' "Meet the Press."

While he declined to outline his upper limit for potential spending, the senator said, "it's not going to be at three and a half, I can assure you" told CNN.

Sen. Bernie Sanders, I-Vt., called Manchin's position unacceptable, arguing that many progressives and the White House had already compromised on provisions seen as priorities.

"No, it's absolutely not acceptable to me," Sanders said on CNN. "I don't think it's acceptable for the president, to the American people, with the overwhelming majority of the people in the Democratic caucus."

Manchin explained his position by saying there was not a need to move so quickly.

"The urgency — I can't understand why we can't take time to deliberate on this and work," Manchin told ABC News' "This Week." He called several of the policies in the package "social reform" that didn't merit the same immediate action as did the stimulus package Democrats passed the spring.

"I'm just saying that we should be looking at everything, and we're not. We don't have the need to rush into this and get it done within one week because there's some deadline we're meeting, or someone's going to fall through the cracks," Manchin told NBC News.

What's in the $3.5 trillion reconciliation bill?

In the spring, President Joe Biden proposed two major policy packages, one focusing primarily on infrastructure, climate and jobs proposals and another on social welfare proposals like healthcare, child care and education.

That framework evolved over the summer into a [deal focused on infrastructure projects](https://www.usatoday.com/story/news/politics/2021/08/10/infrastructure-bill-passes-senate/5505736001/), which Democrats reached with some Republican support in early August.

[The separate $3.5 trillion spending package](https://www.usatoday.com/story/news/politics/2021/08/10/senate-starts-debate-bidens-3-5-trillion-infrastructure-plan/5416121001/)focuses on social spending programs like universal Pre-K for 3- and 4-year-olds, expanded federal health care benefits, a universal child tax credit; climate change policies and greater investments in K-12 and higher education.

Pelosi set Sept. 27 deadline; Manchin is skeptical

Manchin further added that there was "no way" that lawmakers could broker a deal on the reconciliation package by Sept. 27, a deadline House Speaker Nancy Pelosi, D-Calif., set for the lower chamber to vote on the separate bipartisan infrastructure package.

#### Normal means is courts will announce their decision at the end of the term

**Mondak 92** [Jeffery J., assistant professor of political science @ the University of Pittsburgh. “Institutional legitimacy, policy legitimacy, and the Supreme Court.” American Politics Quarterly, Vol. 20, No. 4, Lexis]

The process described by the political capital hypothesis acts as expected in the laboratory, and the logic of the link between institutional and policy legitimacy has thus gained strong empirical corroboration. However, the dynamic's pervasiveness defies precise estimation due to the limitations of available public opinion data. Still, the results reported here are provocative. First, this view of legitimation may apply to institutions beyond the Supreme Court. Consequently, efforts to use this theory in the study of other institutions may yield evidence supportive of a general process. A second concern is how the Court responds to its institutional limits. Specifically, **strategy within the Court can be considered from the context of legitimacy.** For example, **what tactics may the Court employ to reduce the erosion of political capital? By releasing controversial rulings at the end of a term**, for instance, **the Court may afford itself a healing period, a time to repair damaged credibility prior to the next round of efforts at conferring policy legitimacy**. This suggests a third issue, the manner in which institutional approval is replenished. Does institutional support return to some equilibrium once dispute surrounding a particular ruling fades, or must the Court release popular edicts to offset the effects of its controversial actions?

### DA FTC Tradeoff

#### Pounder—antitrust policy creates a harsh environment

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

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

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

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

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

#### Turn—removing *Amex* requirement decreases resources need

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

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

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

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

#### No internal link—agency resources are ineffective because they drive away the best talent

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

The modern critique of the U.S. system often describes the federal agencies as captured by the business community or beholden to ideas that disfavor robust intervention.143 Advocates of change suggest that the execution of their reform program at the federal antitrust agencies will require the appointment of senior managers and new staff who repudiate the consumer welfare standard, or at least embrace a vision for expanded enforcement under the consumer welfare, and embrace the multidimensional conception of the proper goals of competition law. Those already employed by the enforcement agencies as managers and staff will be expected to accept the expanded (goals) framework or they will find their duties reduced and their roles marginalized. New appointees to top leadership positions will not be tainted by substantial previous experience in the private sector, nor will they have spent too much time as civil servants in a government enforcement culture that assumed the primacy of consumer welfare as the aim of antitrust law and accepted norms that tilted toward underenforcement. The concern about compromised motives is also likely to disqualify many academics who, though sympathetic to some expansion of antitrust enforcement, remain excessively beholden to some notion of a consumer (rather than citizen) welfare standard, or have engaged in consulting on behalf of large corporate interests.

One consequence of the acute anxiety about capture is to slam the revolving door shut, or at least to slow the rate at which it spins. We offer two cautions about this approach. First, the modern experience of the FTC raises reasons to question the strength of the theory. For example, if business perspectives dominate the FTC, why did the agency persist in its efforts to challenge reverse payment agreements involving leading pharmaceutical producers?144 Was it because the pharmaceutical firms weren’t as good at lobbying as, say, the information services giants? And what explains the FTC’s decision to sue Qualcomm for monopolization early in 2017?145 Is this simply attributable to the inadequacy of Qualcomm’s Washington, DC, lobbyists, or is the capture explanation for the behavior of the federal antitrust agencies not entirely airtight?

Our second caution is that severe restrictions on the revolving door could deny the federal agencies access to skills they will need to carry out a major expansion of antitrust

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enforcement. Recruiting attorneys, economists, and other specialists from the private sector can give the agencies a vital infusion of talent which, when combined with agency careerists, permit the creation of project teams that can equal the capability of the best teams that the defense can mount in major litigation matters. We also are wary of the idea that an attorney or economist coming from the private sector will discourage effective intervention during the period of public service as a way to pave the road to a better private sector position upon leaving the agency. Rather, there is evidence to suggest that creating a reputation for aggressiveness and toughness as an enforcer increases one’s post-agency employment options. More than a few individuals have development prosperous careers based on piloting businesses through navigational hazards that they helped create while they were senior officials in public agencies.

### DA Econ

#### long-term cost of intervention uncertain and offset by anticompetitive conduct

Greene, Professor of Law, University of Connecticut School of Law; 2013-2014 Senior Visiting Scholar, UC Berkeley School of Law & Visiting Scholar, UC Berkeley College of Engineering, ‘15

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

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

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

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

## 1AR

### Acquisition

#### Rule of reason increases efficiency

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

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

Judicial review is instrumental to the efficiency of antitrust laws. It underpins the ability of these laws to govern antitrust dynamically. Some populists seek to take antitrust away from the courts, or, alternatively, to prevent antitrust cases from being judicially appealed. These gross encroachments into the rule-of-law principles need to be seen for what they are: dangerous calls to undermine the democratic foundations of our society. These calls would encroach upon every litigant’s constitutional right to access justice and seek judicial remedy. The role of the judge must, on the contrary, be preserved as the ultimate arbitrator of antitrust cases. The need to preserve the role of the judge is twofold: basic principles of the rule of law and the fundamental right to access courts.

Also, the evolutionary perspective inherent to judge-made law enhances the efficiency of the law thanks to incremental improvements. Beyond the mere hypothesis of the efficiency of common law due to its evolutionary process, judge-made law allows for a trial-and-error process. It spurs a debate of ideas through the multiplication of cases, increasing society’s knowledge regarding specific cases. In complex matters such as antitrust cases, “learning by doing” being inherent to the evolutionary aspect of judge-made law is a quality, not a pitfall, of the law.

A case-by-case judicial approach proves to be a better approach to complex cases than indiscriminate, broad regulatory compliance rules that are subject to little or no judicial review. To further develop this dynamic approach, the rule of reason must be better protected as a legal standard that is more respectful to the dynamic view of competition.

Rule of Reason for Dynamic Antitrust

Per se prohibitions must be abandoned, given the need to engage in a case-by-case analysis of each litigated behavior’s pro- and anticompetitive effects.65 Tying agreements (or tie-in sales), horizontal group boycotts, ancillary horizontal market division, and even horizontal price fixing, for example, are currently per se prohibited. A discussion of both the pro-competitive effects and the balancing exercise inherent to the rule of reason would help better distinguish the practices that are improving competition and innovation overall from those that deplete competition and innovation.

The objective is to ensure the pro-efficiency and pro-innovative effects are lower than the positive effects in order to enable the sanctioning of conduct.66 Antitrust enforcement requires a balancing exercise between positive and negative consequences for every conduct. In light of legal and economic evidence submitted, only a judicial authority can embark on this necessary balancing exercise.

### CP States

#### Patchwork enforcement makes state law meaningless

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2004, The Case for Federal Preemption in Antitrust Enforcement, 18 Antitrust 79

One irony here Is the considerable effort the states put into the proposed remedy compared to their Insubstantial contributions to the prosecution of the case. Consistent with our earlier discussion regarding the lack of state antitrust experience and resources, the states had limited resources here. California did earmark $3.7 million in 2002 specifically for antitrust enforcement in the "high-technology industry," reflecting the stale's lead. ing role in the Microsoft remedies trial. But this was unusually high for a state. And in any event, that sum was still dwarfed by the $60 million the Department of Justice felt obliged to invest in pursuing the complex case. - '

The states contributed little of consequence to the federal case against Microsoft. In fact, their original complaint included only two claims not already made by the U.S. Government-one of which was subsequently dropped, while the other was dismissed as a matter of law. In fact, the states' case was so similar to the federal case that the court consolidated the two.3

The individual states' claims were not specifically addressed by the court, and the states assured the court that all relevant state statutes were coterminous with the Sherman Act.14 No discovery was targeted at any state law as distinct from the Sherman Act. The court directed that witnesses be questioned by only one lawyer for each side-that is, one lawyer for the defendant and one lawyer representing all of the plaintiffs, federal and state governments combined. While the states could have requested separate examination of any witness, they never asked. In short, the states' and the United States' cases were tried as a single case. Likewise, the appeals court ruling treats the states' case as subsumed by United States' case.

The states' minor role Is neither surprising nor bad-limited state action In national cases is, after all, what we are advocating. Ihe problem Iles In the fact that the states used their stand- Ing to Interrupt efforts aimed at an early settlement, to reject the eventual DOJ settlement, and to propose an alternative remedy that was designed to benefit competitors rather than competition.

#### Won’t be rigorously enforced

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2004, The Case for Federal Preemption in Antitrust Enforcement, 18 Antitrust 79

Lack of Resources and Free Riding

Antitrust experts working for the FTC and the DOJ analyze thousands of cases each year. 3 Most states, In contrast, review only a handful. For example, Pennsylvania conducts only twenty-five antitrust investigations per year."t This relative lack of expertise at the state level leads to a higher probability of missteps, no matter how intelligent or public-minded the state officials may be, 1 Add to the mix a lack of resources. No one state can match the money or manpower that federal agencies can bring to hear in antitrust enforcement. Only two states, Maryland and New Hampshire, devote more than 2 percent of their AG budgets to antitrust. 6 California, the largest state in terms of population, spent $5.6 million In fiscal year 2002.11 In comparison, the bud get for the Antitrust Division of the U.S. Department of Justice was $130.8 million. ' Moreover, the DOJ employs a total staff of approximately 850, including 60 staff economists.10 The FTC, for Its part, spent $73 million on antitrust enforcement in fiscal year 2002 and maintains a staff of approximately 500, Including some 40 economists."0

With little antitrust experience and tightly constrained bud gets, it should not be surprising that state efforts in national antitrust enforcement often amount to little more than free riding on federal initiatives.2' Unfortunately, state efforts in national cases need not stop at free riding. By Joining federal agencies in antitrust prosecution, each state becomes a party to settlement negotiations. And since states' interests are relatively narrow, settlements that on balance promote national economic welfare do not necessarily satisfy state demands. State participation, therefore, can reduce the probability of reaching a resolution. And where settlements are reached, their participation can Increase the costs of achieving that resolution.

#### preemption Specifically applies to divergent procedural devices

Stamp, Chief Counsel, Washington Legal Foundation, ‘14

(Richard A., “The Role of State Antitrust Law in the Aftermath of Actavis,” 15 Minn. J.L. Sci. & Tech. 149 (2014))

It seems reasonably clear, however, that Actavis prohibits states from adopting the procedural devices rejected by the U.S. Supreme Court—either a per se condemnation of reverse payment settlements or a presumption of illegality accompanied by “quick look” review. The Supreme Court rejected those approaches because it determined that in many cases there might well be pro-competitive economic justifications for reverse payment settlements and that presuming their illegality could result in the suppression of economically useful conduct.82 State antitrust laws that adopted the FTC’s proposed presumption of illegality would be subject to similar criticism, and thus would likely be impliedly preempted as inconsistent with the careful balance between antitrust and patent law established by Actavis.

#### CP creates mass uncertainty that stops businesses in their tracks

HLR, Harvard Law Review Note, Antitrust Federalism, Preemption, and Judge-Made Law, June 10, 2020, 133 Harv. L. Rev. 2557

Closely related to the patchwork regime problem is the one-state dominator problem: because national firms may not always be able to maintain different business practices in each state, firms could be forced to follow the law of whichever state has the strictest antitrust policy nationwide. For example, a single state could use its own antitrust laws to “challenge the largest nationwide transactions so long as it can show that the state itself, its citizens, or its economy is affected in a way that provides standing.”44 If a nationwide merger is illegal under one state’s laws, it may not be worth it for the firm to restructure the transaction in order to merge in all but one jurisdiction. This reality could allow for the state with the strictest antitrust policy to dominate the policy decisions of every other state and of the federal government.45

The one-state dominator problem is exacerbated by unrecognized interstate externalities: in making its antitrust laws, a state is not forced to consider the harm or benefit to businesses based outside of its borders. 46 These uninternalized externalities make it more likely that a state will overregulate. The laboratory-of-democracy defenses to the patchwork regime problem, with their variety-is-the-spice-of-life flair, fail to explain why an individual state’s antitrust regime should be allowed to dominate the policy of the entire nation.

### DA FTC

#### Economic interdependence can’t solve war, because history proves the restraining factor is all about the expectation of future trade – security crises and Trump both moot that

Fay 3/20

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One of the signature features of President Donald Trump’s campaign was his hostility to free trade. Then-candidate Trump repeatedly denigrated various multilateral trade pacts as bad deals for the United States. Pulling out of the Trans-Pacific Partnership, appointing opponents of free trade—such as Steve Bannon and Peter Navarro—into key positions, and promises of tariffs that are likely to produce retaliatory measures, all demonstrated that Trump was planning on following through on his protectionist campaign rhetoric. While Trump’s attack on free trade has important implications for American and global economies, it will also have an impact on the likelihood of war between the great powers. As discussed here previously, President Trump sees the world in zero sum terms. Absent disproportionate economic gains for the United States, international agreements cannot be considered successful. However beneficial such arrangements prove to be for all involved, Trump’s mercantilist outlook sees them as a raw deal for Americans. It is not surprising therefore, that U.S. Treasury Secretary Steve Mnuchin nixed attempts to include language supporting free trade in a statement from a G-20 meeting in Baden-Baden, Germany. As CNN reported, while the statement included some positive words on trade, “conspicuous by its absence was the phrase ‘we will resist all forms of protectionism’ that was contained in the communiqué from the last meeting of the group in China, July 2016.” Mnuchin rejected the idea that the omission was meaningful, but the unwillingness to reaffirm American opposition to protectionism ignores that trade provides benefits beyond the global economy. Specifically, the expectation of future trade affects the likelihood of war and peace. The connection between trade and conflict has never been as simple as early liberal theorists suggested. The idea, wrongly attributed to the nineteenth century French economist Frederic Bastiat, that “when goods don’t cross borders, soldiers will” still offers a good summation of the longstanding position that trade has pacifying effects on international politics. The logic behind the argument is compelling: the greater the extent of commercial relations between states, the less likely there will be conflict because the economic cost of war (and the lost benefits of trade) will be too high. However, history has shown that states still sometimes go to war despite high levels of economic interdependence

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at the time of the conflict. In his book Economic Interdependence and War, political scientist Dale Copeland explained that it is not the current level of trade that is important to the likelihood of conflict. Rather, Copeland argues, it is the expectation of future trade that determines a state’s willingness to go to war. He writes, In a very real way, it does not matter in the least whether past and current levels of trade and investment have been low, as long as leaders have strongly positive expectations of for the future. It is their future orientation and expectations of a future stream of benefits that will likely make the leaders incline to peace. Likewise, it does not matter whether past and current levels of commerce have been high if leaders believe they are going to be cut off tomorrow or in the near future. It is their pessimism about the future that will probably drive these leaders to consider hard-line measures and even war to safeguard the long-term security of the state. Multilateral trade has been a feature of the liberal international order developed after World War II for a reason. Postwar policymakers feared a return to the closed economic blocs of the 1930s that helped drive the world to war. It is entirely possible that the norms in favor of free trade are robust enough to withstand the absence of routine language from a statement by a meeting of the world’s finance ministers. But groups like the G-20 help set expectations about the future. Given the connection between those expectations and conflict, failing to reaffirm America’s opposition to protectionism could put the world on a dangerous path.