# Northwestern Round 5 Wiki

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#### Interpretation – prohibit means to forbid a given practice – that’s distinct from restrictions

Kennard 93 – Judge, California Supreme Court

Joyce L. Kennard, THEODORE R. HOWARD et al., Plaintiffs and Appellants, v. GEORGE H. BABCOCK et al., Defendants and Respondents. No. S027061., Supreme Court of California, 1993, https://law.justia.com/cases/california/supreme-court/4th/6/409.html

As I pointed out earlier, the majority's conclusion is at odds with the great weight of authority. Also, in determining reasonableness based on the relationship between or among attorneys, the majority gives little regard to the relationship between the attorney and the client. Moreover, the majority fails to recognize that restrictive covenants are intended to and do restrict the practice of law. Rule 1-500 proscribes agreements that "restrict" the practice of law, not just those that prohibit "altogether" the practice of law. (Contra, Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal.App.3d 963, 969 [285 Cal.Rptr. 845] [rule 1-500 "simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law"].) To "restrict" means to restrain, to confine within bounds. (Webster's New Collegiate Dict. (9th ed. 1988) p. 1006.) To "prohibit" means to prevent, to [\*\*164] [\*\*\*94] forbid. (Id. at p. 940.) The terms are not synonymous.

#### and the phrase “business practice” requires a pattern of conduct---that excludes single acts like mergers and breakups

Lucas 88 – Judge, California Supreme Court

Malcolm Millar Lucas, Cal. ex rel. Van De Kamp v. Texaco, 46 Cal. 3d 1147, Supreme Court of California, October 1988, LexisNexis

\*\* Italics in original.

The statute defines "unfair competition" to mean, as relevant here, "unlawful, unfair or fraudulent *business practice* . . . ." ( Bus. & Prof. Code, § 17200, italics added.) In so doing it effectively requires what the court variously described in the leading case of Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal.Rptr. 745, 496 P.2d 817], as "a 'pattern' . . . of conduct" ( id. at p. 108), "ongoing . . . conduct" ( id. at p. 111), "a pattern of behavior" ( id. at p. 113), and, "a course of conduct" (ibid.).

What the Attorney General challenges in this action is the Texaco-Getty merger. Under the Barquis court's construction of the statute, however, the merger itself cannot be characterized as "a 'pattern' . . . of conduct," "ongoing conduct," "a pattern of behavior," "a course of conduct," or anything relevantly similar: it is rather a single act. That the complaint, under the Attorney General's reading, alleges that Texaco engaged in certain unlawful, unfair, or fraudulent business practices in the past and may engage in other such practices in the future is simply not enough: the complaint attacks not those past or future practices, but only the merger.

#### That’s a voter for limits and ground – allowing affirmative teams to police specific mergers allows thousands of small affs that skew out of core topic DAs

### K Neolib

#### The affirmatives drive toward antitrust intervention adopts neoliberal assumptions of politics and economics which concentrates power in the hands of a few

Vaheesan 18 – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

Over the past forty years, technocrats have dominated antitrust law.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Ameri- cans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, “an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.50

#### Elite capture locks in civilizational collapse, but it’s not inevitable. Try or die for putting political and economic power in the hands of the citizenry, and reorienting government decision-making toward the public good.

MacKay 18 – Professor of Sociology, Mohawk College

Kevin MacKay, also a union activist & executive director of a sustainable community development cooperative, The Ecological Crisis is a Political Crisis, 2018, https://www.resilience.org/stories/2018-09-25/the-ecological-crisis-is-a-political-crisis/

With each passing day, reports on global climate change become increasingly bleak. Recent research has affirmed that the glaciers are melting faster than anticipated1, and that acidification, with its catastrophic effect on ocean ecosystems, is also proceeding faster than feared2. As the concentration of atmospheric carbon continues to rise, so does the likelihood we’ve passed the tipping point for irreversible climate change.3

When one looks at other critical earth ecosystems, the danger is equally apparent. Soil is being destroyed.4 Fresh water shortages are wracking several continents and leaving billions of people without reliable access to clean drinking water.5 Fish stocks are plummeting.6 Oceans are clogged with plastic garbage.7 Biodiversity is disappearing at an alarming rate.8 In the face of this full-spectrum ecological assault, a growing number of scientists have been saying that the collapse of civilization is now unavoidable.9

Stopping the destructive effects of industrial, capitalist civilization has now become the defining challenge of our age. If we don’t radically change our society’s course within the next 30 years, then a deep collapse and protracted Dark Age are all but assured. In order to confront this challenge, we need to understand what is causing civilization’s crisis, and most importantly, how the crisis can be resolved. At stake is nothing less than a viable future on this planet.

The Five Horsemen of the Modern Day Apocalypse

In my book, Radical Transformation: Oligarchy, Collapse, and the Crisis of Civilization, I argue that industrial civilization is being driven toward collapse by five key forces – related to terminal dysfunction within its ecological, economic, socio-cultural, and political sub-systems:

Dissociation: globalized production and distribution systems disrupt people’s ability to put their own actions, and the actions of elites, into a coherent causal and ethical framework. Actions by individuals, institutions, and systems of governance are therefore disconnected from their effect on the natural world and on other peoples. Without this critical feedback, even well-intentioned actors can’t make rational and ethical choices regarding their behaviour.

Complexity: the world-spanning nature of industrial capitalist civilization, and the massive number of interrelationships it represents, make predicting the effect of any given change on the system as a whole devilishly difficult. Disastrous tipping points loom in several of civilization’s systems – from the collapse of ocean ecology to the threat of nuclear war. In addition, because the crisis cannot be contained in one part of the globe, the dysfunctions can’t be dealt with in isolation.

Stratification: a profoundly unequal distribution of wealth – both globally and within nations – leads to mass human poverty, displacement, and to premature death through disease and continuous warfare. Stratification also leads to political instability, eroding a society’s social cohesion and undermining decision-making structures.

Overshoot: the economic practices of industrial capitalism are exceeding ecological limits. Our civilization is critically degrading the biosphere, burning through non-renewable energy sources, and shifting the entire climatic balance.

Oligarchy: in states worldwide, political decision-making is controlled by a numerically small, wealthy elite. This form of government serves to lock in patterns of conflict, oppression, and ecological destruction.

Societies as Decision-Making Systems

Each of the horsemen presents a significant threat to civilization’s viability. However, oligarchy is particularly important as it deals with a society’s decision-making systems. In his 2005 book Collapse: How Societies Choose to Fail or to Succeed, geographer Jared Diamond argued that many past civilizations have collapsed due to their inability to make correct decisions in the face of existential threats.10 Diamond drew on the work of archaeologist Joseph Tainter, who in his 1998 book The Collapse of Complex Societies, argued that civilizations fail due to a constellation of factors.11

To Tainter, the ultimate mistake failed civilizations made was to continually solve problems by adding social complexity, and as a result, increasing the society’s energy needs. Eventually, Tainter argued that civilizations encounter a “thermodynamic crisis” in which they are unable to sustain an energy-intensive level of complexity. The result is collapse – ecological devastation, political upheaval, and mass population die-off.

The tendency for societies to collapse under excessive energy demands is an important insight. However, what Tainter and Diamond failed to appreciate is how oligarchy is an even more fundamental cause of civilization collapse.

Oligarchic control compromises a society’s ability to make correct decisions in the face of existential threats. This explains a seeming paradox in which past civilizations have collapsed despite possessing the cultural and technological know-how needed to resolve their crises. The problem wasn’t that they didn’t understand the source of the threat or the way to avert it. The problem was that societal elites benefitted from the system’s dysfunctions and prevented available solutions.

Oligarchic Control in “Democratic” States

Citizens in countries such as Canada, the United States, Australia, or the Eurozone members, would generally consider themselves to be living in democratic societies. However, when the political systems of Western democracies are scrutinized, clear and pervasive signs of oligarchy emerge.

A 2014 study by American political scientists Martin Gilens and Benjamin Page revealed that the great majority of political decisions made in the United States reflect the interests of elites. After studying nearly 1,800 policy decisions passed between 1981 and 2002, the researchers argued that “both individual economic elites and organized interest groups (including corporations, largely owned and controlled by wealthy elites) play a substantial part in affecting public policy, but the general public has little or no independent influence.”12

Today, oligarchic control over decision-making, and its catastrophic ecological effects, have never been clearer. In the U.S., Donald Trump and his billionaire-dominated cabinet are seeking to dismantle the Environmental Protection Agency13, to question climate science14, and to pursue a policy of “American energy dominance” that will dramatically expand production of fossil fuels.15

U.S. energy companies are also having a profound impact on domestic energy policy by accelerating the development of hard-to-access fuel sources through hydraulic fracturing, deep-sea oil drilling, and mountain-top removal coal mining.16 At the same time, fossil fuel oligarchs are working overtime to dismantle green energy initiatives, such as the Koch brothers’ war on the solar industry in Florida, and in other cities across the continent.17

In Canada, often thought of as more progressive than its southern neighbor, the situation hasn’t been much different. Under prime minister Stephen Harper’s two terms, the Canadian state became an unapologetic cheerleader for extracting some of the world’s dirtiest oil –Tar Sands bitumen. Harper accelerated Tar Sands production, leading to the clear-cutting of thousands of acres of boreal forest, the diversion of millions of gallons of freshwater, and the creation of miles of toxic tailings ponds, filled with water contaminated by the bitumen extraction process.18

Like the Trump administration, the Harper government silenced federal climate scientists.19 The government also targeted environmental charities and non-profits, using funding cuts and the threat of audits to undermine climate advocacy.20 When a movement of national outrage swept Harper from power in 2015, Canadians were hopeful that climate change would once more be taken seriously. However, the new government of Justin Trudeau, while embracing the international discourse on global warming, has shown a continued allegiance to the fossil-fuel oligarchy by committing over $7 billion in federal funds to purchase the failing Kinder-Morgan Trans Mountain pipeline.21

What is To Be Done?

To create a sustainable future, we must first learn the lessons of the past, and what archaeological research shows is that throughout history, civilizations that have been captive to the interests of an oligarchic elite have all collapsed.22 Today’s industrial, capitalist civilization is trapped in this same deadly cycle.

As long as a self-interested elite controls decision-making in modern states, we will be far too late to avoid the effects of steadily contracting ecological limits. In addition, we will be unable to avert the downward spiral of economic crisis, conflict, and warfare that will result as oligarchs scramble to maintain their wealth and power in the face of dwindling resources and mounting crisis.23

Breaking free from this destructive pattern will require us to take political and economic power back from the 1% and return it to the hands of citizens. This means that advocates for ecological sustainability must move far beyond individual actions, lobbying, or reform of existing political and economic institutions. If we are to have a chance, we must ensure that governments make decisions based on the public good, not on private profit.

Radically transforming industrial, capitalist civilization won’t be easy. It will require movements for environmental sustainability, social justice, and economic fairness to come together, and to realize their common interest in dismantling the system of oligarchy and building a democratic, eco-socialist society.24 This “movement of movements” must put aside sectarian squabbles, and finally realize that the goals of economic justice, human rights, and ecological sustainability are all intrinsically linked.

Such changes may seem like a tall order, but hope can be found in the deepening struggle being waged to protect our fragile ecosystems. First Nations groups are leading this charge and beginning to win some important victories. The inspiring Water Protectors of Standing Rock were able to disrupt the Dakota Access Pipeline in the face of intense government oppression.25 In Canada, Several British Columbia First Nations recently won an impressive court victory in their opposition to the Trans Mountain pipeline.26

If successful grassroots struggles can be linked with equally hopeful movements for real political change, then there is hope for the future. However, if we continue on with “business as usual” – hoping that change will come from lifestyle choices and the interchangeable representatives of elite political parties, then the future looks grim indeed.

### CP Section 5

#### The Federal Trade Commission should determine that “unfair methods of competition” pursuant to section 5 of the FTC act to favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies and bring associative enforcement actions

#### The CP uses congressional given powers to allow the FTC to improve competition

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau.

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

Under progressive leadership, one federal agency, the FTC, could resurrect antitrust law as “a comprehensive charter of economic liberty.”22 Modern administrative law and Congressional delegation of policymaking authority grant the FTC expansive power to interpret the antitrust provision of Section 5 of the FTC Act.23 In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to police “unfair methods of competition” that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system.24 Congress intended the FTC’s antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic stage before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.25

Since the early 1980s, the FTC has championed antitrust law centered on economic efficiency. In 2015, the FTC codified this approach in a Statement of Enforcement Principles laying out its interpretation of Section 5’s prohibition on unfair methods of competition.26 The FTC stated that it would use its Section 5 authority to advance “consumer welfare,” which is functionally similar to the allocative efficiency goal, and apply the rule of reason framework.27 In articulating this narrow interpretation of Section 5, the FTC contradicted Congress’s political economic vision in 1914, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the FTC adopted a convoluted test that cannot advance the Congressional vision underlying Section 5.

Despite being a champion of the efficiency paradigm since 1981, the FTC under progressive leadership in the future could still change course and be true to the Congressional intent from when the agency was created more than a century ago. In setting out an interpretation of Section 5, whether through enforcement actions or rulemakings, the FTC should anchor Section 5 in the expansive political economic vision of Congress. By enacting the FTC Act, Congress sought to prevent—rather than remedy after the fact—three principal harms from concentrated economic power: wealth transfers from consumers and producers to monopolies, oligopolies, and cartels; private blockades against entry and competition in markets; and the accumulation of economic and political power in corporate hands. To advance Congress’s antitrust vision, the FTC should adopt presumptions of illegality for a variety of competitively suspicious conduct, such as mergers in concentrated industries, exclusionary practices by firms with market dominance or near-dominance, and restraints on retail competition; and challenge monopolies and oligopolies that inflict significant harm on the public. When seeking to preserve or restore competitive market structures, the FTC should pursue simple structural remedies over complicated behavioral fixes.

### DA Innovation

#### There’s a wave of M&A now – companies doubt rule changes will affect them now

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

"The order itself will be less likely to have a chilling effect on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were bracing for a tougher antitrust environment under Biden even before last week's executive order. Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

#### Expanding scope of antitrust liability brings that to a halt—undermines dynamism and global competitiveness

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### Large-firm dynamism is the only way to maintain tech leadership vis-à-vis china—key to competitiveness and AI

Lee, senior lecturer at the University of Hong Kong Faculty of Business and Economics, ‘19

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- effective antitrust measures could stifle the ability of American tech companies to compete with their Chinese challengers. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing consumer welfare, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But the wider the antitrust authorities reach, the more likely they are to damage the tech giants' global competitiveness. This applies especially in the key field of artificial intelligence, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, lots of data. Such data can only be collected at scale, which conflicts with hipster antitrust notions of size. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a disadvantage to China.

The idea of size is one of many fundamental differences separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed so-called "super apps" that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, that lead is shrinking, and if China does overtake the U.S. in artificial intelligence, it will likely be a result of advantages in data and government policy.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have broader implications beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able to close the growing competitive chasm.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to shape user privacy norms, establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that aggressive antitrust sanctions would risk inhibiting American companies from maintaining the scale necessary to compete with their Chinese rivals.

AI supremacy will be a defining feature of superpower status. And if future researchers one day examine how the U.S. lost the war for artificial intelligence, the hindsight of history may show that the current antitrust debate was the fatal turning point.

#### Tech giants will expand into the finance— but regulations deters that

Jones and Ozcan 21 – Head of Finance, Strategy and Planning at retirement FinTech; Smart, headquartered in London, Professor of Entrepreneurship and Innovation at Saïd Business School, Oxford University

Ryan Jones and Pinar Ozcan, "Rise of BigTech platforms in banking," Saïd Business School at the University of Oxford, Industry Paper 1, 2021, <https://www.sbs.ox.ac.uk/sites/default/files/2021-02/Rise%20of%20BigTech%20Platforms%20in%20Banking%20-%20Oxford%20White%20Paper%20Final%20%28002%29.pdf>

Banks, and in particular current accounts, can be viewed in many ways as a platform model of the 20th century. Incumbents, who provide free current account services to consumers, have long boasted of their number of products per customer (PPC) – quoted as high as 6 for premier account customers of leading UK banks. This has been fostered by a relationship built around the current account platform from which additional services are bundled to create both economies of scale and scope. This in turn has **become the expectation** of consumers who want a **one-stopshop** for financial needs, creating a barrier for new entrants. This barrier has proven hard to navigate for FinTechs whose innovation focuses in one area of the banking ecosystem.

While all informants agree that the traditional disruptive path is significantly constrained and reshaped by the regulatory context, it is also clear that a platform business model is particularly suitable for financial services.

Having seen the impact of BigTech in other industries, the banking industry is understandably keeping an eye on the **potential for BigTech** to deploy their platforms in banking. Amongst our informants, some saw this as a matter of time, whilst others doubted it would happen at all, with the cost of regulation commonly cited as the largest barrier. Interestingly, even among those who saw entry as a certainty, **none considered that it was already happening** – this is supported by the fact that no BigTech company has yet acquired a full banking license in the UK. However, **this should not fool anyone**. Over recent years there has been **significant activity** from BigTech players in **banking-related services**, resurfacing and reiterating the question of where banking **starts and ends.**

As shown in the table above, BigTech are **actively broadening** their platforms into a **number of areas** of the financial ecosystem, in particular payments. This may partly be due to the lower regulatory burden of payments; as one insider put it – e-money license holders can ‘zip around like bugs’ compared with more heavily regulated deposit-takers. Another potential reason is datafication. Access to the payments network provides a vast amount of new data on consumer preferences and buying habits, which can be coupled with existing platform data to enrich BigTech’s understanding of its customers and create new opportunities for monetisation and lock-in.

As well as acquiring new sources of data, activity in financial services to date is also offering BigTech the opportunity to **further monetise** their existing data stacks. Amazon’s extension of credit to businesses on the platform via Amazon Lending, launched in the US in 2012 and in the UK in 2015, is a prime example. Amazon already has **unrivalled access to data** on its seller community. As the sole source distributor for many of its merchants, Amazon already knows product type, quantity and, importantly, revenue generation of each seller per month. This information can be used to profile sellers’ ability to pay and extend credit on a targeted basis, **far better** than a bank could without access to similar data. From this advantage, Amazon can begin to use this data to learn more about risk modelling and other core areas of banking. The same dynamics are true of Facebook and the social media platforms, who capture **swathes of data** on individuals that can be collated with payments and other financial data to create new and innovative bankingproducts.

Entry into these, perhaps peripheral, areas of the banking bundle could be the extent of BigTech’s ambitions in banking. However, they appear to be the start of a **broader envelopment**. While troubled in its execution, Facebook’s closed libra ecosystem has the mission to ‘enable a simple global payment system and financial infrastructure that empowers billions of people’3 . It has since attracted a significant amount of debate and regulatory attention from both the Federal Reserve Bank and the Bank of England, among others. Similarly, Google has announced it ambitions to enter the US ‘checking account’ market with an anticipated consumer launch during 2021. This **gradual participation** in banking services in many ways **mirrors the classic disruptive path** described by the innovator’s dilemma (Christensen, 2003). BigTech’s acquisition of elements of the banks’ bundle could represent a **similar path to market domination**. Ceding markets that they previously dominated may leave incumbents open to a fuller platform envelopment by BigTech in their most profitable services, such as mortgages and consumer credit. This trend is also evident in the table above by the number of lending and credit services already offered by BigTech.

#### Blockchain key to prevent snap financial collapse

Furber 19 – Sophia Furber is a journalist with S&P Global Market Intelligence, where she leads EMEA fintech and banking tech reporting, citing Brian Behlendorf, executive director of Hyperledger

Sophia Furber, "Blockchain could prevent rerun of 2008 banking meltdown, says tech veteran," S&P Global Market Intelligence, 6-28-2019, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/blockchain-could-prevent-rerun-of-2008-banking-meltdown-says-tech-veteran-52534233

The aftermath of the 2008 global financial crisis would have been considerably less chaotic if banks had used blockchain to keep track of complex derivative trades, according to technologist Brian Behlendorf, executive director of Hyperledger.

Hyperledger, a global cross-industry group that aims to advance the use of blockchain technologies, is an initiative of the The Linux Foundation and counts major global banks including Deutsche Bank AG, JPMorgan Chase & Co. and Citigroup Inc. among its members.

More than the crash in the U.S. housing market, it was what happened next with the vastquantity of credit derivatives that really tipped the financial system into crisis, Behlendorf said.

At the height of the global financial crisis in October 2008, the collapse of Lehman Brothers Holdings Inc. triggered hundreds of billions in credit default swap, or CDS, protection payouts, but because the derivative instruments had been bought and sold **so many times**, it was **difficult to** know who was liable to pay out.

'A crisis of paperwork'

"This was not a crisis of over-exuberance. It was a crisis of paperwork," Behlendorf said in an interview. "It showed the fallibility of [banks'] digital systems. There was not an automated systematic record of who owned what, and banks were slow to respond."

Using blockchain would have meant that banks had a common system of record for instruments such as swaps, which could have resulted in a more "orderly unwinding" of contracts, he said.

There is a strong case for using blockchain in the parts of a bank that deal with settlements, clearing and trading, as this could help to prevent a re-runof the events of 2008, he said.

Until February this year, Hyperledger had been chaired by Blythe Masters, the JP Morgan banker widely credited with inventing the credit default swap in the 1990s. Following her career in banking, Masters has emerged in recent years one of the most vocal advocates for the use of blockchain in the world of finance and spent four years as CEO of blockchain services firm Digital Asset Holdings, LLC before stepping down in February this year, citing personal reasons.

Masters has taken a step back from Hyperledger for the time being for health reasons, according to Behlendorf.

The global CDS market has shrunk considerably since the days of the global financial crisis: outstanding notional amounts of CDS contracts stood at $8 trillion at the end of the first half of 2018, compared with $61.2 trillion at the end of 2007, according to the Bank for International Settlements.

But beyond the infamous CDSs, the global derivatives market is still vast — and growing. The notional outstanding value of over-the-counter derivatives stood at $595 trillion as of end-June 2018, up from $532 trillion at end-2017, according to the BIS.

#### Sustained economic depression triggers world war

* Distinct from Covid because that was only 1 year

Walt 20 – Stephen M. Walt is a columnist at Foreign Policy and the Robert and Renée Belfer professor of international relations at Harvard University.

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

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

### CP Inequality

#### The United States federal government should:

#### Implement a Universal Basic Income

#### Substantially increase taxes on the ultra-wealthy and corporations

#### Increase Internal Revenue Service funding and close tax loopholes

#### Grant significant increases to union and labor rights

#### Tax rates on the ultra wealthy solves income inequality and democracy

Collins 21 – Chuck Collins directs the Program on Inequality and the Common Good at the Institute for Policy Studies, where he also co-edits Inequality.org.

Chuck Collins, 3-26-2021, "Want to Fix the Nation's Woes? Tax Wealth," Inequality.org, <https://inequality.org/great-divide/fix-nations-woes-tax-wealth/>

An annual wealth tax, levied on those with assets of more than $50 million, could solve a number of festering problems, from raising revenue for pandemic relief to slowing a democracy-disrupting concentration of power. It’s an idea whose time has come.

Sen. Elizabeth Warren (D-MA), U.S. Representatives Pramila Jayapal (D-WA) and Brendan Boyle (D-PA), recently introduced legislation to levy a 2 percent annual tax on wealth starting at $50 million, rising to 3 percent on fortunes of more than $1 billion.

Polls show that the idea of a national wealth tax has overwhelming popular support, including among Republicans and independents.

The tax, which would apply to fewer than 100,000 U.S. residents, would raise an estimated $3 trillion over the next decade. It would be paid entirely by multi-millionaires and billionaires who have reaped the lion’s share of wealth gains over the last four decades, including during the pandemic. According to one analysis, almost half the revenue would come from the 650 billionaires who have seen their wealth increase more than $1.3 trillion since March 2020, and who together hold $4.2 trillion in assets.

A wealth tax would reverse more than a half-century of tax cuts for the wealthiest households. Billionaires have seen their taxes decline roughly 79 percent as a percentage of their wealth since 1980. The “effective rate” on the billionaire class — the actual percentage paid — was 23 percent in 2018, lower than for most middle-income taxpayers.

**The revenue from a wealth tax could be deployed to pay for pandemic emergency measures as well as urgently needed public investments in infrastructure, education and health care.**

#### Universal basic income solves income inequality

UNESCO 17

2-14-2017, "Can the universal basic income solve global inequalities?," No Publication, https://en.unesco.org/inclusivepolicylab/news/can-universal-basic-income-solve-global-inequalities

UBI has potentially profound ramifications for inequality. **Poverty is eliminated**, the labour contract becomes more nearly voluntary, and the power relations between workers and employers become less unequal since workers have the option of exit. The possibility of people forming cooperative associations to produce goods and services to serve human need outside the market increases since such activity no longer needs to provide the basic standard of living for participants. Sceptics of basic income typically raise two main objections: that UBI would reduce incentives to work and reduce the supply of labour, and that the tax rates needed to fund UBI would be prohibitively high.

Two things can be said about the incentive issue. First, means-tested income support programmes are plagued by poverty traps in which people lose their benefits when their earned income crosses some threshold. By contrast, a UBI creates no disincentive to work. **Paid work always increases the discretionary income** of people with a UBI. Second, while no country has adopted a full basic income, there have been a few limited experiments in various places in the world which enable us to examine the effects of UBI on labour force participation. In the United States and Canada in the 1970s there were a number of randomized controlled trials, most notably in Seattle and Denver, in which randomly selected low-income individuals received a UBI. More recently, **in India in 2011**, eight villages were selected in which all residents were given a basic income. In all of these experiments, receiving a UBI significantly improved the lives of people while having at most a modest effect on labour force participation.

### CP States

#### Text: The fifty states and all relevant United States territories should favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies.

#### States have the right to enforce federal antitrust law and enact and enforce their own antitrust laws---those are not inherently Congressionally preempted.

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

### DA FTC

#### The plan forces tradeoffs in FTC enforcement efforts – they’re in a merger tsunami and barely staying afloat, but the plan drowns them

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Despite short resources, FTC is effectively regulating hospital mergers – the plan halts that progress

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Rural health organizations going out of business triggers quick and massive food price spikes – also causes hyperinflation that makes the US dollar worthless almost overnight

Alemian 16

David Alemian, Vice President of Capital Crest Financial Group, Rural Healthcare Is a Matter of National Security, NOVEMBER 08, 2016, <http://www.mdmag.com/physicians-money-digest/contributor/david-alemian-/2016/11/rural-healthcare-is-a-matter-of-national-security>

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If too many rural health organizations go out of business, it then becomes a matter of national security and here’s why:

In most rural communities, the healthcare organization is the largest employer. When the largest employer goes out of business, the community collapses and people move away. What was once a thriving community then becomes a ghost town. Rural America produces the food that feeds the rest of the country.

What will happen when our amber waves of grain turn to desert wastelands because there is no one to work our great farmlands? As the source of food dries up, and store shelves empty, the price of food will go through the roof. As food prices go up, hyperinflation will become a reality, and our printed money will become worthless. Almost overnight, Americans will begin to go hungry because they won’t be able to afford to put food on the table.

#### Nuclear war

FDI 12, Future Directions International, a Research institute providing strategic analysis of Australia’s global interests; citing Lindsay Falvery, PhD in Agricultural Science and former Professor at the University of Melbourne’s Institute of Land and Environment, “Food and Water Insecurity: International Conflict Triggers & Potential Conflict Points,” <http://www.futuredirections.org.au/workshop-papers/537-international-conflict-triggers-and-potential-conflict-points-resulting-from-food-and-water-insecurity.html>

There is a growing appreciation that the conflicts in the next century will most likely be fought over a lack of resources. Yet, in a sense, this is not new. Researchers point to the French and Russian revolutions as conflicts induced by a lack of food. More recently, Germany’s World War Two efforts are said to have been inspired, at least in part, by its perceived need to gain access to more food. Yet the general sense among those that attended FDI’s recent workshops, was that the scale of the problem in the future could be significantly greater as a result of population pressures, changing weather, urbanisation, migration, loss of arable land and other farm inputs, and increased affluence in the developing world. In his book, Small Farmers Secure Food, Lindsay Falvey, a participant in FDI’s March 2012 workshop on the issue of food and conflict, clearly expresses the problem and why countries across the globe are starting to take note. . He writes (p.36), “…if people are hungry, especially in cities, the state is not stable – riots, violence, breakdown of law and order and migration result.” “Hunger feeds anarchy.” This view is also shared by Julian Cribb, who in his book, The Coming Famine, writes that if “large regions of the world run short of food, land or water in the decades that lie ahead, then wholesale, bloody wars are liable to follow.” He continues: “An increasingly credible scenario for World War 3 is not so much a confrontation of super powers and their allies, as a festering, self-perpetuating chain of resource conflicts.” He also says: “The wars of the 21st Century are less likely to be global conflicts with sharply defined sides and huge armies, than a scrappy mass of failed states, rebellions, civil strife, insurgencies, terrorism and genocides, sparked by bloody competition over dwindling resources.” As another workshop participant put it, people do not go to war to kill; they go to war over resources, either to protect or to gain the resources for themselves. Another observed that hunger results in passivity not conflict. Conflict is over resources, not because people are going hungry. A study by the [IPRI] International Peace Research Institute indicates that where food security is an issue, it is more likely to result in some form of conflict. Darfur, Rwanda, Eritrea and the Balkans experienced such wars. Governments, especially in developed countries, are increasingly aware of this phenomenon. The UK Ministry of Defence, the CIA, the [CSIS] US Center for Strategic and International Studies and the [OPRI] Oslo Peace Research Institute, all identify famine as a potential trigger for conflicts and possibly even nuclear war.

### Innovation

#### Tech giants inevitably circumvent enforcement and even the harshest DOJ penalties aren’t an effective deterrent

Jeffers citing **McCareins 19** – Mark McCareins, Clinical Professor of Business Law; Co-Director, JDMBA Program at NU Kellogg. Glenn Jeffers, freelance writer.

Mark McCareins, 8-19-2019, "Why Antitrust Regulators Don’t Scare Big Tech," Kellogg Insight, <https://insight.kellogg.northwestern.edu/article/why-antitrust-regulators-dont-scare-big-tech>

The Big Tech Firms Are Devoting Resources to Antitrust Compliance

Because their sheer size makes them highly attractive targets for antitrust investigation, big tech companies like Apple, Google, Amazon, and Facebook will have spent a lot of time, money, and energy on staying on the right side of antitrust laws.

“They should have devoted serious resources to what I would call ‘antitrust compliance,’” McCareins says. “Before they launch a new product or service, they’ve already probably run it through an antitrust filter and either said, ‘This is a solid idea,’ or ‘That may be crossing the line. Don’t do that.’”

This “antitrust filter” happens on a few levels. For one, these firms are educating their employees about compliance issues. Their business development and strategy teams are also consulting with antitrust compliance experts—both within their own companies and with outside firms they’ve retained—to evaluate whether existing programs and new products and services might run afoul of regulators.

“Walmart and Amazon are now bringing the benefits of their competition to the consumer. This is the exact result envisioned by the U.S. antitrust laws.”

In McCareins’s view, these large businesses have to date played within the antitrust rules to keep markets competitive. Large-scale government investigations like the ones the DOJ and FTC plan could not only prove costly and ineffective, but could also draw resources away from targeting actual abuses in other markets.

“It’s a trade-off,” he says. “If regulators bring a highly speculative case in one of these big-name markets because they think it will show America that they are tough on regulation, and they lose—and while they’ve been doing that, they let 20 other markets go unattended—I don’t know if that’s a good allocation of our prosecutorial resources. The Antitrust Division’s loss earlier this year in the ATT/Time Warner merger litigation is an example of the government rolling the dice with a speculative case and limited resources. One would think with respect to the current tech investigations that the government cannot afford a repeat of the ATT/Time Warner outcome.”

The Feds Don’t Have Time on Their Side

Even where there may be cause for concern, federal regulatory agencies are notoriously slow to investigate anticompetitive practices by tech companies. The investigations of any of these four firms will take years to unfold, and even longer to prosecute.

Take, for example, Microsoft. The FTC launched an investigation into the software firm’s bundling practices in 1990, with the DOJ following suit eight years later. At the time, the company’s Windows operating system accounted for 90 percent of the PC market. The DOJ eventually charged Microsoft, claiming that its Internet Explorer browser, which was built into Windows, had an unfair advantage over other web browsers like Netscape.

In 2000, a federal judge ordered the company to be split into separate entities, but an appeals court reversed the ruling. The DOJ and Microsoft finally settled the case in 2002—a full twelve years after a regulatory agency first launched an investigation. Microsoft was ultimately required to give computer manufacturers identical licensing contracts for Windows, which gave other companies more equal access to the browser market, as well as undergo nine years of court supervision into its business practices.

The punishment was, to say the least, much reduced from its original form. “The U.S. Department of Justice was not overly successful in that attack,” says McCareins, who was a partner in the firm that represented Microsoft, Winston & Strawn.

Any Penalties Are Likely to Be Insufficient

Which brings McCareins to his final argument: even if regulators are successful in proving anticompetitive behavior by one of the big four, the penalties will likely be civil judgements in the form of large fines, which may not serve as an effective deterrent for such huge, highly profitable companies. In addition, the antitrust division announced earlier that it is not a big fan of what it describes as “behavioral remedies.” So if the division does find grounds to sue, it will need to be sure that a structural remedy will be the ultimate result.

At worst, the FTC and DOJ could force a divestiture similar to the federal ruling in the Microsoft case. However, according to McCareins, divestitures do not always work to quell anticompetitive behavior in a timely manner, especially in markets where technological change is rampant.

In 1984, for example, the federal government broke AT&T into eight regional telecom providers, which became known as the “Baby Bells.” But those companies have since been reunited through a series of mergers and acquisitions. AT&T is now even bigger than it was in the 1980s thanks to its acquisitions of cellular and cable companies.

“You look at the telecom landscape today and you look at AT&T back in the day; you laugh and say, ‘I can’t believe we spent so much time and energy on that process,’” McCareins says.

#### The Big Four have increased innovation and *driven down* prices

**Litan 18** – B.S. in Economics, the Wharton School; J.D., Yale Law School; Ph.D., Yale University. Non-Resident Senior Fellow at the Brookings Institution; previously Vice President and Director of Economic Studies

(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

Nonetheless, fears have been expressed from across the political spectrum about the growing power of the major tech platforms – especially The Four – for stifling innovation. It is important in assessing any such claims to distinguish between the factors that have led to tech platform successes, and subsequent activities of certain platforms once they have gained some measure of market power or influence.

As for their success, there is no evidence – nor do I detect any serious argument – for the proposition that any of the major tech platforms earned their positions through anti-competitive means. Even when the Department of Justice twice sued Microsoft in the 1990s – initially for abusive licensing practices in 1994, which was settled by a consent decree, and then again in 1998 for unlawfully maintaining its Windows operating systems (OS) monopoly for personal computers, ending in certain restrictions on Microsoft’s behavior – the Department never argued that the company achieved its OS monopoly unlawfully. Likewise, each of The Four has achieved its success through superior products or services that consumers or users clearly want (shortly, I address arguments that the success of Facebook and Google is attributable, at least in part, to mergers that should not have been approved).

Moreover, in each of these cases, the tech platforms have taken advantage of economies of scale given the high fixed costs (but low to zero marginal costs) of serving additional users/ customers, or “network effects” arising from the fact that the value of their networks or platforms increases with the number of users, or both. Put differently, tech platform markets (for perfectly legitimate and well-understood reasons) tend toward monopoly – “winner take all” – or at least a high degree of market concentration.8

Competition has not somehow been “lessened” when successful platforms invent a product or service that did not previously exist. Furthermore, despite their dominance in one market or sector (which may not constitute a “relevant market” for antitrust purposes) – social media (Facebook), online commerce (Amazon), Internet search (Google), premium smartphones (Apple) – the platforms are invading each other’s turf and, in turn, creating new kinds of competition against each other. Witness Facebook’s competition with Google for online ads, which Apple is just joining. Likewise, while Google may dominate general Internet searches, its chief competitor for product searches is Amazon.

Speaking of Amazon, though businesses in various parts of the economy are fearful of that company’s business model, recent research documents that online commerce, which Amazon has pioneered, has kept consumer product inflation in check – and, in many cases, helped drive prices downward. This clearly benefits consumers.9 The Chairman of the Federal Reserve Board, Jerome Powell, has pointed to the “Amazon effect” as potentially a major reason the overall inflation rate has not accelerated even as the unemployment rate has fallen to historic lows.10 It is hard to square these developments with claims that competition has weakened in consumer product markets. All of this is good for consumers and workers since, other things being equal, less inflation at any given level of unemployment enables the Fed to permit the economy to run “hotter,” with less unemployment, than might otherwise be the case.

Amazon, Apple and Alphabet also have entered the entertainment business, joining another tech platform, Netflix, and the traditional Hollywood studios – in the process, providing much stronger competition in the content generation market. Significantly, the tech companies’ entry into content is de novo, or from scratch, rather than through acquisition of existing firms, except for Alphabet’s acquisition of YouTube – a content site Google (later Alphabet) beefed up after it was acquired.11

Each of the tech platforms already has entered (or is looking to enter) other lines of business – either creating new markets or adding to competition in existing ones. Examples include Alphabet’s Waymo division that is working hard to commercialize driverless vehicles, and Amazon’s apparent intention to enter the transportation market – not only to make the company independent of third-party transporters such as FedEx, UPS and the U.S. Postal Service, but eventually to compete directly against them, potentially bringing down transportation costs as Amazon has done in other markets it has entered.

#### Antitrust is the wrong instrument for tech regulation

**Rosoff 21** – Matt Rosoff, Editorial Director, Digital at CNBC

Matt Rosoff, “Op-ed: This week showed how the Big Tech antitrust campaign is totally misguided,” June 30, 2021, CNBC, <https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html>

On Wednesday, the tech industry saw five companies debut on public stock markets. One of them, Chinese ride-hailing giant Didi, is worth nearly $70 billion. Two others, Taboola and Integral Ad Science, compete in the online advertising industry -- one of the markets that has supposedly been ruined by Alphabet (in particular) and Facebook.

More generally, this year has seen the hottest IPO market in years, and investors continue to pile into start-ups at a record pace -- Q1 saw more than $64 billion in venture funding, a record.

This does not look like a deserted wasteland of stifled innovation and broken dreams.

Meanwhile, the general public doesn’t see tech power as a particularly pressing issue. In a survey funded by a tech industry group, 44% of respondents ranked tech industry regulations as the lowest priority on a list of five options, behind the economy, public health, climate change and infrastructure. Yes, 53% of the respondents thought some legislation was a good idea. But that does not mean the public wants Congress and the courts to aim the antitrust cannon at these giants.

As I wrote four years ago, antitrust is the wrong approach here.

None of these companies have monopolies over meaningfully defined relevant markets -- you really have to stretch and squeeze the market definitions for their dominance to come into clear view. The real state of the tech industry is an all-out business war between the five giants, a constantly shifting landscape of rivalries and backbiting -- think Great Powers Europe before World War I -- with numerous well-funded competitors of all sizes waiting to seize any opportunity and fill any gap they leave open.

For instance:

Google dominates search and Facebook is the biggest social media company by far. But the main source of their revenues is online advertising, and they compete bitterly for every available online ad dollar, with Amazon coming quickly up behind. And yet, there’s still enough space for TikTok, Twitter, Snap and a dozen small ad-tech competitors to build sustainable, thriving ad-supported businesses.

Amazon, Microsoft and Google are locked in a hard-knocking three-way war for supremacy in cloud computing infrastructure. And yet, there are dozens of companies delivering thriving cloud services on top of or alongside these platforms, including Snowflake, which debuted last year and is now worth more than $70 billion, and Zoom, which went public in 2019, and is worth almost $115 billion.

Facebook hates Apple and complains about its control over iPhone apps every chance it gets -- except, Mark Zuckerberg now admits that Facebook might actually be stronger after Apple’s recent privacy changes to the iPhone. Meanwhile, Apple’s iOS is actually a minority competitor, as Google’s Android operating system is the dominant mobile platform in the world -- and Microsoft just signed a deal with Amazon to support Android apps on Windows.

To be perfectly clear: Yes, it is in the public interest to regulate these tech giants more strictly.

For instance, Facebook and Google’s YouTube exercise an enormous amount of influence over public discourse and politics by allowing misinformation to spread almost unchecked.

Amazon and Apple control extremely valuable marketplaces that reach hundreds of millions of people, and can use this control to pit suppliers against each other and extract arguably onerous fees.

Union advocates allege Amazon illegally interfered in a recent attempt to unionize in Alabama, and many workers have complained about working conditions in warehouses and delivery vehicles.

All of the companies have used acquisitions to enter adjacent markets and, arguably, to stifle potential competitors before they got too big -- a tactic also used by companies outside the Big Five, such as Oracle in past years and Salesforce more recently.

Several of their founders are now centi-billionaires, a perfect example of the runaway income inequality that many progressives believe must be curbed.

But all of these activities can be addressed with targeted regulations or stricter enforcement of existing laws. Antitrust is a blunt instrument meant to address major market distortions created by true monopolists. Being big, in itself, is not illegal. Applying antitrust law to these companies is misguided, wrong, and will not have the desired effect of curbing their power in meaningful ways.

#### Robust M&A has increased entrepreneurial activity

**Manne 21** – Geoffrey Manne, JD UChicago Law, fellow at Northwestern University Center on Law, Business, and Economics, founder of the International Center for Law and Economics. Samuel Bowman, Director of Competition Policy at the International Center for Law and Economics. Dirk Auer, LLM from UChicago.

(Geoffrey A. Manne, Samuel Bowman & Dirk Auer, “Technology Mergers and the Market for Corporate Control,” Draft edition released August 4, 2021, forthcoming in Missouri Law Review (Fall 2021), <https://laweconcenter.org/wp-content/uploads/2021/08/SSRN-id3899524.pdf>)

We begin by assessing whether the evidence that anticompetitive conduct, especially in mergers, is impeding the ability of new firms to enter and compete with incumbents. This is the primary underlying theory of harm suggesting the need for invigorated enforcement to prevent such “kill zones.” A close look at the evidence suggests that, whatever the strength of these concerns in theory, they are not observed in practice.

First, the supposed “kill-zone” effect does not appear to have led to aggregate reductions in entrepreneurial activity, even if it may in principle lead to displacements. On the contrary, by most conventional measures, entrepreneurial activity in the tech sector has grown healthily in the presence of increasing M&A activity by large incumbents. Indeed, these may be related.

Startups generally have two methods for achieving liquidity for their shareholders: IPOs or acquisitions. According to the latest data from Orrick and Crunchbase, between 2010 and 2018 there were 21,844 acquisitions of tech startups for a total deal value of $1.193 trillion.46 By comparison, according to data compiled by Jay R. Ritter, a professor at the University of Florida, there were 331 tech IPOs for a total market capitalization of $649.6 billion over the same period.47 As venture capitalist Scott Kupor said in his testimony during the FTC’s hearings on “Competition and Consumer Protection in the 21st Century,” “these large players play a significant role as acquirers of venture-backed startup companies, which is an important part of the overall health of the venture ecosystem.” 48

Moreover, acquisitions by large incumbents are known to provide a crucial channel for liquidity in the venture capital and startup communities: While at one time the source of the “liquidity events” required to yield sufficient returns to fuel venture capital was evenly divided between IPOs and mergers, “[t]oday that math is closer to about 80 percent M&A and about 20 percent IPOs—[with important implications for any] potential actions that [antitrust enforcers] might be considering with respect to the large platform players in this industry.” 49 As investor and serial entrepreneur Leonard Speiser said recently, “if the DOJ starts going after tech companies for making acquisitions, venture investors will be much less likely to invest in new startups, thereby reducing competition in a far more harmful way.” 50

Thus, regulatory intervention that reduces the likelihood of reaching a profitable exit could reduce the incentive for venture capitalists to invest in startups and may inhibit new business formation.

A research paper by Gordon Phillips and Alexei Zhdanov analyzed data on venture capital investments and mergers and acquisitions activity in 48 countries to study this relationship rigorously:

Our evidence shows increases in VC [i.e., venture capital] activity after protakeover laws. VC activity grows by about 40-50% more from pre-law periods to post-law periods in countries that enact pro-takeover laws versus those that do not. . . . This evidence provides support for our hypothesis that M&A and VC markets are connected and improvements in M&A legislation spill over to VC markets by creating more viable exit opportunities for VC firms.”

Across the United States, “the number of [VC] deals scaled by the number of public firms in the state declines by about 27% in post antitakeover years in states that enact an antitakeover law relative to those that do not enact such a law.” 52 The authors conclude by noting that “[a]s many start-ups rely on VC funding and venture capitalists rely on acquisitions for subsequent exits, our results suggest that an active M&A market is important for encouraging venture capital investments, entrepreneurship and growth.” 53

While venture capital may be relatively small in total size—$130.9 billion in 201854—the market punches above its weight in terms of its effect on the broader economy. According to the National Venture Capital Association, “venture capital investments amounted to less than 0.2% of U.S. GDP in 2010,” but “revenues from venture-backed companies accounted for 21% of U.S. GDP and 11% of private sector employment.” 55 In recent years, about 60% of all IPOs were VC-backed companies.56 A research paper from Stanford University found that “public companies with venture capital backing employ four million people and account for one-fifth of the market capitalization and 44% of the research and development spending of U.S. public companies.” 57

Changing competition standards with the intention of reducing the number of tech acquisitions would therefore risk disabling the mechanism that currently provides roughly two-thirds of the liquidity for startups and one-fifth of GDP. Perhaps some other set of market conditions might provide a more optimal set of incentives for entrepreneurs, but advocates of changes have yet to compellingly demonstrate why their preferred vision for the economy is superior to the status quo.

Further, targeted advertising on large platforms also enables startups in other sectors of the economy via efficient customer acquisition: It’s the existence of these platforms that in many ways explains the significant growth we’ve seen in the last seven to ten years in consumer startup and VC financing activity. Simply put, the math works. Companies can experiment with customer acquisition via these channels and fund their marketing companies iteratively based on which yields the highest return on capital. Without these platforms, I would venture that the economics of customer acquisition might be cost prohibitive for most startups and, thus, that the venture capital economy would shift its investment into other more costeffective areas.58

### Inequality

#### Antitrust enforcement doesn’t solve wealth inequality – market dynamics are way too complex for this facile argument to be true – CEOs in consolidated markets make less than in competitive ones

Schechter ’16 – writer at ProMarket citing Daniel Crane, the associate dean for faculty and research and the Frederick Paul Furth Sr. Professor of Law at the University of Michigan, disputes the monopoly regressivity claim

Asher, “Is More Antitrust the Answer to Rising Wealth Inequality?” ProMarket, <https://promarket.org/2016/07/08/antitrust-answer-rising-wealth-inequality/>

Daniel Crane, the associate dean for faculty and research and the Frederick Paul Furth Sr. Professor of Law at the University of Michigan, disputes the monopoly regressivity claim. He also disputes the growing notion that a more rigorous antitrust enforcement can diminish wealth inequality, arguing that “more antitrust is not the answer to wealth inequality.”4

In a recent paper, Crane challenges what he deems as an oversimplification, claiming that that the relationship between antitrust law and wealth inequality is “far more complex” and that the relationship between income distribution and market power is “subtle, circumstantially contingent, and, at least for a developed economy, extremely difficult to generalize.” Crane then goes on to argue that more antitrust can in fact lead to greater inequality, and that “when it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help, but it can be calibrated not to harm.”5

That the U.S. economy is suffering from increasing concentration levels, and that this rise in concentration has led in some cases to significant price increases, has been established in recent years by a growing number of studies. A recent paper by José Azar, Martin C. Schmalz, and Isabel Tecu6 showed that ticket prices are 3-11 percent higher due to common ownership among airlines. A similar paper by Azar, Schmalz, and Sahil Raina that looked at common ownership in U.S. banking7 found that that the largest U.S. banks share identical top shareholders, and that reduced competition in banking leads to worse service for consumers in the form of higher fees for deposit accounts and lower savings interest rates.

In health care, studies show that consolidations among hospitals led to significant price hikes. A 2015 study by Zack Cooper, Stuart Craig, Martin Gaynor, and John Van Reenen found that in markets where hospitals have a monopoly, prices are 15.3 percent higher than in more competitive markets that have four or more hospitals.8

To be sure, Crane does not completely dispute the idea that antitrust enforcement (or lack thereof) is related in some way to growing wealth inequality. What he does dispute, he says, is the “simplistic” version of the relationship between wealth inequality and antitrust, in which consumer-to-producer wealth transfers, enabled by lax antitrust enforcement and rent extractions, create regressive distributional effects. “In a complex, advanced economy, the lines of exploitation and profiting run in too many complicated and cross-cutting directions to permit broad generalization,” he writes in the paper.

“I am not claiming that there is no relationship between wealth inequality and antitrust or market competitiveness,” Crane tells ProMarket. “I am also not claiming that there couldn’t be certain antitrust interventions that would reduce wealth inequality. I think that there could be. All I am saying is that the overall picture, this facile assumption that more antitrust means greater equality and wealth is just way over-broad. The interactions between the distribution of wealth in society and market competitiveness are very complex and cross-cutting, and there are a number of ways in which more antitrust would actually increase wealth inequality.”

He adds: “I am not going to argue that there could never be case in which it would be appropriate to rationalize antitrust enforcement because of the inequality factor—if inequality is your priority, you could try to make a case—but it’s just that there are countercurrents where the effects are much more complicated than the people understand.”

In his paper, Crane disputes one of the key arguments for more antitrust enforcement–that shareholders and senior corporate managers are the main beneficiaries of monopoly rents. The literature on these issues, he argues, is ambiguous. Shareholding is something tens of millions of Americans do across social classes, as part of their 401(k)s and other retirement plans. It is far from clear that shareholders reap the lion’s share of monopoly profits, he notes, and a number of studies have shown that mergers don’t necessarily produce positive returns to the shareholders of the acquiring firm.

Some empirical studies, he claims, have actually shown that CEO compensation declines as markets become less competitive. Labor unions have also supported anti-competitive mergers in the past, he notes—such as the merger between US Airways and American Airlines—expecting that higher concentration would lead to a monopoly wage premium.

“When it comes to regressivity in monopoly, there are two questions: who bears the brunt—who is the effective payer of monopoly overcharges—and who obtains the gains. If you look at CEOs, for instance, the economic literature on CEOS earning a higher wage or stock option in more concentrated markets is very weak. In fact, there’s some literature that suggests that CEOs actually earn a lower wage in monopoly markets. If it’s a monopoly market, they’re less valuable to the firm, because it’s easier to generate income. There’s some literature suggesting it’s precisely where you see highly paid corporate executives that markets are very competitive, because then special talent is most beneficial to shareholders,” he says.

Moreover, Crane argues, antitrust cases have been brought not only against abusive corporations, but against middle-class professionals, such as music teachers, dentists, and lawyers. As an example, he points to a case brought by the Department of Justice against the National Association of Realtors in 2005, a case that concerned restrictions on home buyers to search for listings online.“If you look at statistics on the income of relators and the income of people selling homes, the income profile of a home-selling family is roughly twice the income profile of a realtor, on average,” he says. “Which means that if these allegations were correct, this is a huge wealth transfer from much-richer home sellers to much poorer realtors, and the enforcement action would have actually been regressive.” His point, he stresses, is not to dispute the case, but the notion that antitrust enforcement necessarily leads to progressive wealth redistribution.

Another factor that is often not taken into account, he argues, is government purchasing. Monopolists, he notes, often sell to “large intermediary organizations, which may distribute the incidence of monopoly charges progressively.” In the US, federal procurement accounts for roughly one-seventh of the GDP, not including state and local governments. Government, he argues, pays these monopoly overcharges and ultimately transmits them to taxpayers. Since the U.S. tax code is generally progressive, he argues, those overcharges are being borne progressively. Meaning: wealthy people should, in theory at least, pay a greater share, “which actually means that an antitrust intervention that diminishes anticompetitive conduct in government procurement actually has the effect of increasing wealth inequality.”

When it comes to the issue of price discrimination, says Crane, the relatively wealthy tend to be exploited proportionally more than the relatively poor. “According to most economic accounts, price discrimination has progressive distribution effects, meaning that a greater share of the higher prices charged by price discrimination comes from wealthier individuals than from poorer ones. That’s not uniformly true, but as a generality, in a market characterized by less competition, as monopolists are increasing their prices they are going to be charging proportionally higher prices on higher-income people, on average.”

The proponents of government antitrust action, argues Crane, ignore private efforts to curtail monopoly power. Government, he argues, should “get out of the way” of these private efforts. In the paper, he writes: “When it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help, but it can be calibrated not to harm.”

“I think it’s just a mistake, as a general matter, to include reducing wealth inequality as one of the goals of antitrust law,” says Crane. “I’m resisting the idea that somehow talking about wealth inequality will improve antitrust enforcement. If anything, it will just distract, making it a political hot potato, but I don’t think it will have any appreciable effect on wealth inequality. Antitrust law works best when it’s concerned with economic efficiency and the protection of consumer welfare. That has been the consensus by economists, people in the field, and antitrust agencies for several decades now. My concern [is] that at a political level, people are looking for new scapegoats for wealth inequality, and particularly in recent times people have been looking at weak antitrust enforcement.”

#### Relationship between economic decline and diversionary war is exagerrated

Håkan Frisén 17, Head of Economic Forecasting at SEB, 2-22-17, "Global economy resilient to new political challenges," https://sebgroup.com/press/news/global-economy-resilient-to-new-political-challenges

The interplay between economics and politics was undoubtedly a dominant feature of analyses during 2016. As we know, it was difficult to foresee both election results and their economic consequences. It was certainly not strange that economists were unable to predict the Brexit referendum outcome or Donald Trump’s victory, when public opinion polling organisations and betting firms failed to do so, but lessons might be learned from the economic assessment impacts they made. Economists probably tend to exaggerate the importance of more general political phenomena. While in the midst of elections that appear historically important, it is tempting to present alarmist projections about election outcomes that seem improbable and/or unpleasant. But once the initial shock effect has faded, more ordinary economic data such as corporate reports and macroeconomic figures take the upper hand. ¶ Psychological effects often exaggerated¶ One important observation is that it is difficult to find any historical correlation between heightened security policy tensions and economic activity. Households and businesses do not seem to be especially sensitive in their consumption or capital spending behaviour. This is perhaps because uncertainty is offset by investments in a defence build-up, for example. Only when the conditions that directly determine profitability and investments are affected, for example via rising oil prices or poorly functioning financial markets, will the effects become clear.¶ Markets also seem to have a general tendency to assume that the economic policy makers can actually behave rationally in crisis situations, until this has been disproved. Both during the US sub-prime mortgage crisis of 2007-2008 and the euro zone's existential crisis a few years later, for a rather long time the market maintained its faith that a response would come. Not until after a lengthy period of inept actions by decision makers did these crises become genuinely acute, with large secondary effects as a consequence. This market "patience" is presumably based on a long-time pattern of recurring bailout measures by governments and central banks, which usually benefit risk-taking at the expense of caution or speculation that policy responses will not materialise.¶ It is reasonable to assume that this may also underpin the rather cautious reactions to the risks associated with the Trump administration's agenda. Although one cannot complain about the administration's power of initiative, there is a fairly high probability that in important areas it will not go from words to actions. There may be various reasons for this, such as the inertia built into the separation of powers between the White House, Congress and the court system, or expectations that Trump's newly appointed cabinet secretaries and advisors will eventually take their cues from more established US positions.

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#### Exemptions based on legal tests are NOT prohibitions

Skoczny 01 – Professor of law, Holder of the Jean Monnet Chair on European Economic Law at the Warsaw University Faculty of Management

Tadeusz Skoczny, “Polish Competition Law in the 1990s - on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules,” European Business Organization Law Review, Vol. 2, Issue 3-4, September 2001, LexisNexis

Most importantly, the new Act departed from the relativity of the prohibition of dominant position abuses; as in Article 82 EC Treaty, it is now a general prohibition which does not allow for exemptions on the basis of a rule of reason. Also new is the prohibition of the abuse of dominant position by groups of undertakings, which will allow to effectively control the state and the development of competition on oligopolistic markets. The Act also eliminated the distinction between monopolistic and dominant position; in theory and in practice, it was difficult to justify the maintenance of this distinction. Therefore, the Act relates only to a dominant position, the definition of which however has been changed. According to the new Article 4 point 9, dominant position means a position "which allows [the undertaking] to prevent effective competition on the relevant market thus enabling [the undertaking] to act to a significant degree independently from its competitors, contracting parties and consumers". It is easy to notice that this definition is based on the United Brands and Hoffmann La-Roche standards. It must nevertheless be emphasised that such understanding of dominance was introduced by the AMC already in 1993; it considered dominance as the capacity to act "to a large extent independently of the competitors and clients, thus also the consumers". Thanks to the AMC's judgements also the relevant product and geographical markets are defined on the basis of the criteria of "close commodity substitutability" and "homogenous competition conditions".

#### Even if they are correct that they make new anticompetitive conduct liable, that isn’t a prohibition. Precedent shows that “Rule of reason” standards are derogations from prohibitions.

Doherty 2k – Lancashire Law School, University of Central Lancashire

Michael G. Doherty, “The judicial use of the principles of EC environmental policy,” Environmental Law Review, Vol. 2, Issue 4, December 2000, LexisNexis

The Walloon case concerned the legality of a ban on the importation of waste imposed by the Walloon Regional Executive. The case centred around the application of the 'rule of reason', allowing derogations from the prohibition on quantitative restrictions on imports. This doctrine was developed by the Court on the basis that obstacles to free movement caused by disparate national laws must be accepted 'in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements'. The Court had earlier held that environmental protection was one of the mandatory objectives of the Community, and in this case found that the reason for the ban was genuinely environmental. On the face of it the Walloon restriction did not meet the criteria of being indistinctly applicable, that is, not discriminatory as between domestic and foreign goods. In deciding, however, that the ban was indistinctly applicable the Court relied heavily upon the principle in Article 174 that environmental damage should as a priority be rectified at source (the 'source principle').

#### Affirmatives that allow the conduct they affect to continue to a certain extent or which subject that conduct to certain conditions are imposing restrictions, not prohibitions.

Groves 97 – Solicitor with Pritchard Englefield, the City law firm, specialising in intellectual property law

Peter Groves, Sourcebook on Intellectual Property Law, Google Books

Then I come to the word ‘restrict’. A person though not prohibited is restricted from using something if he is permitted to use it to a certain extent or subject to certain conditions but otherwise obliged not to use it, but I do not think that a person is properly said to be restricted from using something by a condition the effect of which is to offer him some inducement not to use it, or in some other way to influence his choice. To my mind, the more natural meaning here is restriction of the licensee’s right to use the article and I am fortified in that opinion by two considerations.

#### Prohibition is distinct from regulation---it requires ending something fully, which excludes regulating within the bounds of prescribed rules.

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### There’s a marked difference between prohibition, which requires ending something fully, and regulation, which allows activities to continue within the bounds of certain prescribed rules.

Hadley 1909 – Judge

Hiram E. Hadley, McPherson v. State, 174 Ind. 60, Supreme Court of Indiana, December 1909, LexisNexis

In the majority opinion it is conceded "that there is a marked difference" between unqualified prohibition of the sale of intoxicating liquors and the regulation of such sale. It is said in the opinion that "to regulate, restrict and control the sale implies that the sale shall go on within the bounds of certain prescribed rules, restrictions or limitations." Citing Sweet v. City of Wabash (1872), 41 Ind. 7; Duckwall v. City of New Albany (1865), 25 Ind. 283; Loeb v. City of Attica (1882), 82 Ind. 175, 42 Am. Rep. 494.

"Prohibition," states the majority opinion, "as applied to the liquor traffic, implies putting a stop to its sale as a beverage; to end it fully, completely and indefinitely. So, if the purpose of the act in question is to authorize the exercise of unqualified prohibitory power, as usually understood by the term, the act is void because its subject is not expressed in the title." The court might properly have further said [\*\*\*45] that if the act under its provisions is not one to regulate the sale of intoxicating liquors it is void, for the reason that it does not meet or respond to the subject as expressed in its title.

#### A prohibition implies the entire destruction of the subject-matter in question---that’s distinct from regulation that allow for continuance.

Ellison 1905 – Judge, Missouri Supreme Court

George Robb Ellison, State ex rel. Sheffel v. McCammon, 111 Mo. App. 626, Court of Appeals of Missouri, Kansas City, April 1905, LexisNexis

Under power conferred on cities of the fourth class "to regulate and to license" dramshops, there is no authority to wholly prohibit or suppress. Where [\*\*\*10] there is mere power in a municipality to regulate in a State with a general policy of conducting licensed saloons, authority to prohibit is excluded. "The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity; the latter implies its entire destruction or cessation." Black on Intox. Liq., section 227; 17 Amer. & Eng. Ency. Law (2 Ed.), pp. 285, 286; 1 Dillon on Munic. Corp. (3 Ed.), section 357, note 2, section 363 and notes; Berry v. Cramer, 58 N.J.L. 278, 33 A. 201; Steffy v. Monroe City, 135 Ind. 466, 35 N.E. 121; Champer v. Greencastle, 138 Ind. 339, 35 N.E. 14; Ex parte Hinkle, 104 Mo. App. 104, 78 S.W. 317.

#### Mergers are single acts---that’s distinct from other violations of antitrust laws that unfold over time.

Grove 13 – Chief sustainability officer and president of the Lubrizol Foundation

Elizabeth A. Grove, Brief for Defendant-Appellee The Lubrizol Corporation, Z Technologies Corporation v. The Lubrizol Corporation, US Court of Appeals for the Sixth Circuit, March 2013, LexisNexis

This Court has long recognized that all “Sherman Act” claims are not the same. Conspiracy and scheme claims under the Sherman Act are fundamentally different from merger monopoly claims under the Sherman Act precisely because of the way in which the alleged violations occur. In a merger monopoly case, competition is injured in a single act that occurs all at one time: the merger. In a claim alleging a conspiracy or scheme, the alleged violation necessarily unfolds over time and involves a series of overt acts that occur at various points in time. Although both kinds of claims can be brought under the Sherman Act, this Court has long recognized that they are fundamentally different in terms of the specific conduct or means by which the Sherman Act was violated.

### CP UBI

#### 1AC Riech says that increasing labor rights is whats key to solve their impacts – kicking this means they cant solve

Reich, 15 -- UC Berkeley public policy professor

[Robert, "The Political Roots of Widening Inequality," The American Prospect, 4-8-15, https://prospect.org/power/political-roots-widening-inequality/, accessed 6-26-21]

The Political Roots of Widening Inequality

The key to understanding the rise in inequality isn’t technology or globalization. It’s the power of the moneyed interests to shape the underlying rules of the market.

For the past quarter-century-at least since Bob Kuttner, Paul Starr, and I founded The American Prospect-I've offered in articles, books, and lectures an explanation for why average working people in advanced nations like the United States have failed to gain ground and are under increasing economic stress: Put simply, globalization and technological change have made most of us less competitive. The tasks we used to do can now be done more cheaply by lower-paid workers abroad or by computer-driven machines.

My solution-and I'm hardly alone in suggesting this-has been an activist government that raises taxes on the wealthy, invests the proceeds in excellent schools and other means people need to become more productive, and redistributes to the needy. These recommendations have been vigorously opposed by those who believe the economy will function better for everyone if government is smaller and if taxes and redistributions are curtailed.

While the explanation I offered a quarter-century ago for what has happened is still relevant-indeed, it has become the standard, widely accepted explanation-I've come to believe it overlooks a critically important phenomenon: the increasing concentration of political power in a corporate and financial elite that has been able to influence the rules by which the economy runs. And the governmental solutions I have propounded, while I believe them still useful, are in some ways beside the point because they take insufficient account of the government's more basic role in setting the rules of the economic game.

Worse yet, the ensuing debate over the merits of the "free market" versus an activist government has diverted attention from how the market has come to be organized differently from the way it was a half-century ago, why its current organization is failing to deliver the widely shared prosperity it delivered then, and what the basic rules of the market should be. It has allowed America to cling to the meritocratic tautology that individuals are paid what they're "worth" in the market, without examining the legal and political institutions that define the market. The tautology is easily confused for a moral claim that people deserve what they are paid. Yet this claim has meaning only if the legal and political institutions defining the market are morally justifiable.

Most fundamentally, the standard explanation for what has happened ignores power.

As such, it lures the unsuspecting into thinking nothing can or should be done to alter what people are paid because the market has decreed it.

The standard explanation has allowed some to argue, for example, that the median wage of the bottom 90 percent-which for the first 30 years after World War II rose in tandem with productivity-has stagnated for the last 30 years, even as productivity has continued to rise, because middle-income workers are worth less than they were before new software technologies and globalization made many of their old jobs redundant. They therefore have to settle for lower wages and less security. If they want better jobs, they need more education and better skills. So hath the market decreed.

Yet this market view cannot be the whole story because it fails to account for much of what we have experienced. For one thing, it doesn't clarify why the transformation occurred so suddenly. The divergence between productivity gains and the median wage began in the late 1970s and early 1980s, and then took off. Yet globalization and technological change did not suddenly arrive at America's doorstep in those years. What else began happening then?

Nor can the standard explanation account for why other advanced economies facing similar forces of globalization and technological change did not succumb to them as readily as the United States. By 2011, the median income in Germany, for example, was rising faster than it was in the United States, and Germany's richest 1 percent took home about 11 percent of total income, before taxes, while America's richest 1 percent took home more than 17 percent. Why have globalization and technological change widened inequality in the United States to a much greater degree?

Nor can the standard explanation account for why the compensation packages of the top executives of big companies soared from an average of 20 times that of the typical worker 40 years ago to almost 300 times. Or why the denizens of Wall Street, who in the 1950s and 1960s earned comparatively modest sums, are now paid tens or hundreds of millions annually. Are they really "worth" that much more now than they were worth then?

Finally and perhaps most significantly, the market explanation cannot account for the decline in wages of recent college graduates. If the market explanation were accurate, college graduates would command higher wages in line with their greater productivity. After all, a college education was supposed to boost personal incomes and maintain American prosperity.

To be sure, young people with college degrees have continued to do better than people without them. In 2013, Americans with four-year college degrees earned 98 percent more per hour on average than people without a college degree. That was a bigger advantage than the 89 percent premium that college graduates earned relative to non-graduates five years before, and the 64 percent advantage they held in the early 1980s.

But since 2000, the real average hourly wages of young college graduates have dropped. (See chart below.) The entry-level wages of female college graduates have dropped by more than 8 percent, and male graduates by more than 6.5 percent. To state it another way, while a college education has become a prerequisite for joining the middle class, it is no longer a sure means for gaining ground once admitted to it. That's largely because the middle class's share of the total economic pie continues to shrink, while the share going to the top continues to grow.

A deeper understanding of what has happened to American incomes over the last 25 years requires an examination of changes in the organization of the market. These changes stem from a dramatic increase in the political power of large corporations and Wall Street to change the rules of the market in ways that have enhanced their profitability, while reducing the share of economic gains going to the majority of Americans.

This transformation has amounted to a redistribution upward, but not as "redistribution" is normally defined. The government did not tax the middle class and poor and transfer a portion of their incomes to the rich. The government undertook the upward redistribution by altering the rules of the game.

Intellectual property rights-patents, trademarks, and copyrights-have been enlarged and extended, for example. This has created windfalls for pharmaceuticals, high tech, biotechnology, and many entertainment companies, which now preserve their monopolies longer than ever. It has also meant high prices for average consumers, including the highest pharmaceutical costs of any advanced nation.

At the same time, antitrust laws have been relaxed for corporations with significant market power. This has meant large profits for Monsanto, which sets the prices for most of the nation's seed corn; for a handful of companies with significant market power over network portals and platforms (Amazon, Facebook, and Google); for cable companies facing little or no broadband competition (Comcast, Time Warner, AT&T, Verizon); and for the largest Wall Street banks, among others. And as with intellectual property rights, this market power has simultaneously raised prices and reduced services available to average Americans. (Americans have the most expensive and slowest broadband of any industrialized nation, for example.)

Financial laws and regulations instituted in the wake of the Great Crash of 1929 and the consequential Great Depression have been abandoned-restrictions on interstate banking, on the intermingling of investment and commercial banking, and on banks becoming publicly held corporations, for example-thereby allowing the largest Wall Street banks to acquire unprecedented influence over the economy. The growth of the financial sector, in turn, spawned junk-bond financing, unfriendly takeovers, private equity and "activist" investing, and the notion that corporations exist solely to maximize shareholder value.

Bankruptcy laws have been loosened for large corporations-notably airlines and automobile manufacturers-allowing them to abrogate labor contracts, threaten closures unless they receive wage concessions, and leave workers and communities stranded. Notably, bankruptcy has not been extended to homeowners who are burdened by mortgage debt and owe more on their homes than the homes are worth, or to graduates laden with student debt. Meanwhile, the largest banks and auto manufacturers were bailed out in the downturn of 2008–2009. The result has been to shift the risks of economic failure onto the backs of average working people and taxpayers.

Contract laws have been altered to require mandatory arbitration before private judges selected by big corporations. Securities laws have been relaxed to allow insider trading of confidential information. CEOs have used stock buybacks to boost share prices when they cash in their own stock options. Tax laws have created loopholes for the partners of hedge funds and private-equity funds, special favors for the oil and gas industry, lower marginal income-tax rates on the highest incomes, and reduced estate taxes on great wealth.

All these instances represent distributions upward-toward big corporations and financial firms, and their executives and shareholders-and away from average working people.

Meanwhile, corporate executives and Wall Street managers and traders have done everything possible to prevent the wages of most workers from rising in tandem with productivity gains, in order that more of the gains go instead toward corporate profits. Higher corporate profits have meant higher returns for shareholders and, directly and indirectly, for the executives and bankers themselves.

Workers worried about keeping their jobs have been compelled to accept this transformation without fully understanding its political roots. For example, some of their economic insecurity has been the direct consequence of trade agreements that have encouraged American companies to outsource jobs abroad. Since all nations' markets reflect political decisions about how they are organized, so-called "free trade" agreements entail complex negotiations about how different market systems are to be integrated. The most important aspects of such negotiations concern intellectual property, financial assets, and labor. The first two of these interests have gained stronger protection in such agreements, at the insistence of big U.S. corporations and Wall Street. The latter-the interests of average working Americans in protecting the value of their labor-have gained less protection, because the voices of working people have been muted.

Rising job insecurity can also be traced to high levels of unemployment. Here, too, government policies have played a significant role. The Great Recession, whose proximate causes were the bursting of housing and debt bubbles brought on by the deregulation of Wall Street, hurled millions of Americans out of work. Then, starting in 2010, Congress opted for austerity because it was more interested in reducing budget deficits than in stimulating the economy and reducing unemployment. The resulting joblessness undermined the bargaining power of average workers and translated into stagnant or declining wages.

Some insecurity has been the result of shredded safety nets and disappearing labor protections. Public policies that emerged during the New Deal and World War II had placed most economic risks squarely on large corporations through strong employment contracts, along with Social Security, workers' compensation, 40-hour workweeks with time-and-a-half for overtime, and employer-provided health benefits (wartime price controls encouraged such tax-free benefits as substitutes for wage increases). But in the wake of the junk-bond and takeover mania of the 1980s, economic risks were shifted to workers. Corporate executives did whatever they could to reduce payrolls-outsource abroad, install labor-replacing technologies, and utilize part-time and contract workers. A new set of laws and regulations facilitated this transformation.

As a result, economic insecurity became baked into employment.

Full-time workers who had put in decades with a company often found themselves without a job overnight-with no severance pay, no help finding another job, and no health insurance. Even before the crash of 2008, the Panel Study of Income Dynamics at the University of Michigan found that over any given two-year stretch in the two preceding decades, about half of all families experienced some decline in income.

Today, nearly one out of every five working Americans is in a part-time job. Many are consultants, freelancers, and independent contractors. Two-thirds are living paycheck to paycheck. And employment benefits have shriveled. The portion of workers with any pension connected to their job has fallen from just over half in 1979 to under 35 percent today. In MetLife's 2014 survey of employees, 40 percent anticipated that their employers would reduce benefits even further.

The prevailing insecurity is also a consequence of the demise of labor unions. Fifty years ago, when General Motors was the largest employer in America, the typical GM worker earned $35 an hour in today's dollars. By 2014, America's largest employer was Walmart, and the typical entry-level Walmart worker earned about $9 an hour.

This does not mean the typical GM employee a half-century ago was "worth" four times what the typical Walmart employee in 2014 was worth. The GM worker was not better educated or motivated than the Walmart worker. The real difference was that GM workers a half-century ago had a strong union behind them that summoned the collective bargaining power of all autoworkers to get a substantial share of company revenues for its members. And because more than a third of workers across America belonged to a labor union, the bargains those unions struck with employers raised the wages and benefits of non-unionized workers as well. Non-union firms knew they would be unionized if they did not come close to matching the union contracts.

Today's Walmart workers do not have a union to negotiate a better deal. They are on their own. And because less than 7 percent of today's private-sector workers are unionized, most employers across America do not have to match union contracts. This puts unionized firms at a competitive disadvantage. Public policies have enabled and encouraged this fundamental change. More states have adopted so-called "right-to-work" laws. The National Labor Relations Board, understaffed and overburdened, has barely enforced collective bargaining. When workers have been harassed or fired for seeking to start a union, the board rewards them back pay-a mere slap on the wrist of corporations that have violated the law. The result has been a race to the bottom.

Given these changes in the organization of the market, it is not surprising that corporate profits have increased as a portion of the total economy, while wages have declined. (See charts above.) Those whose income derives directly or indirectly from profits-corporate executives, Wall Street traders, and shareholders-have done exceedingly well. Those dependent primarily on wages have not.

The underlying problem, then, is not that most Americans are "worth" less in the market than they had been, or that they have been living beyond their means. Nor is it that they lack enough education to be sufficiently productive. The more basic problem is that the market itself has become tilted ever more in the direction of moneyed interests that have exerted disproportionate influence over it, while average workers have steadily lost bargaining power-both economic and political-to receive as large a portion of the economy's gains as they commanded in the first three decades after World War II. As a result, their means have not kept up with what the economy could otherwise provide them. To attribute this to the impersonal workings of the "free market" is to disregard the power of large corporations and the financial sector, which have received a steadily larger share of economic gains as a result of that power. As their gains have continued to accumulate, so has their power to accumulate even more.

Under these circumstances, education is no panacea. Reversing the scourge of widening inequality requires reversing the upward distributions within the rules of the market, and giving workers the bargaining leverage they need to get a larger share of the gains from growth. Yet neither will be possible as long as large corporations and Wall Street have the power to prevent such a restructuring. And as they, and the executives and managers who run them, continue to collect the lion's share of the income and wealth generated by the economy, their influence over the politicians, administrators, and judges who determine the rules of the game may be expected to grow.

The answer to this conundrum is not found in economics. It is found in politics. The changes in the organization of the economy have been reinforcing and cumulative: As more of the nation's income flows to large corporations and Wall Street and to those whose earnings and wealth derive directly from them, the greater is their political influence over the rules of the market, which in turn enlarges their share of total income. The more dependent politicians become on their financial favors, the greater is the willingness of such politicians and their appointees to reorganize the market to the benefit of these moneyed interests. The weaker unions and other traditional sources of countervailing power become economically, the less able they are to exert political influence over the rules of the market, which causes the playing field to tilt even further against average workers and the poor.

#### Increases in taxation of the top 1% is sufficient to reduce inequality

Aaron 15 – Bruce and Virginia MacLaury Senior Fellow, The Brookings Institution.

Henry Aaron, October 2015, “Can taxing the rich reduce inequality? You bet it can!” Brookings, https://www.brookings.edu/wp-content/uploads/2016/06/taxing-the-rich-you-bet-aaron.pdf

Taxes are collected for one of two reasons: to balance current spending; or, when deficits are problematic, to avoid undesired spending cuts that would otherwise be necessary. Thus, to gauge the full impact on inequality of changes in tax policy one should pair them with the spending they pay for. Using the Gini coefficient, the Congressional Budget Office reports that government transfers in cash and in kind reduce inequality of market incomes more than twice as much as do taxes of all kinds. Transfers account for nearly 40 percent of the income of people in the bottom income quintile (and even more of those at the 10th income percentile). This fact underscores two key points. • Because taxes pay for public spending, one cannot understand the impact of tax changes on income inequality without considering the activities that they pay for. • Public expenditures are a much more powerful instrument than is the tax system for equalizing the distribution of income. The conclusion that boosting the top bracket can powerfully affect inequality holds even if the revenue is not directly allocated to lower-income households. Projected budget deficits are fueling calls for massive cutbacks in public spending. The Congressional budget resolution passed this year calls for spending cuts of $4.9 trillion over ten years. Of that total, $3.1 trillion would fall on people with low or modest incomes.7 The tax changes shown in lines 3, 4, and 5, of the table below would yield, cumulatively over ten years, respectively, $1.3 trillion, $2.0 trillion, and $2.3 trillion. Even if one accepts the view that currently projected deficits justify such spending cuts (which I do not), the added revenue from tax increases falling exclusively on the highest-income Americans would undercut the argument that such spending cuts are necessary to prevent an increase in the ratio of debt to GDP. The benefits of avoiding such cuts would accrue to people of modest means who benefit from the programs on which spending would be slashed. These benefits should be counted along with the direct revenue effects in measuring the impact on inequality of tax increases. That income inequality has increased massively in the past four decades is beyond serious dispute. Most income gains have accrued to those at the very top of the income distribution. Large proportional gains have accrued to the top 10 percent, larger proportional increases to the top 1 percent, and truly massive increases to the top 0.1 percent of income recipients. My colleagues and I agree that inequality has increased so much and for so many reasons that no single policy can fully offset their effects. That conclusion certainly holds for so narrowly focused a policy as one that increases just the top tax rate on ordinary income from 39.6 percent to 50 percent, a measure that affects only about half of the income of ½ percent of tax payers. But the question remains: can such a policy make a significant dent in inequality? The answer is a clear: Yes.

#### Increases in the IRS budget will drastically improve tax compliance

Thornton and Hendricks 19 – Alexandra Thornton is the senior director of Tax Policy for Economic Policy at American Progress. Galen Hendricks is a special assistant for Economic Policy at the Center.

Alexandra Thornton, Galen Hendricks, June 4 2019, “Ending Special Tax Treatment for the Very Wealthy,” Center for American Progress, https://www.americanprogress.org/issues/economy/reports/2019/06/04/470621/ending-special-tax-treatment-wealthy/

One clear way to rebalance the tax system between wages and wealth would be to increase the tax on capital gains and dividends, which currently are subject to a tax rate of 20 percent—significantly lower than the top marginal rate of 37 percent on ordinary income. A higher tax rate on capital gains might encourage the wealthy to hold on to their assets for longer, so increasing the tax rate on capital gains should be combined either with the mark-to-market system of taxing unrealized capital gains on an annual basis, or with repeal of the stepped-up basis rule mentioned above. Unlike a wealth tax, a mark-to-market regime, or the estate tax, an increase in the tax rate on capital gains does not reach unrealized, untaxed gain. However, a higher rate on realized gains would equalize the treatment of income from work and income from selling assets and thus reduce the ability of the very wealthy to amass even more wealth.

Increase IRS enforcement funding and take other steps to close the tax gap

Funding for the IRS has decreased significantly over the past several years, and this has hampered the agency’s efforts to obtain uncollected taxes from very wealthy individuals. As mentioned above, it is far less costly for the IRS to collect taxes from lower-income taxpayers. With simpler returns, a letter from the IRS known as a “correspondence audit” often can elicit compliance from the taxpayer without any further effort

or expense on the part of the agency.

While ensuring that higher income taxpayers are paying what they owe can be complex and time-consuming, the return on investment may be much greater. The biggest challenge is that Congress has failed to provide the resources the IRS needs to hire employees with the expertise to audit high-end tax returns—indeed, the IRS has approximately the same number of auditors today as it did in the 1950s, when the economy was a fraction of the size it is today.[63](https://www.americanprogress.org/issues/economy/reports/2019/06/04/470621/ending-special-tax-treatment-wealthy/#fn-470621-63) Increased IRS funding could be used to hire additional auditors, increase audit rates for wealthy taxpayers, and establish a minimum audit rate.

#### Solves

Standing 19 – Standing is a professorial research associate at the School of Oriental and African Studies (SOAS)

Standing, 4-16-2019, "Everyone's Talking About Basic Income. Here's 8 Problems It Could Fix," Time, <span class="skimlinks-unlinked">https://time.com/5571472/basic-income-society-problems</span>/

Inequality

The first giant is inequality. Within almost all countries, income and wealth inequalities have increased hugely, partially concealed by wealth stashed in tax havens. We have morphed from an era of liberalized financial markets to one of rentier capitalism, when more income is captured by owners of financial, physical and intellectual property, leaving average wages to stagnate. Governments have increased subsidies and tax cuts for the wealthy, while cutting social benefits and making them harder to obtain.

Inequalities breed resentment, foster social illnesses and slow economic growth. If most of the gains go to an elite, governments must boost growth more to see any gain for lower-income households. But higher economic growth brings other problems, such as more environmental damage, including pollution.

We need something to reverse growing inequality — something compatible with a free market economy. By recycling the rental income now taken by the elite to everybody in society, a **basic income could be the anchor of a reformed distribution system and** modestly **reduce inequality**, if only because a flat-rate regular payment represents a larger share of a low-income person’s income than it would for wealthier people.

Economic Insecurity

The second giant is economic insecurity. Most welfare states insured most male workers and their families against contingency risks such as unemployment, illness and accidents. But social insurance has withered in the face of flexible labor markets and technological disruption. Worse, today’s economic insecurity is characterized by chronic uncertainty. People feel threatened by “unknown unknowns,” which cannot be covered by insurance. And everywhere governments have shifted to a “targeting” approach for the poor, through means-testing and behavior-testing. That has made access to benefits much more uncertain for people in need and those worried about becoming so. In an open, globalized economy, a basic income would provide basic economic security — simply because it would be guaranteed as a right.

Debt

The third giant is debt. This stems from the inequality, stagnant wages and insecurity, and is central to rentier capitalism. More people are living on the financial edge, with unpaid housing rents, utility bills, high-cost credit cards and even higher-cost short-term loans. Globally, total global debt is three times the size of the global economy, with household debt in the U.S. and U.K. at record levels. A rise in interest rates or a recession would trigger an avalanche of distress.

A basic income would not solve the debt problem, but pilot projects around the world show that when people know a predictable amount is coming regularly, they are likelier to pay debts and gain more control of their finances.

### Innovation Adv

#### Acquisitions further innovation by integrating firms’ services with the incumbent

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(Geoffrey A. Manne, Samuel Bowman & Dirk Auer, “Technology Mergers and the Market for Corporate Control,” Draft edition released August 4, 2021, forthcoming in Missouri Law Review (Fall 2021), <https://laweconcenter.org/wp-content/uploads/2021/08/SSRN-id3899524.pdf>)

Moreover, even the so-called “kill zones” may actually be highly innovative and procompetitive. Offering a take on “kill zone” theory inspired by similar phenomena in the pharmaceutical industry, the Crémer Report opines that the presence of “kill zones” calls for a new innovation-based theory of harm in merger control. Essentially, the Commission should explore whether the merger brings about a risk of a “cannibalisation effect”: is there a plausible scenario in which the target, using its innovation, could “eat into the market of the acquirer”? If yes, would the acquirer then have an incentive to delay or cancel potential innovation?59

But as the report itself goes on to note, these acquisitions in the tech industry are distinct in nature from those in the pharmaceutical industry:

There may indeed be cases in the digital realm where a dominant acquirer buys up innovative targets but later shuts down the relevant innovation. This is, however, not the typical scenario. Frequently, the project of the bought-up start-up is integrated into the “ecosystem” of the acquirer or into one of their existing products. Such acquisitions are different from killer acquisitions as the integration of innovative complementary services often has a plausible efficiency rationale. In these cases, the theory of harm becomes more complex.60

Thus, although some of the innovative developments that originate from outside of a dominant firm are brought within that firm, it is not done so to kill those innovations but to integrate them into existing service offerings. There are certainly benefits and costs to this approach—one benefit being that a firm with large scope and scale and a large amount of capital can help introduce new innovations to a ready consumer base. But, no matter what, it’s simply a mistake to say that acquisitions kill innovation; at worst, they transform the way the production of innovation is undertaken.

It is common for entrepreneurs to explicitly include acquisition by an incumbent as part of their “exit” strategy when they are discussing their business plan with potential investors. Insofar as startups may avoid directly competing with the core product offerings of large incumbents, they also consider how their technology might fit into an incumbent’s broader platform or ecosystem (and therefore make their companies ripe for acquisition). One startup co-founder described how some startups “identify what’s missing in someone’s portfolio and they build a company around it,” noting that “[m]any startups build their companies around an exit strategy.” 61 There are even comprehensive guides available online for founders who want to better understand the acquisition strategies of the most acquisitive tech giants.62

#### Dangers of false positives comparatively outweigh risk of anticompetitive mergers

**Manne 21** – Geoffrey Manne, JD UChicago Law, fellow at Northwestern University Center on Law, Business, and Economics, founder of the International Center for Law and Economics. Samuel Bowman, Director of Competition Policy at the International Center for Law and Economics. Dirk Auer, LLM from UChicago.

(Geoffrey A. Manne, Samuel Bowman & Dirk Auer, “Technology Mergers and the Market for Corporate Control,” Draft edition released August 4, 2021, forthcoming in Missouri Law Review (Fall 2021), <https://laweconcenter.org/wp-content/uploads/2021/08/SSRN-id3899524.pdf>)

Of course, the real test for regulators is not just identifying possibly anticompetitive mergers, but being able to do so in a cost effective manner. For example, one might ask whether regulators could successfully have identified the two allegedly anticompetitive mergers out of Google’s 270 acquisitions and, under an error cost analysis,121 done less harm to consumers with false positives than false negatives. If anticompetitive mergers are a tiny percentage of total mergers—and identifying them a priori is difficult—then a precautionary principle strategy that results in many false positives for enforcement would likely not merit the benefits from blocking one or two anticompetitive mergers.

The intuition behind our argument is simple: the desirability of implementing a given legal test is not just a function of (i) the test’s accuracy, (ii) the cost of administering it, and (iii) the respective costs of false positives and false negatives. It also critically depends upon the prevalence of the conduct that adjudicators are attempting to tackle.

Consider two hypothetical settings. Imagine that 10,000 tech mergers occur each year and that, of these, either 1,000 or 2,500 are anticompetitive (the remainder are thus procompetitive or competitively neutral). Suppose further that authorities can either attempt to identify anticompetitive mergers with 75% accuracy, or perform no test at all (i.e., let all mergers go through unchallenged). If there are 1,000 anticompetitive mergers, applying the test would result in 7,500 correct decisions and 2,500 incorrect ones (2,250 false positives and 250 false negatives). And “doing nothing” would lead to 9,000 correct decisions and 1,000 false negatives. But suppose the number of anticompetitive deals increased to 2,500. Applying the test would then lead to the same number of incorrect decisions as not applying it (1,875 false positives and 625 false negatives, versus 2,500 false negatives). And the advantage would tilt towards applying the test if anticompetitive mergers were even more widespread.

This hypothetical example holds a simple lesson for policymakers: the rarer the conduct that they are attempting to identify, the more accurate their identification method must be, and the more costly false negatives must be relative to false positives.

Which leads us to a third critical factor that that is often overlooked in the economic literature, namely the question of merger-specific efficiencies. The issue here is twofold. First, while many of the above papers attempt to quantify the harms that might stem from increased market power (due to a merger), they routinely assume away the possibility of efficiencies. Second, even when they do accept the importance of efficiencies, scholars tend to overlook the fact that they are notoriously difficult to identify and quantify—even (or perhaps especially) for the merging parties.

The following excerpts are revealing in that regard:

The assumption that the merged firm has to choose one or the other technology is consistent with my focus on effects that arise when mergers do not generate productive efficiencies.

\* \* \*

[W]e think that both the question of where to place the burden of proof, and what the standard of proof is, need some rethinking. […] We submit that a fortiori merger policy would benefit from a reversal of the burden of proof in case one of the merging parties has an entrenched dominant position, as it is the case for some of the big tech firms. The merging parties would then need to provide evidence that either the merger does not raise any significant competitive issue . . . or that expected efficiency gains . . . are sufficiently strong to justify the acquisition.

The inability to effectively identify and measure merger-related efficiencies has ramifications as far as the optimal antitrust policy is concerned. Indeed, just as hypothetical future harms weigh in favor of tougher antitrust enforcement, so do **hypothetical efficiencies cut in the opposite direction**.

Perhaps more problematically, moves to focus on potential competition are deeply intertwined with the idea that the burden of proof should be shifted in tech merger proceedings. Defendants would thus bear the responsibility of proving that their merger generates efficiencies for consumers. As a report published by the Stigler Center at Chicago Booth puts it:

The behavior that may be of greatest concern to the many policymakers studying powerful digital businesses is their acquisition of potential competitors. […] These specific merger regulations should require merging firms to demonstrate that the combination will affirmatively promote competition. This shifting of the burden of proof from the government (to prove harm) to the parties (to prove benefit) will assist the DA by placing the job of demonstrating efficiencies on the parties, who have a greater ability to know what they are.125

Likewise, Steven Salop surmises that:

The analysis contained in these points leads to the conclusion that there should be an intrusive legal standard: when the dominant firm (or leading firm in a highly concentrated market) proposes to acquire a unique potential entrant (or one of only a small number), the law should apply a strong anticompetitive presumption with a high rebuttal burden placed on the acquiring firm. This recommended legal standard is in marked contrast to the current, permissive legal standard applied in the U.S.126

As we explain below, such a move would prove highly unfortunate.127 Moving the focus of investigations towards hypothetical harms and benefits effectively shifts antitrust analysis away from tangible factors, such as actual overlaps between merging parties, industry barriers to entry and the current state of competition in an industry. In turn, this dramatically increases the discretion afforded to adjudicators. Under these proposals, antitrust authorities have a discretionary veto over every single tech merger—no matter how small or insignificant. The error-cost consequences of such a shift would be considerable. “[P]lacing the burden of proof on the merging parties would correspond to an enormous shift in approval rates, and the (limited) benefit of cancelling a few anti-competitive mergers would come at a (very high) cost of reduced efficiency gains and innovation incentives.” 128

#### Data – smaller firms means its spread out, harming algorithmic research

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

All else being equal, smaller AI firms have less data. While the relationship between the quantity of data inputs and the quality of algorithmic outcomes is not linear, a correlation is usually evident. For example, recent experiments by researchers at Google found a logarithmic relationship between the amount of data fed into an image recognition model and the model’s performance.42 If more data means more innovation, a post-breakup AI sector could be less innovative overall.

Antitrust action would likely reduce the amount of data held by large companies. This might hurt innovation, especially in application areas requiring exceptionally high amounts of data for acceptable performance.43 In short, the impact of antitrust action on data-driven innovation may hinge on the size of broken-up companies and their data holdings. Google Search or Amazon Web Services, for example, would be large corporations in their own right.44 AWS, one of Amazon’s larger divisions, achieved revenues similar to Raytheon’s company-wide revenues in 2018,45 demonstrating the possible size of spin-offs.46

#### Data is the ONLY thing that matters in the development in AI – startups will lead to a bunch of half-baked solutions that CAN’T solve

Sundblad 18 – Willem Sundblad is a manufacturing industry expert and specializes in analyzing and commenting on trends with clarity and technical expertise.

Willem Sundblad, October 18 2018, “Data Is The Foundation For Artificial Intelligence And Machine Learning,” Forbes, https://www.forbes.com/sites/willemsundbladeurope/2018/10/18/data-is-the-foundation-for-artificial-intelligence-and-machine-learning/?sh=6640b85251b4

Artificial intelligence (AI) and machine learning (ML) are going to have a huge impact on manufacturing. With these technologies, manufacturers will gain the computational power needed to solve problems that humans can’t possibly solve. They will ultimately be able to provide prescriptive answers to production issues manufacturers have been asking for centuries. Namely, how do we make our product as efficiently as possible, with zero waste and the least amount of downtime.

As with most reports about groundbreaking technology, this discussion of the ‘holy-grail’ is way ahead of industry practices. The vision serves a useful purpose in suggesting what’s possible. But with many manufacturers lacking the data infrastructure necessary to obtain real AI and ML capabilities, the journey towards perfect production can also be so abstract that it confuses the very people looking to achieve it. I’m often asked by corporate leadership, “Where and how do we adopt AI technology?”

Begin with data

While the sci-fi-sounding AI scenarios highlight the technology’s incredible computational power, the practical, effective applications begin with data. Indeed, data is both the most underutilized asset of manufacturers and the foundational element that makes AI so powerful. Think of [Maslow’s Hierarchy of Needs](https://www.simplypsychology.org/maslow.html), a theory of motivation that is depicted as a pyramid, with the most basic, most important needs at the bottom, and the most complex needs at the top.

The Data Science Hierarchy of Needs Pyramid

 SOURCE: “THE AI HIERARCHY OF NEEDS” MONICA ROGATI.

Similarly, [Monica Rogati’s Data Science Hierarchy of Needs](https://hackernoon.com/the-ai-hierarchy-of-needs-18f111fcc007) is a pyramid showing what’s necessary to add intelligence to the production system. At the bottom is the need to gather the right data, in the right formats and systems, and in the right quantity. Any application of AI and ML will only be as good as the quality of data collected.

When beginning to adopt AI, many manufacturers discover that their data is in many different formats stored [throughout several MES, ERP, and SCADA](https://www.forbes.com/sites/willemsundbladeurope/2018/10/03/beyond-digital-transformation-how-industry-4-0-benefits-your-customers-employees-and-culture/#1704f40f29fc) systems. If the production process has been manual, very little data has been gathered and analyzed at all, and it has a lot of variance in it. This is what’s known as ‘dirty data’, which means that anyone who tries to make sense of it—even a data scientist—will have to spend a tremendous amount of time and effort. They’ll need to convert the data into a common format and import it to a common system, where it can be used to build models.

Once good, clean data is being gathered, manufacturers must ensure they have enough of the right data about the process they’re trying to improve or the problem they’re trying to solve. They need to make sure they have enough use cases and that they are capturing all the data variables that are impacting that use case.

For example, gathering only one variable about revolutions per minute of your machine is not going to be enough to tell you why a failure happened. However, if you add vibration, temperatures, and data about many conditions that contribute to machine failure, you can begin to build models and algorithms to predict failure. In addition, as more data is collected, you can create accuracy requirements, such as This algorithm will be able to predict this failure within one day’s time, with 90% accuracy.

If this all sounds complicated, solutions are available to automatically collect the data from a variety of devices and systems, then automatically clean the data or format. This allows engineers to focus on building models and algorithms, rather than spend time cleaning the data.

Start by solving a simpler problem

Starting an AI journey with a data first approach allows manufacturers to start understanding and controlling their processes from the beginning.

This not only helps manufacturers get to a controlled process and begin reaping some relatively quick benefits like eliminating process variations, it will improve the types of analytics they can do in the future, with more advanced AI and ML models.

Remember: If your process is out of control, adding AI to it won’t magically fix it.

Another crucial reason to start with gathering data and solving immediate production problems is to gain first mover advantage in your industry. Companies like Google, Amazon and Facebook dominated their industries because they were the first to begin building data sets. Their data sets have become so large, and their data collection and analysis so sophisticated that they are able to grow their competitive advantage.

For manufacturers, the equation is similar. The sooner a manufacturer starts the journey toward AI, the sooner they will build large data sets that will enable them to execute advanced AI and ML models. With each iteration, they’ll put more distance between themselves and the competition.

#### Costs – the speculative nature of AI requires huge investments to reap rewards, means only large companies can

**Foster 20** – Dakota Foster is a graduate student at Oxford University and a former visiting researcher at the Center for Security and Emerging Technology.

Dakota Foster, 6-2-2020, "Antitrust investigations have deep implications for AI and national security," Brookings, https://www.brookings.edu/techstream/antitrust-investigations-have-deep-implications-for-ai-and-national-security/

In late March, Attorney General William Barr announced that “decision time” was looming for America’s leading tech firms. By early summer, Barr expects the Department of Justice to reach preliminary conclusions about possible antitrust violations by Silicon Valley’s largest companies. The DOJ’s investigation is just one of several probes scrutinizing potential abuses by Facebook, Google, Amazon, Apple, and Microsoft. While concerns over consumer protections, anti-competitive practices, and industry concentration have fueled these antitrust investigations, their results will almost certainly have national-security ramifications.

Secretary of Defense Mark Esper has argued that artificial intelligence is likely to shape the future of warfare, and the national-security community has largely backed that conclusion. The most recent National Defense Strategy, released in 2018, highlights AI’s importance, noting that the Pentagon will seek to harness “rapid application[s] of commercial breakthroughs…to gain competitive military advantages.” With defense officials arguing that U.S. military superiority may hinge on artificial intelligence capabilities, antitrust action aimed at America’s largest tech companies—and leading AI innovators—could affect the United States’ technological edge.

But the effects of such action are highly uncertain. Will a less concentrated tech sector comprised of slightly smaller firms fuel innovation and create openings for a new generation of tech companies? Or will reductions to scale significantly hurt leading tech firms’ ability to leverage the traditional building blocks of AI innovation—like computing power and data—into breakthroughs? The answers to these questions aren’t clear cut but offer a way to begin thinking about how antitrust enforcement could impact artificial intelligence innovation and national security more broadly.

Unlike some earlier national-security technologies, the commercial sector plays an outsize role in AI development. As a result, government access to both AI products and innovation hinges, in large part, on industry. While academia, private research labs, and AI start-ups offer important contributions to AI development, major American technology companies have traditionally led the field. Last year, Microsoft, Facebook, Amazon, Google, and Apple ranked among the ten largest recipients of U.S. artificial intelligence and machine learning (ML) patents.

Changes to the composition of America’s tech sector might boost net AI innovation. From 2013-2018, 90 percent of successful Silicon Valley AI start-ups were purchased by leading tech companies. This is a potentially worrisome trend for AI innovation. After all, incumbent firms and emerging companies can have very different incentives. Entrenched tech giants may be more focused on maintaining market share than disrupting markets altogether.

As Big Tech increasingly moves to acquire AI start-ups, individual firm dynamics also shift. Instead of “building for scale,” start-ups begin to “build for sale,” adopting a mentality that may be ill-suited for moonshot innovations. Would a company like DeepMind (now owned by Google parent-company Alphabet), for example, have developed AlphaGo—the ground-breaking computer program that became the first to beat a human player in Go—if the firm’s primary goal was to be acquired by a bigger player?

Antitrust action could shift these incentives and spur competition, potentially opening the door for new AI innovations—and for a new wave of AI companies. With their smaller statures, some of these firms might focus on more niche AI applications, including defense-related products, as start-ups like Anduril and ShieldAI have done. Today’s tech giants have every financial incentive to cater to foreign markets and the average consumer, not to the U.S. federal government. Indeed, with its global user-base, it is hard to imagine Google tailoring its AI innovation decisions to U.S. defense needs. The same may not hold within an AI ecosystem where some companies built, for example, in the mold of Palantir (a data-analytics company with clear national-security applications) consider government their primary customer and subsequently concentrate on its demands.

National-security agencies, from the Pentagon to the U.S. intelligence community, could stand to benefit from more targeted innovation—and from an industrial base better attuned to their needs. As Christian Brose points out, only a fraction of the U.S.’s billion-dollar tech “unicorns” have operated in the defense sector, leaving the U.S. military “shockingly behind the commercial world in many critical technologies.”

As Silicon Valley’s largest companies consolidate AI talent and novel ideas through acquisitions, these companies gain an ever-larger say in the future of AI. This consolidation, which antitrust action could disrupt, may not favor innovation. But breaking up major tech firms also has potential pitfalls for AI innovation. With scale comes resources, and AI innovation is resource-intensive, requiring large quantities of data, diverse datastores, and vast computing power—known as “compute” in industry jargon.

American tech giants’ huge revenues uniquely equip them to fund costly AI research. Google’s DeepMind, arguably the world’s leading AI-research organization, is billions of dollars in debt and lost over $500 million in 2018 alone. Google’s fortress-like balance sheet can easily absorb the costs associated with such cutting-edge research, but smaller firms likely cannot. The economics of compute offer a concrete example of this dynamic. The rapidly increasing volume of compute required for deep learning research, coupled with compute’s prohibitively expensive prices, creates significant barriers to entry and innovation for smaller AI firms. As Microsoft co-founder Paul Allen noted in 2019, the “exponentially higher” costs of compute may leave the U.S. with only “a handful of places where you can be on the cutting edge.” Even the most well-funded independent AI organizations rely on Big Tech’s compute resources. OpenAI’s billion-dollar compute partnership with Microsoft, reached after OpenAI spent millions renting compute from leading tech firms, offers one example.

Changes to firms’ scale also may impact their access to data, another key resource required for AI innovation. Studies have linked the performance of deep learning models to the quantity of data fed into them. At present, tech giants have access to unprecedented volumes of data about their users. Google, for example, can harness data from Google Search, Maps, YouTube, Gmail, and other sources. If antitrust enforcement leads to divestment or broader break-ups, access to data may diminish, lessening innovation.

#### Which is why big tech firms spend proportionally MORE on R&D

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

If R&D spending drives innovation, firms that can spend more on R&D— presumably large ones—will generally hold an edge in innovation. A post-breakup AI sector could be less innovative as a result. Large tech companies do in fact spend more on R&D both in absolute and relative terms. According to PricewaterhouseCoopers, in absolute terms, Amazon and Alphabet were the world’s top two corporate R&D spenders in 2018, with Samsung, Intel, Microsoft and Apple in the top ten.62

In terms of relative R&D spending—the percentage of total firm expenses spent on R&D—large tech companies remained among the highest spenders, led by Facebook (33 percent) in fifth place globally.63 Alphabet and Microsoft, which each spent 20 percent, and Amazon (13 percent) ranked among the top thirty. The smallest firm (based on total operating expenses) of the top 100 global relative R&D spenders was NXP Semiconductors, a Dutch firm with $6.8 billion in operating expenses.64

Because larger firms tend to spend more on R&D, breaking them up would likely reduce their R&D spending. Increases in spending at smaller firms could counter this decline, but the amount and efficacy of that spending are uncertain—both at the individual firm level and in the aggregate across the post-breakup AI ecosystem.65 That said, broken-up firms would remain very large, with sizable R&D budgets to match. Imagine a break-up of Alphabet, whose operating expenses amounted to $110 billion last year; a spin-off company with one-fourth of Alphabet’s current R&D budget would still be larger than 77 of the 100 leading global relative R&D spenders.

#### This conclusion is empirically verified – most historical innovation occurs in incumbent firms NOT start ups

Garcia-Macia et al. 19 – Garcia-Macia, International Monetary Fund; Hsieh, Booth School of Business, University of Chicago and National Bureau of Economic Research; Klenew, Department of Economics, Stanford University and National Bureau of Economic Research

Daniel Garcia-Macia, Chang-Tai Hsieh, and Peter J. Klenew, "How Destructive Is Innovation?," Econometrica, Vol. 87, No. 5 (September, 2019), 1507–1541, September 2019, <http://klenow.com/DestructiveInnovation_GHK.pdf>

Likewise, when a new product replaces an existing product, one would like to identify whether the new product is owned by another firm (“creative destruction”) or the same firm (“own innovation”). Based on case studies, Christensen (1997) argued that innovation largely takes the form of creative destruction, and almost always from new firms. Akcigit and Kerr (2018) looked at whether patents cite earlier patents by the same firm or by other firms. The case studies and the sample of patenting firms, however, may not be representative of firms in the broader economy. Many innovative firms, particularly outside of manufacturing, do not patent.

In the absence of more direct evidence, we try to infer the sources of growth indirectly from the patterns of job creation and job destruction among all private sector firms in the U.S. nonfarm economy. We use data from the U.S. Longitudinal Business Database (LBD) from 1983 to 2013. The seminal work of Davis, Haltiwanger, and Schuh (1996) documents the magnitude of job flows within U.S. manufacturing, and these flows are commonly used as proxies for the intensity of creative destruction. For example, Decker, Haltiwanger, Jarmin, and Miranda (2014) pointed to the decline in U.S. job reallocation since the 1970s as evidence of a decline in the rate of creative destruction.

We view the LBD data through the lens of an exogenous growth model featuring creative destruction, own innovation, and new varieties. For industries such as manufacturing, the object of innovation may be products. For services and retail, which make up the bulk of the LBD data, innovation may take the form of new and improved establishments. For example, Walmart opening a new store may be akin to adding a new product. A new Walmart store arguably gains market share by offering a distinct variety (the store format, including all the items for sale within it) and/or by offering low prices (due to high process efficiency) relative to existing stores in the local market.

We reach four conclusions from our indirect inference based on LBD data. First, most growth appears to come from incumbents rather than entrants. This is because the employment share of entrants is modest. Second, most growth seems to occur through quality improvements rather than brand new varieties. Third, own-variety improvements by incumbents loom larger than creative destruction

(by entrants and incumbents). The contribution of creative destruction is around 25 percent of growth, with the remainder mostly due to own innovation by incumbent firms. Fourth, the contribution of entrants and creative destruction declined from 1983–1993 to 2003–2013, while the contribution of incumbent firms, particularly through own innovation, increased.

#### Bureaucracy – small firms cant navigate pentagon contracts

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

Contracting with the Pentagon is difficult, expensive, and time-consuming. Smaller AI firms may be less able to navigate the federal procurement process, effectively preventing the Pentagon from accessing their technology. The few DOD programs that do partner with smaller firms are under scrutiny for their efficacy.

The high barriers of entry, coupled with an unstable budgetary environment and the high certification costs of federal contracting, favor larger companies.148 Simply put, large firms have more resources and deeper institutional knowledge to bring to the federal contracting process.

## 1NR

### Inequality

#### 1AC doesn’t actual create an impact, says that inequality leads to opposition to LIO but does not say its sufficient to collapse it. LIO structurally sustainable—no reason plan solves it

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In many respects, today's liberal democratic malaise is a byproduct of the liberal world order's success. After the Cold War, that order became a global system, expanding beyond its birthplace in the West. But as free markets spread, problems began to crop up: economic inequality grew, old political bargains between capital and labor broke down, and social supports eroded. The benefits of globalization and economic expansion were distributed disproportionately to elites. Oligarchic power bloomed. A modulated form of capitalism morphed into winnertake- all casino capitalism. Many new democracies turned out to lack the traditions and habits necessary to sustain democratic institutions. And large flows of immigrants triggered a xenophobic backlash. Together, these developments have called into question the legitimacy of liberal democratic life and created openings for opportunistic demagogues.

Just as the causes of this malaise are clear, so is its solution: a return to the fundamentals of liberal democracy. Rather than deeply challenging the first principles of liberal democracy, the current problems call for reforms to better realize them. To reduce inequality, political leaders will need to return to the social democratic policies embodied in the New Deal, pass more progressive taxation, and invest in education and infrastructure. To foster a sense of liberal democratic identity, they will need to emphasize education as a catalyst for assimilation and promote national and public service. In other words, the remedy for the problems of liberal democracy is more liberal democracy; liberalism contains the seeds of its own salvation.

Indeed, liberal democracies have repeatedly recovered from crises resulting from their own excesses. In the 1930s, overproduction and the integration of financial markets brought about an economic depression, which triggered the rise of fascism. But it also triggered the New Deal and social democracy, leading to a more stable form of capitalism. In the 1950s, the success of the Manhattan Project, combined with the emerging U.S.-Soviet rivalry, created the novel threat of a worldwide nuclear holocaust. That threat gave rise to arms control pacts and agreements concerning the governance of global spaces, deals forged by the United States in collaboration with the Soviet Union. In the 1970s, rising middle-class consumption led to oil shortages, economic stagnation, and environmental decay. In response, the advanced industrial democracies established oil coordination agreements, invested in clean energy, and struck numerous international environmental accords aimed at reducing pollutants. The problems that liberal democracies face today, while great, are certainly not more challenging than those that they have faced and overcome in these historically recent decades. Of course, there is no guarantee that liberal democracies will successfully rise to the occasion, but to count them out would fly in the face of repeated historical experiences.

Today's dire predictions ignore these past successes. They suffer from a blinding presentism. Taking what is new and threatening as the master pattern is an understandable reflex in the face of change, but it is almost never a very good guide to the future. Large-scale human arrangements such as liberal democracy rarely change as rapidly or as radically as they seem to in the moment. If history is any guide, today's illiberal populists and authoritarians will evoke resistance and countermovements.

THE RESILIENT ORDER

After World War II, liberal democracies joined together to create an international order that reflected their shared interests. And as is the case with liberal democracy itself, the order that emerged to accompany it cannot be easily undone. For one thing, it is deeply embedded. Hundreds of millions, if not billions, of people have geared their activities and expectations to the order's institutions and incentives, from farmers to microchip makers. However unappealing aspects of it may be, replacing the liberal order with something significantly different would be extremely difficult. Despite the high expectations they generate, revolutionary moments often fail to make enduring changes. It is unrealistic today to think that a few years of nationalist demagoguery will dramatically undo liberalism.

Growing interdependence makes the order especially difficult to overturn. Ever since its inception in the eighteenth century, liberalism has been deeply committed to the progressive improvement of the human condition through scientific discovery and technological advancements. This Enlightenment project began to bear practical fruits on a large scale in the nineteenth century, transforming virtually every aspect of human life. New techniques for production, communication, transportation, and destruction poured forth. The liberal system has been at the forefront not just of stoking those fires of innovation but also of addressing the negative consequences. Adam Smith's case for free trade, for example, was strengthened when it became easier to establish supply chains across global distances. And the age-old case for peace was vastly strengthened when weapons evolved from being simple and limited in their destruction to the city-busting missiles of the nuclear era. Liberal democratic capitalist societies have thrived and expanded because they have been particularly adept at stimulating and exploiting innovation and at coping with their spillover effects and negative externalities. In short, liberal modernity excels at both harvesting the fruits of modern advance and guarding against its dangers.

This dynamic of constant change and ever-increasing interdependence is only accelerating. Human progress has caused grave harm to the planet and its atmosphere, yet climate change will also require unprecedented levels of international cooperation. With the rise of bioweapons and cyberwarfare, the capabilities to wreak mass destruction are getting cheaper and ever more accessible, making the international regulation of these technologies a vital national security imperative for all countries. At the same time, global capitalism has drawn more people and countries into cross-border webs of exchange, thus making virtually everyone dependent on the competent management of international finance and trade. In the age of global interdependence, even a realist must be an internationalist.

The international order is also likely to persist because its survival does not depend on all of its members being liberal democracies. The return of isolationism, the rise of illiberal regimes such as China and Russia, and the general recession of liberal democracy in many parts of the world appear to bode ill for the liberal international order. But contrary to the conventional wisdom, many of its institutions are not uniquely liberal in character. Rather, they are Westphalian, in that they are designed merely to solve problems of sovereign states, whether they be democratic or authoritarian. And many of the key participants in these institutions are anything but liberal or democratic.

Consider the Soviet Union's cooperative efforts during the Cold War. Back then, the liberal world order was primarily an arrangement among liberal democracies in Europe, North America, and East Asia. Even so, the Soviet Union often worked with the democracies to help build international institutions. Moscow's committed antiliberal stance did not stop it from partnering with Washington to create a raft of arms control agreements. Nor did it stop it from cooperating with Washington through the World Health Organization to spearhead a global campaign to eradicate smallpox, which succeeded in completely eliminating the disease by 1979.

More recently, countries of all stripes have crafted global rules to guard against environmental destruction. The signatories to the Paris climate agreement, for example, include such autocracies as China, Iran, and Russia. Westphalian approaches have also thrived when it comes to governing the commons, such as the ocean, the atmosphere, outer space, and Antarctica. To name just one example, the 1987 Montreal Protocol, which has thwarted the destruction of the ozone layer, has been actively supported by democracies and dictatorships alike. Such agreements are not challenges to the sovereignty of the states that create them but collective measures to solve problems they cannot address on their own.

Most institutions in the liberal order do not demand that their backers be liberal democracies; they only require that they be status quo powers and capable of fulfilling their commitments. They do not challenge the Westphalian system; they codify it. The UN, for example, enshrines the principle of state sovereignty and, through the permanent members of the Security Council, the notion of great-power decision-making. All of this makes the order more durable. Because much of international cooperation has nothing at all to do with liberalism or democracy, when politicians who are hostile to all things liberal are in power, they can still retain their international agendas and keep the order alive. The persistence of Westphalian institutions provides a lasting foundation on which distinctively liberal and democratic institutions can be erected in the future.

Another reason to believe that the liberal order will endure involves the return of ideological rivalry. The last two and a half decades have been profoundly anomalous in that liberalism has had no credible competitor. During the rest of its existence, it faced competition that made it stronger. Throughout the nineteenth century, liberal democracies sought to outperform monarchical, hereditary, and aristocratic regimes. During the first half of the twentieth century, autocratic and fascist competitors created strong incentives for the liberal democracies to get their own houses in order and band together. And after World War II, they built the liberal order in part to contain the threat of the Soviet Union and international communism.

The Chinese Communist Party appears increasingly likely to seek to offer an alternative to the components of the existing order that have to do with economic liberalism and human rights. If it ends up competing with the liberal democracies, they will again face pressure to champion their values. As during the Cold War, they will have incentives to undertake domestic reforms and strengthen their international alliances. The collapse of the Soviet Union, although a great milestone in the annals of the advance of liberal democracy, had the ironic effect of eliminating one of its main drivers of solidarity. The bad news of renewed ideological rivalry could be good news for the liberal international order.

#### Even zero us emissions does nothing

--using *their own models* as per a super-qualified NASA and IPCC scientist

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In any case, impact on global temperature for current and proposed reductions in greenhouse gases will be tiny at best. To demonstrate this, let us assume, for example, that the total emissions from the United States were reduced to zero, as of last May 13th, 2015 (the date of a hearing at which I testified). In other words as of that day and going forward, there would be no industry, no cars, no utilities, no people – i.e. the United States would cease to exist as of that day. Regulations, of course, will only reduce emissions a small amount, but to make the point of how minuscule the regulatory impact will be, we shall simply go way beyond reality and cause the United States to vanish. With this we shall attempt to answer the question of climate change impact due to emissions reductions.

Using the U.N. IPCC impact tool known as Model for the Assessment of Greenhouse-gas Induced Climate Change or MAGICC, graduate student Rob Junod and I reduced the projected growth in total global emissions by U.S. emission contribution starting on this date and continuing on. We also used the value of the equilibrium climate sensitivity as determined from empirical techniques of 1.8 °C. After 50 years, the impact as determined by these model calculations would be only 0.05 to 0.08 °C – an amount less than that which the global temperature fluctuates from month to month. [These calculations used emission scenarios A1B-AIM and AIF-MI with U.S. emissions comprising 14 percent to 17 percent of the 2015 global emissions. There is evidence that the climate sensitivity is less than 1.8 °C, which would further lower these projections.]

As noted, the impact on global emission and global climate of the recent agreements in Paris regarding global emissions is not exactly quantifiable. Knowing how each country will behave regarding their emissions is essentially impossible to predict besides the added issue of not knowing how energy systems themselves will evolve over time.

Because halting the emissions of our entire country would have such a tiny calculated impact on global climate, it is obvious that fractional reductions in emissions through regulation would produce imperceptible results. In other words, there would be no evidence in the future to demonstrate that a particular climate impact was induced by the proposed and enacted regulations. Thus, the regulations will have no meaningful or useful consequence on the physical climate system – even if one believes climate models are useful tools for prediction.

#### Russia and China Spoil AI coop

Kania 2017 – Elsa B. Kania is an adjunct senior fellow with the Technology and National Security Program at the Center for a New American Security (CNAS). She is also a doctoral student in Harvard University's Department of Government. Her research focuses on Chinese military innovation, information operations and emerging technologies.

Elsa Kania, September 19 2017, “Great Power Competition and the AI Revolution: A Range of Risks to Military and Strategic Stability,” Lawfare Blog, https://www.lawfareblog.com/great-power-competition-and-ai-revolution-range-risks-military-and-strategic-stability

These fears may be premature, but AI’s disruptive potential is real. The **recent progress** in AI has primarily involved machine learning and particularly deep learning techniques, such as the use of deep neural networks, across disciplines including computer vision, pattern recognition and natural language processing. Since 2016, several critical milestones have revealed the rapid pace of advances and potential real-world applications. In 2016, the [victory](https://www.darpa.mil/news-events/2016-08-04) of “[Mayhem](https://forallsecure.com/early-access/)” in DARPA’s Cyber Grand Challenge [demonstrated](https://www.technologyreview.com/s/602071/pentagon-bot-battle-shows-how-computers-can-fix-their-own-flaws/) the potential of autonomous detection and patching of software vulnerabilities to transform cybersecurity. With the computer program AlphaGo’s historic defeat of Lee Sedol in their 2016 [match](https://www.wired.com/2016/03/two-moves-alphago-lee-sedol-redefined-future/) and subsequent [victory](https://www.theverge.com/2017/5/25/15689462/alphago-ke-jie-game-2-result-google-deepmind-china) over Ke Jie, the world’s top Go player, AI has [achieved](https://www.nature.com/nature/journal/v529/n7587/full/nature16961.html) mastery of the game of Go, which requires [complex](https://www.wired.com/2014/05/the-world-of-computer-go/) strategizing, at least a decade [earlier](https://www.scientificamerican.com/article/how-the-computer-beat-the-go-master/) than expected.

Recognizing the disruptive, even revolutionary implications of AI for national defense, the United States, China and Russia are actively seeking to advance their capabilities to employ AI for a range of military applications. In spring 2017, the Department of Defense (DoD) [revealed](https://www.govexec.com/media/gbc/docs/pdfs_edit/establishment_of_the_awcft_project_maven.pdf) it had established an Algorithmic Warfare Cross-Functional Team “to accelerate DoD’s integration of big data and machine learning.” This summer, China [released](http://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm) the New Generation AI Development Plan, which [articulated the ambition](https://www.newamerica.org/cybersecurity-initiative/blog/chinas-plan-lead-ai-purpose-prospects-and-problems/) to “lead the world” in AI by 2030. This plan calls for military-civil fusion in AI to [leverage](https://www.lawfareblog.com/dual-use-dilemma-chinas-new-ai-plan-leveraging-foreign-innovation-resources-and-military-civil) dual-use advances for applications in national defense, including in support of command decision-making, military deduction, and defense equipment. Meanwhile, the Russian military has been [aggressively advancing](http://defense-update.com/20151231_russian-combat-robots.html) its efforts in intelligent robotics, and Russian President Vladimir Putin [recently declared](http://www.cnn.com/2017/09/05/opinions/russia-weaponize-ai-opinion-allen/index.html), “Whoever becomes the leader in [AI] will become the ruler of the world.” Indeed, the advent of AI in warfare appears to be resulting in a transformation of the character of conflict beyond information-age warfare toward “algorithmic warfare,” in the U.S. military’s phrasing, or “intelligentized” (智能化) warfare, as Chinese military thinkers [characterize](http://news.xinhuanet.com/mil/2017-01/23/c_129459228.htm) it.

Despite recurrent calls to [ban “killer robots”](http://journals.sagepub.com/doi/abs/10.1177/2053168015627183)—and a recent [open letter](https://www.dropbox.com/s/g4ijcaqq6ivq19d/2017%20Open%20Letter%20to%20the%20United%20Nations%20Convention%20on%20Certain%20Conventional%20Weapons.pdf?dl=0) that articulated concerns that the development of lethal autonomous weapons would open a “Pandora’s box” and risk unleashing “weapons of terror”—an outright ban is [unlikely](https://www.thecipherbrief.com/killer-robots-drive-concern-odds-ban-less-clear) to be [feasible](https://www.weforum.org/agenda/2017/09/should-machines-not-humans-make-life-and-death-decisions-in-war/). It is improbable that major powers would accept constraints on capabilities considered critical to their future military power. Even attempts to pursue some form of regulation or an international treaty to restrain military applications of AI could be readily overtaken by technological developments. The [diffusion](https://books.google.com/books?id=kH6TAWUst5EC&pg=PA7&lpg=PA7&dq=technology+diffusion+dual-use+military&source=bl&ots=wxX8JhhSTn&sig=52QpOX5pclMXy7Af-jq_jAZcteU&hl=en&sa=X&ved=0ahUKEwiB2PTH6aTWAhUo7oMKHUNaCcw4ChDoAQguMAI#v=onepage&q&f=false) of this dual-use technology will also be difficult to control.

### DA Innovation

#### M&A activity continues to trend upwards---a stable stock market and low interest rates promote dealmaking

Sraders 21 – Finance Reporter at Fortune Magazine

Anne Sraders, "M&A activity has already blown past the $2 trillion mark in a record-breaking 2021," Fortune, 6-2-2021, https://fortune.com/2021/06/02/mergers-acquisitions-2021-m-and-a-record-year-spacs/

Dealmakers are having a **record-breaking** year.

So far in 2021, global **mergers and acquisitions** have totaled a record $2.4 trillion, **up 158%** from the same period last year, according to a Refinitiv Deals Intelligence report out Wednesday. That marks the highest year-to-date total going back to 1980 when Refinitiv’s records began (the first quarter was also a banner few months for M&A).

“As the **surging stock market** continues to **drive confidence**, and **interest rates** remain at **record lows** making borrowing for acquisitions cheap, dealmaking **continues at pace**,” Lucille Jones, a Deals Intelligence analyst at Refinitiv, wrote alongside the report.

Though deals in May totaled slightly less than those in April, they still topped $500 billion globally (at nearly $533 billion) for the third consecutive month (see Refinitiv’s chart below), and notched the highest-ever May total. Deals involving at least one U.S. company (worth together some $274.2 billion for May) slumped 3% from the month prior.

[[figure omitted]]

Notably, the much-beloved tech sector wasn’t the hottest area to find deals last month. According to Refinitiv, media and entertainment deals accounted for 29% of “M&A announcements by value during May 2021,” knocking tech off the top spot for the first time in 10 months. That media and entertainment deal spurt was boosted by megadeals like the $43 billion WarnerMedia and Discovery merger and Amazon’s $8.5 billion purchase of famed studio MGM.

At some firms, there has been “anecdotal evidence to suggest this forward calendar [year] is **out of control**” for M&A, Marc Cooper, CEO of boutique investment bank PJ Solomon, told Fortune back in April. Indeed, Cooper added, if the backlog of deals the firm was working on “means anything, it’s going to be a **big back half**.”

#### The threshold is small – lowered plaintiff burdens means tech companies like are subject to more treble damages – treble damages force companies to significantly limit investment in tech to avoid liability

Delrahim, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, ‘20

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is “exclusionary” or “predatory” in nature. I will focus on so-called “exclusionary” conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term exclusionary conduct in antitrust law is potentially misleading because there is a difference under the Sherman Act between “lawful” and “unlawful” conduct that results in exclusion of a competitive alternative. In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn “exclusionary” conduct that is driven by competition on the merits such as innovation. Most obviously, legitimate competition on the merits can be “exclusionary” in the sense that consumers choose a superior product or service. That conduct does not violate Section 2. By comparison, conduct that “excludes” a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.

When courts police the line between lawful and unlawful “exclusionary” conduct, a few themes emerge.

First, courts have recognized that not every type of conduct that may enhance a business’s market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position. The Supreme Court held that the claim did not satisfy Section 2 as a matter of law. That is because the claim would condemn a monopolist’s refusal to share its resources and effectively would create an antitrust duty to help a competitor. Such a duty, the Court explained, is in “tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” The Court applied a legal rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of “false positives” or condemnations of lawful pro-competitive conduct. As the Court has explained, “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” Judge Robert Bork, in his famous Antitrust Paradox, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that “[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed.”

This backdrop helps frame the question whether a unilateral refusal to license a lawful patent on “FRAND” terms after committing to do so constitutes a form of unlawful exclusionary conduct. A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct.

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the “exclusion” of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey. By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the “winning” technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.

This form of lawful and pro-competitive exclusionary conduct should not be condemned as unlawful under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on “FRAND” terms and engaged in so-called “hold-up.” That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are “FRAND.” I will explain why.

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on “fair,” “reasonable,” and “non-discriminatory” terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down “FRAND” by its component terms makes clear why this is so.

First, the Sherman Act does not police “fair” prices or competition; it protects the competitive process. Judge Easterbrook once asked, “Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When economic pressure must give way to fair conduct . . . rivals will trim their sails”; introducing conceptions of “fairness” into the Sherman Act “is to turn antitrust law on its head.”

Second, having undertaken a contractual duty to charge “nondiscriminatory” rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination; indeed, in some circumstances price discrimination may be pro-competitive.

Third, the Sherman Act does not authorize courts to determine “reasonable” licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would “require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. Transforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and the patent laws themselves, both of which serve the same goal of increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in Trinko, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in Novell v. Microsoft, following Trinko, a monopolist’s refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a “presumably profitable course of dealing between the monopolist and the rival” and that termination is “irrational but for its anticompetitive effect.”

I would note that then-Judge Gorsuch’s standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the Trinko case. The brief stated:

Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival, the inquiry into whether conduct is “exclusionary” or “predatory” requires a sharper focus. In that context, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms. An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme. It logically follows that there is no antitrust liability for proposing to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly “deceives” an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder’s profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of “FRAND” and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of “FRAND.” Because both patent-holders and licensees participating in a standard-setting process recognize that the proper “FRAND” rate will be determined after the fact—in court, if necessary—there is therefore no meaningful ex ante “deception” that should give rise to an antitrust claim.

To be sure, having one’s technology incorporated into a standard, in some circumstances, may increase a patent-holder’s market power. The same could be said, of course, about a monopolist’s refusal to deal with a rival who might gain market share if it had access to the monopolist’s inputs. Even if this occurs as a result of a patent holder’s so-called “deception” about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would “require[] the court to assume the day-to-day controls characteristic of a regulatory agency.”

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

#### Tech scrutiny decks private sector innovation

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Dakota Foster, 6-2-2020, "Antitrust investigations have deep implications for AI and national security," Brookings, https://www.brookings.edu/techstream/antitrust-investigations-have-deep-implications-for-ai-and-national-security/

In late March, Attorney General William Barr announced that “decision time” was looming for America’s leading tech firms. By early summer, Barr expects the Department of Justice to reach preliminary conclusions about possible antitrust violations by Silicon Valley’s largest companies. The DOJ’s investigation is just one of several probes scrutinizing potential abuses by Facebook, Google, Amazon, Apple, and Microsoft. While concerns over consumer protections, anti-competitive practices, and industry concentration have fueled these antitrust investigations, their results will almost certainly have national-security ramifications.

Secretary of Defense Mark Esper has argued that artificial intelligence is likely to shape the future of warfare, and the national-security community has largely backed that conclusion. The most recent National Defense Strategy, released in 2018, highlights AI’s importance, noting that the Pentagon will seek to harness “rapid application[s] of commercial breakthroughs…to gain competitive military advantages.” With defense officials arguing that U.S. military superiority may hinge on artificial intelligence capabilities, antitrust action aimed at America’s largest tech companies—and leading AI innovators—could affect the United States’ technological edge.

But the effects of such action are highly uncertain. Will a less concentrated tech sector comprised of slightly smaller firms fuel innovation and create openings for a new generation of tech companies? Or will reductions to scale significantly hurt leading tech firms’ ability to leverage the traditional building blocks of AI innovation—like computing power and data—into breakthroughs? The answers to these questions aren’t clear cut but offer a way to begin thinking about how antitrust enforcement could impact artificial intelligence innovation and national security more broadly.

Unlike some earlier national-security technologies, the commercial sector plays an outsize role in AI development. As a result, government access to both AI products and innovation hinges, in large part, on industry. While academia, private research labs, and AI start-ups offer important contributions to AI development, major American technology companies have traditionally led the field. Last year, Microsoft, Facebook, Amazon, Google, and Apple ranked among the ten largest recipients of U.S. artificial intelligence and machine learning (ML) patents.

Changes to the composition of America’s tech sector might boost net AI innovation. From 2013-2018, 90 percent of successful Silicon Valley AI start-ups were purchased by leading tech companies. This is a potentially worrisome trend for AI innovation. After all, incumbent firms and emerging companies can have very different incentives. Entrenched tech giants may be more focused on maintaining market share than disrupting markets altogether.

As Big Tech increasingly moves to acquire AI start-ups, individual firm dynamics also shift. Instead of “building for scale,” start-ups begin to “build for sale,” adopting a mentality that may be ill-suited for moonshot innovations. Would a company like DeepMind (now owned by Google parent-company Alphabet), for example, have developed AlphaGo—the ground-breaking computer program that became the first to beat a human player in Go—if the firm’s primary goal was to be acquired by a bigger player?

Antitrust action could shift these incentives and spur competition, potentially opening the door for new AI innovations—and for a new wave of AI companies. With their smaller statures, some of these firms might focus on more niche AI applications, including defense-related products, as start-ups like Anduril and ShieldAI have done. Today’s tech giants have every financial incentive to cater to foreign markets and the average consumer, not to the U.S. federal government. Indeed, with its global user-base, it is hard to imagine Google tailoring its AI innovation decisions to U.S. defense needs. The same may not hold within an AI ecosystem where some companies built, for example, in the mold of Palantir (a data-analytics company with clear national-security applications) consider government their primary customer and subsequently concentrate on its demands.

National-security agencies, from the Pentagon to the U.S. intelligence community, could stand to benefit from more targeted innovation—and from an industrial base better attuned to their needs. As Christian Brose points out, only a fraction of the U.S.’s billion-dollar tech “unicorns” have operated in the defense sector, leaving the U.S. military “shockingly behind the commercial world in many critical technologies.”

As Silicon Valley’s largest companies consolidate AI talent and novel ideas through acquisitions, these companies gain an ever-larger say in the future of AI. This consolidation, which antitrust action could disrupt, may not favor innovation. But breaking up major tech firms also has potential pitfalls for AI innovation. With scale comes resources, and AI innovation is resource-intensive, requiring large quantities of data, diverse datastores, and vast computing power—known as “compute” in industry jargon.

American tech giants’ huge revenues uniquely equip them to fund costly AI research. Google’s DeepMind, arguably the world’s leading AI-research organization, is billions of dollars in debt and lost over $500 million in 2018 alone. Google’s fortress-like balance sheet can easily absorb the costs associated with such cutting-edge research, but smaller firms likely cannot. The economics of compute offer a concrete example of this dynamic. The rapidly increasing volume of compute required for deep learning research, coupled with compute’s prohibitively expensive prices, creates significant barriers to entry and innovation for smaller AI firms. As Microsoft co-founder Paul Allen noted in 2019, the “exponentially higher” costs of compute may leave the U.S. with only “a handful of places where you can be on the cutting edge.” Even the most well-funded independent AI organizations rely on Big Tech’s compute resources. OpenAI’s billion-dollar compute partnership with Microsoft, reached after OpenAI spent millions renting compute from leading tech firms, offers one example.

Changes to firms’ scale also may impact their access to data, another key resource required for AI innovation. Studies have linked the performance of deep learning models to the quantity of data fed into them. At present, tech giants have access to unprecedented volumes of data about their users. Google, for example, can harness data from Google Search, Maps, YouTube, Gmail, and other sources. If antitrust enforcement leads to divestment or broader break-ups, access to data may diminish, lessening innovation.

#### Antitrust key—can singlehandedly give other countries the lead

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

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

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

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

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

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

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

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

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

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

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