# AFF – Northwestern Round 3

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## platform adv – 1ac

Advantage 1 is platforms –

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

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

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

A. Against Platform Exceptionalism

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

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

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

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

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

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

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

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

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

[Begin fn76]

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

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

[End fn76]

The Court overlooked all of these problems. 77

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Private Sector Institutional Dynamics

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

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

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

Ii. The Competition Shortcomings

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

A. Entry Barriers

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

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

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

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

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

C. International Competitiveness

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

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

#### US competitive advantage in finance key to dollar as reserve currency—Determines lending. Falling behind means China wins.

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Richard X. Bove, "Why the US needs big banks," New York Post, 12-21-2013, https://nypost.com/2013/12/21/why-the-us-needs-big-banks/

Unfortunately people in places as diverse as Canada and China do not have the same beliefs. They are both driving to **supplant US banks** in the **global financial system**, and they are **succeeding**.

But if the government succeeds in its goal to make the United States a **secondary financial power**, we will all **feel the result**, and we will not like it. This country must have bigger banks, for three main reasons:

First, all banks have legal lending limits generally based on their asset size. The bigger the bank, the greater the amount of funds it can lend on large-scale projects. As US-based banks shrink **relative** to the global money supply and the **size of their competitors**, they **lose their competitive advantage** in the world’s commercial markets. This is important to big **US international companies** in other sectors, because this means they **must look for funds elsewhere**.

One entity that is seeking others to raise money is the federal government itself. In 1960, the United States designated a select number of banks and brokers to act as the entities that would raise money for the US government whenever the country needed money. These banks were and are called Primary Dealers. In 1960 there were 18 Primary Dealers, all of whom were US companies.

Today the Federal Reserve Bank of New York, which manages Primary Dealers, indicates that there are 21 Primary Dealers — 14 foreign companies and 7 US banks. There are no regional US banks among the primary dealers. It is reasonable to assume that if the federal government uses big foreign banks to raise funds, large US corporations are likely to do the same. It also suggests that large foreign companies **have advantages over US companies** in obtaining money, because **foreign banks will favor foreign companies** over US ones when lending.

The second case for big banks is that monoline financial companies have not been successful in this country for decades. According to the FDIC, every 21 hours since 1986 a small US bank has disappeared through merger or failure. The total is 11,200 banks.

There are no big, publicly held mortgage originators left in the United States. There is only one big commercial lender — CIT. There is only one big independent credit card company — Discover (Visa and MasterCard do not lend money to anyone). The same can be said for companies in automobile finance, consumer finance (where are Beneficial Finance or Household Finance or for that matter the Money Store?), factoring companies, receivable lenders and so on.

What the record proves is that small does not work, because in bad times small companies only have one line of revenues and they cannot get financing. Yet this nation is attempting to rid itself of big banks in order to replace them with a system that history clearly indicates does not work.

Finally, it’s important to remember that the United States currently has the **only reserve currency** in the world. This means that the dollar can be used to pay for a taxi ride in Bolivia or for the purchase of tons of oil from Saudi Arabia.

A nation obtains a global reserve currency as a consequence of its military conquests, its trade surplus, or the **size and stability** of its **banking system.** The benefits are **huge**. Everything is **cheaper** for that country, from interest rates to oil. Plus, the country with the reserve currency **never has to repay** its debt.

This country has not had a trade surplus for quite some time. It is not involved in military ventures to expand its global control. It is crippling its banking system. Any realist **must recognize** that the reserve currency is **going to be lost to China**. **It is only a matter of time.**

#### Key to dollar reserve status.

**Best 21** – Financial writer and Consultant to the Financial Service Industry

Richard Best, "How the U.S. Dollar Became the World's Reserve Currency," Investopedia, 5-29-2021, https://www.investopedia.com/articles/forex-currencies/092316/how-us-dollar-became-worlds-reserve-currency.asp

Standing on Its Own as the World’s Reserve Currency

As a result of the Bretton Woods Agreement, the U.S dollar was **officially crowned** the world’s reserve currency and was backed by the world’s largest gold reserves. Instead of gold reserves, other countries accumulated reserves of U.S. dollars. Needing a place to store their dollars, countries began buying U.S. Treasury securities, which they considered to be a **safe store of money**.

The demand for Treasury securities—coupled with the deficit spending needed to finance the Vietnam War and the Great Society domestic programs—caused the United States to flood the market with paper money. With growing concerns over the stability of the dollar, the countries began to convert dollar reserves into gold.

The demand for gold was such that President Richard Nixon was forced to intervene and de-link the dollar from gold, which led to the **floating exchange rates** that exist today. Although there have been periods of stagflation, which is defined as high inflation and high unemployment, the U.S. dollar has remained the **world’s reserve currency**.

Present Day

Today, more than **61%** of all **foreign bank reserves** are denominated in U.S. dollars, according to the International Monetary Fund (IMF). Many of the reserves are in cash or U.S bonds, such as **U.S. Treasuries**. Also, approximately **40%** of the **world's debt** is denominated in dollars.

The **reserve status is based largely** on the **size** and **strength** of the U.S. economy **and the dominance of the U.S. financial markets**. Despite large deficit spending, trillions of dollars in debt, and the unbridled printing of U.S. dollars, **U.S. Treasury securities** remain the **safest store** of money. The **trust and confidence** that the world has in the ability of the United States to **pay its debts** have kept the dollar as the **most redeemable currency** for facilitating **world commerce**.

#### Extinction.

McCoy 10

Alfred W. McCoy is the J.R.W. Smail Professor of History at the University of Wisconsin-Madison, Salon, December 6, 2010, "How America will collapse (by 2025)", http://www.salon.com/2010/12/06/america\_collapse\_2025/

Such negative trends are encouraging increasingly sharp criticism of the dollar’s role as the world’s reserve currency. “Other countries are no longer willing to buy into the idea that the U.S. knows best on economic policy,” observed Kenneth S. Rogoff, a former chief economist at the International Monetary Fund. In mid-2009, with the world’s central banks holding an astronomical $4 trillion in U.S. Treasury notes, Russian president Dimitri Medvedev insisted that it was time to end “the artificially maintained unipolar system” based on “one formerly strong reserve currency.” Simultaneously, China’s central bank governor suggested that the future might lie with a global reserve currency “disconnected from individual nations” (that is, the U.S. dollar). Take these as signposts of a world to come, and of a possible attempt, as economist Michael Hudson has argued, “to hasten the bankruptcy of the U.S. financial-military world order.” Economic Decline: Scenario 2020 After years of swelling deficits fed by incessant warfare in distant lands, in 2020, as long expected, the U.S. dollar finally loses its special status as the world’s reserve currency. Suddenly, the cost of imports soars**.** Unable to pay for swelling deficits by selling now-devalued Treasury notes abroad, Washington is finally forced to slash its bloated military budget. Under pressure at home and abroad, Washington slowly pulls U.S. forces back from hundreds of overseas bases to a continental perimeter. By now, however, it is far too late. Faced with a fading superpower incapable of paying the bills, China, India, Iran, Russia, and other powers, great and regional, provocatively challenge U.S. dominion over the oceans, space, and cyberspace. Meanwhile, amid soaring prices, ever-rising unemployment, and a continuing decline in real wages, domestic divisions widen into violent clashes and divisive debates, often over remarkably irrelevant issues. Riding a political tide of disillusionment and despair, a far-right patriot captures the presidency with thundering rhetoric, demanding respect for American authority and threatening military retaliation or economic reprisal**.** The world pays next to no attention as the American Century ends in silence.

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

Harrell and Rosenberg 19 – Peter E. Harrell is an adjunct senior fellow at the Center for a New American Security; former Deputy Assistant Secretary for Counter Threat Finance and Sanctions at the U.S. State Department. Elizabeth Rosenberg is a senior fellow and director and director of the Energy, Economics, and Security Program at the Center for a New American Security.

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

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

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

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

Maintaining U.S. Leverage

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

#### Iran’s an emerging global hub for Bitcoin mining. Absent our internal link, they’ll obviate the role of financial institutions and effectiveness of sanctions.

**Erdbrink 19** – Dutch journalist who is the Northern Europe bureau chief for The New York Times

Thomas, 1-29-2019, "How Bitcoin Could Help Iran Undermine U.S. Sanctions,” New York Times, https://www.nytimes.com/2019/01/29/world/middleeast/bitcoin-iran-sanctions.html

Iran’s economy has been hobbled by banking sanctions that effectively stop foreign companies from doing business in the country. But transactions in Bitcoin, difficult to trace, could allow Iranians to make international payments while bypassing the American restrictions on banks.

In the past, the threat of United States sanctions has been enough to squelch most business with Iran, but the anonymous payments made in Bitcoin could change that. While Washington could still monitor and intimidate major companies, countless small and midsize companies could exploit Bitcoin and other cryptocurrencies to conduct business under American radar.

The United States Treasury, well aware of the threat, is attempting to bring Bitcoin and the others into line. In recent weeks, in response to an internet fraud case originating from Iran, the Treasury imposed sanctions on two Iranians and the Bitcoin addresses, or ‘‘wallets,’’ they had used for trading in the currency.

The Treasury also has warned digital marketplaces that buy and sell Bitcoin and companies that sell computers used to process Bitcoin transactions that they should not provide services to Iranians. Several well-known trading sites are now blocking buyers and sellers from Iran. Some have confiscated money belonging to clients based in Iran.

“Treasury will aggressively pursue Iran and other rogue regimes attempting to exploit digital currencies,” the department said in a statement.

But by their nature, cryptocurrencies are uncontrolled by any person or entity. At best, efforts to regulate or monitor trade in them are episodic, whack-a-mole affairs. With Bitcoin and other cryptocurrencies, there is simply no way to duplicate the banking sanctions that have proved so damaging to the Iranian economy.

Bitcoin transactions are recorded on a digital ledger or database known as the blockchain, maintained communally by many independent computers. The system is designed explicitly to avoid central banks and large financial institutions. Like emails delivered without going through a central postal service, the computer network maintaining Bitcoin records enables the movement of money without going through any central authority.

The Iranian government has been slow to recognize the potential sanctions-evading possibilities of Bitcoin. But it is now considering the establishment of exchanges to facilitate trading, one official, Abdolhassan Firouzabadi, said recently. Despite the failure of Venezuela’s state-backed cryptocurrency, the Petro, Iran’s central bank said recently that it was seriously considering creation of something similar, possibly called the Crypto-Rial, named after the national currency, the rial.

Still, Iran’s venture into Bitcoin pales in comparison to what has been happening the former Soviet republic of Georgia, where thousands of people have jumped into the cryptocurrency business.

At the computerized processing operation in the Iranian desert, no one seemed particularly concerned with the geopolitical implications of Bitcoin.

The operation consisted of 2,800 computers from China, fitted into eight containers, which when linked are called a farm. It makes intense mathematical calculations, known as mining, needed to confirm Bitcoin transactions. Miners collect fees in Bitcoin for their services.

Ignoring the rain, the European visitor used the calculator on his mobile phone to determine how much money could be made from this particular farm, multiplying computer power and deducting electricity and operational costs.

He estimated about five Bitcoins a month, which at roughly $4,000 per Bitcoin at current price levels, would be about $20,000.

“Not too bad,” he said.

The currency fluctuates like any other, though it has proved particularly volatile, sinking to slightly less than $4,000 a unit from nearly $20,000 about a year ago.

“We’ll have two engineers on site to keep everything running, that’s it,” said Behzad, the chief executive of IranAsic, the company running the site. He, like the European investor, did not want to provide his family name, out of fear of penalties from the United States.

The Chinese computers, called Antminer V9s, were regarded as outdated by the European visitor. Still, he said, “I guess this is the last place on earth where they are still profitable.”

That helps explain why Iran seems to be taking its first baby steps toward becoming a global center for mining Bitcoins. Because of generous government subsidies, electricity — the energy for the computers needed to process cryptocurrency transactions — costs little in Iran. It goes for about six-tenths of a cent per kilowatt-hour, compared with an average of 12 cents in the United States and 35 cents in Germany.

In recent months, dozens of foreign investors from Europe, Russia and Asia have considered moving their mining operations to Iran and other low-cost countries like Georgia. “We have to be flexible in this industry and go where prices are the lowest in order to survive,” said the European investor.

#### Tracking solves Iranian evasion – US lead key.

**Robinson 21** – Ph.D., Co-founder and Chief Scientist discusses cryptocurrency forensics, investigations, compliance, and sanctions.

Tom, "How Iran Uses Bitcoin Mining to Evade Sanctions and “Export” Millions of Barrels of Oil," Elliptic, <https://www.elliptic.co/blog/how-iran-uses-bitcoin-mining-to-evade-sanctions>

The Iranian state is therefore effectively selling its energy reserves on the global markets, using the Bitcoin mining process to bypass trade embargoes. Iran-based miners are paid directly in Bitcoin, which can then be used to pay for imports - allowing sanctions on payments through Iranian financial institutions to be circumvented.

This has become all but an official policy, with a think tank attached to the Iranian president’s office recently publishing a report highlighting the use of cryptoassets to avoid sanctions.

Many of those making the Bitcoin transactions and paying the fees to Iran-based miners will be located in the United States - the very country spearheading the sanctions. As the US government considers whether to lift some sanctions on Iran in exchange for a return to a nuclear deal, it will need to consider the role that Bitcoin mining plays in enabling Iran to monetise its natural resources and access financial services such as payments.

In the meantime, financial institutions should consider the sanctions risk they are exposed to due to Iranian Bitcoin mining - particularly those that are beginning to offer cryptoasset services. If 4.5% of Bitcoin mining is based in Iran, then there is a 4.5% chance that any Bitcoin transaction will involve the sender paying a transaction fee to a Bitcoin miner in Iran. Financial institutions should also be on the lookout for crypto deposits originating from Iranian miners that are seeking to cash-out their earnings.

Solutions for Sanctions Risks

However as we discuss in more detail our new sanctions guide, solutions to these challenges exist and are already used by financial institutions engaging in cryptoasset activity.

For example, blockchain analytics solutions such as those provided by Elliptic can be used by regulated financial institutions to detect and block cryptoasset deposits from Iran-based entities including miners. Techniques can also be employed to ensure that transaction fees are not paid to miners in high risk jurisdictions.

#### Effective sanctions key to prevent Iranian nuclear acquisition.

**Morrison 21** – Master of Arts of Political Science, University of Waterloo.

Kallen, 2021, “Economic Sanctions and Nuclear Non-proliferation: A Comparative Study of North Korea and Iran, “University of Waterloo, Fulfilment of the thesis requirement for the degree of Master of Arts, https://uwspace.uwaterloo.ca/bitstream/handle/10012/16666/Morrison\_Kallen%20.pdf?sequence=3

Economic sanctions have been successful in stopping Iran from pursuing their nuclear program thus far. Iran has conceded multiple times to the United States and the international community to halt the enrichment of uranium and the advancement of their nuclear program. The most notable example of Iran’s concessions has been the signing of the Joint Comprehensive Plan of Action in which Iran agreed to halt and greatly reduce their nuclear program in return for substantial easing of economic sanctions. The second criteria has been met as Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Continued economic pressure has been paramount to bringing Iran to the negotiating table. While the United States and its regional allies do pose a military threat to Iran, that is unlikely a sufficient factor in dissuading Iran.

We have established that the level of political contestation in the targeted countries, their economic and security vulnerabilities, and the degree of international cooperation are important factors in determining if economic sanctions are effective at limiting nuclear proliferation. In Iran’s case the regime, while authoritarian, allows for limited political contestation. The general public gets to elect the president (even if candidates are handpicked by the supreme leader). Iranians have been able to protest against the government. One goal of economic sanctions is to galvanize the general public against the government and their policy decisions. Iranians have indeed been frustrated by the sanctions and voiced their discontent with the government policies targeted by the sanctions.

Iran’s international environment is also conductive for economic sanctions to be effective. Iran is a regional power with an impressive arsenal of missiles and extensive network of proxy forces. Therefore, nuclear weapons are not imperative for Iran’s defence. On the other end, Iran’s economy is largely based on oil and gas exports. Integration into the global market is very important for Iranians and a vital source of revenue for the government. Economic sanctions have hurt the Iranian economy and therefore have hurt Iranians. The economic squeeze has brought Iran to the negotiating table in the past and will likely do so in the future. The international approach to Iran has been encompassing with the European Union and the United Kingdom taking a common stand with the United States in preventing Iran from acquiring nuclear weapons. Even after the United States left the JCPOA the EU and UK have attempted to develop mechanisms to provide Iran with economic incentives to keep Iran abiding to the JCPOA. Even though China has given Iran an economic lifeline there is tension within Iran over concerns of becoming too economically dependent on China.

#### Israel would preempt before the nukes come online. Sparks a wider regional conflict that draws in all the major powers.

Scheinman 18 – Security Studies Chair, Nat’l War College; Nuclear Nonprolif Rep. for Obama

Adam M. Scheinman, What if Iran leaves the NPT?, 8 June 2018, <https://thebulletin.org/2018/06/what-if-iran-leaves-the-npt/>

Not to diminish the immensity of North Korea’s nuclear challenge, but Iran’s withdrawal from the NPT carries weightier risks. It would likely mean that Iran’s Supreme Leader had given the green light to an Iranian nuclear weapon, opening the floodgates to NPT withdrawals by other Arab states—Saudi Arabia, the UAE, and Egypt head that list. These and possibly other Sunni governments, none of whom can rely on a major power for defense, may conclude that they require their own nuclear weapon to check Iran’s rise. The Saudis are very clear and public on this point.

More immediately, Israel may feel compelled to strike Iranian nuclear facilities before they become fully operational. This raises the specter of a regional war that may draw in several of the nuclear weapon states—the United States, the UK, France, and Russia—and reshape the Middle East in ways we cannot predict. Whether the NPT could survive such a shock is another unknown.

#### Loss of economic leverage alone is sufficient to trigger the impact.

**Zilber 21** – Journalist covering Middle East politics and an adjunct fellow at the Washington Institute for Near East Policy.

Neri, 9-14-2021, "Israel Can Live With a New Iran Nuclear Deal, Defense Minister Says," Foreign Policy, https://foreignpolicy.com/2021/09/14/israel-iran-nuclear-deal-defense-minister-gantz/

TEL AVIV, Israel—Israel would be willing to accept a return to a U.S.-negotiated nuclear deal with Iran, Defense Minister Benny Gantz told Foreign Policy—but Israeli officials are also pressing Washington to prepare a serious “demonstration of power” in case negotiations with Tehran fail.

The remarks, made during an exclusive interview last week, appear to reflect a shift in policy for Israel, which under the leadership of former Prime Minister Benjamin Netanyahu loudly opposed the 2015 nuclear agreement and worked to undermine it.

Former U.S. President Donald Trump pulled the United States out of the agreement in 2018, but the Biden administration has renewed the diplomacy—even as Iran moves closer to enriching enough uranium to make a nuclear weapon.

Gantz, asked about efforts by the Biden administration to get back to an agreement with Iran, said: “The current U.S. approach of putting the Iran nuclear program back in a box, I’d accept that.”

He added that Israel would want to see a “viable U.S.-led plan B” that includes broad economic pressure on Iran in case the talks fail. And he gestured at Israel’s own “plan C,” which would involve military action.

Gantz estimated that Iran was two to three months away from having the materials and capabilities to produce one nuclear bomb. Iran has steadily ramped up its nuclear work since the United States withdrew from the deal, despite a so-called maximum pressure campaign advanced by Trump and Netanyahu that included sanctions and sabotage efforts.

#### Can’t stay contained—multiple pathways to global nuclear war.

Avery 13 – Lektor Emeritus & Associate Professor, U of Copenhagen

John Scales Avery, Lektor Emeritus, Associate Professor, at the Department of Chemistry, University of Copenhagen, since 1990 he has been the Contact Person in Denmark for Pugwash Conferences on Science and World Affairs, An Attack On Iran Could Escalate Into Global Nuclear War, 11/6/13, http://www.countercurrents.org/avery061113.htm

Despite the willingness of Iran's new President, Hassan Rouhani to make all reasonable concessions to US demands, Israeli pressure groups in Washington continue to demand an attack on Iran. But such an attack might escalate into a global nuclear war, with catastrophic consequences. As we approach the 100th anniversary World War I, we should remember that this colossal disaster escalated uncontrollably from what was intended to be a minor conflict. There is a danger that an attack on Iran would escalate into a large-scale war in the Middle East, entirely destabilizing a region that is already deep in problems. The unstable government of Pakistan might be overthrown, and the revolutionary Pakistani government might enter the war on the side of Iran, thus introducing nuclear weapons into the conflict. Russia and China, firm allies of Iran, might also be drawn into a general war in the Middle East. Since much of the world's oil comes from the region, such a war would certainly cause the price of oil to reach unheard-of heights, with catastrophic effects on the global economy. In the dangerous situation that could potentially result from an attack on Iran, there is a risk that nuclear weapons would be used, either intentionally, or by accident or miscalculation. Recent research has shown that besides making large areas of the world uninhabitable through long-lasting radioactive contamination, a nuclear war would damage global agriculture to such an extent that a global famine of previously unknown proportions would result. Thus, nuclear war is the ultimate ecological catastrophe. It could destroy human civilization and much of the biosphere. To risk such a war would be an unforgivable offense against the lives and future of all the peoples of the world, US citizens included.

#### Saudi will follow them across the nuclear threshold---nuclear war.

Robb et. al 12 (Senator Charles S. – Virginia, General Charles Wald – Former Deputy Commander of U.S. European Command, Dr. Daniel Ahn – Senior Economist and Head of Portfolio Strategy for CitiBank New York, John Hannah – Former Assistant for National Security Affairs to the Vice President, Stephen Rademaker – Former Assistant Secretary of State for Arms Control and Nonproliferation, Christopher Carney – former U.S. Representative from Pennsylvania, Ed Husain – Senior Fellow for Middle Eastern Studies at the Council on Foreign Relations, Ambassador Dennis Ross – Counselor for the Washington Institute for Near East Policy, Ambassador Eric Edelman – Former Under Secretary of Defense for Policy, Reuben Jeffrey III – Former U. S. Under Secretary of State for Economic, Business, and Agricultural Affairs, John Tanner – Former U.S. Representative from Tennessee, Secretary Dan Glickman – Senior Fellow at the Bipartisan Policy Center, Admiral Gregory Johnson – Former Commander of U.S. Naval Forces, Europe, Mortimer Zuckerman – CEO and Chairman of the Board of Directors for Boston Properties, Inc., Larry Goldsetin – Founder of Energy Policy Research Foundation, Inc., and General Ron Keys – Former Commander of the Air Combat Command, The Price of Inaction: Analysis of Energy and Economic Effects of a Nuclear Iran, Bipartisan Policy Center, p. 24)

Saudi Arabia would be very likely to try to follow Iran across the nuclear threshold. Should it do so, the world would face the possibility of an Iran-Saudi nuclear exchange—a catastrophic humanitarian event that would threaten the entirety of Gulf oil exports for an extended period of time. In early 2008, the Senate Foreign Relations Committee concluded: “If Iran obtains a nuclear weapon, it will place tremendous pressure on Saudi Arabia to follow suit.”19 By 2012, some experts believe it has already begun to do so. Two main factors could drive Saudi Arabia to pursue a nuclear weapon: (1) a decades-long Saudi-Iran cold war waged along sectarian, religious, ethnic, and geopolitical lines and (2) a deep-seated competition over the energy policies that form the lifeblood of both regimes. The Sunni Saudi monarchy and Shiite Iranian theocracy each claim leadership of the Islamic world. This sectarian competition for primacy is reinforced by ethnic differences: Saudi Arabia is the largest and most populous Arab country astride the Gulf, but it is dwarfed by Iran’s much larger Persian-majority population. These competing claims have pitted the two countries in an enduring cold war and proxy conflict spanning from Lebanon to Iraq and the Arabian Peninsula. Iran—under both the Shah and the ayatollahs—has routinely sought to use its conventional military capabilities, large population, geostrategic position, expansive resources, and ties to armed groups to shift the balance of power in the Persian Gulf in its favor and at the expense of its Sunni Arab neighbors.20 As a result, Saudi Arabia has made it clear it views a nuclear-capable Iran as an existential threat. In 2008, King Abdullah urged the United States to “cut off the head of the snake,” one instance of his “frequent exhortations [to] the United States to attack Iran to put an end to its nuclear weapons program,” according to U.S. diplomatic cables revealed by Wikileaks.21 With uncertain prospects for a halt to Iran’s nuclear program—peaceful or otherwise—in 2009, the King informed a senior American official, “If [Iran] gets nuclear weapons, we will get nuclear weapons.” This year, senior Saudi officials reiterated that “it would be completely unacceptable to have Iran with a nuclear capability and not the kingdom [of Saudi Arabia].”22 Rather than lose time developing an indigenous nuclear program, it is likely the Saudi kingdom would seek to obtain a nuclear warhead from Pakistan ready to mount on its CSS-2 ballistic missiles. Close Saudi-Pakistani security ties date back to shared Cold War–era interests, and it is widely believed that Riyadh bankrolled Islamabad’s nuclear weapons program with the stipulation that Pakistan would sell nuclear devices to Saudi Arabia in an emergency; in the words of a senior Saudi official, “within weeks.”23 Pakistan would benefit by receiving much-needed cash and could demand in return dual-key authority over missile launches, both to control Saudi policy and to bolster its own secondstrike capability against India. At best, this would create a nuclear-armed standoff between the two most powerful and mutually antagonistic countries in the Persian Gulf. At worst, it could devolve into atomic warfare. Iran’s and Saudi Arabia’s small arsenals, lack of durable communication channels, poor civilian oversight of command-and-control systems, erratic intelligence, proximity to each other, religious ardor, and sectarian divide would all distinguish this scenario from the Cold War balance between the United States and the Soviet Union. Any such conflict would likely be extremely devastating. Each country would have natural incentives to cripple its opponent’s oil facilities in any nuclear conflict. Crudeoil exports are both regimes’ political and economic lifeblood, and thus the basis for their military power. Also, each country’s oil infrastructure and export terminals are concentrated along the Gulf, within range of the other’s nuclear-weapons delivery vehicles. Moreover, a nuclear war in this region would likely not only destroy a large portion of the Gulf’s oil infrastructure but also render the entire Gulf unavailable to shipping for some period of time. This could come directly through radioactive fallout, atmospheric pollution, and environmental destruction, or indirectly through prohibitively high insurance rates and other risk factors for tankers transiting the region.24 Therefore, even if a nuclear exchange did not spread into a region-wide war, the transit of Hormuz-bound oil exports would be halted by such a conflict.

Thus, the plan: The United States federal government should illegalize those anticompetitive business practices which cause net-harm on one side of platforms.

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

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

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

More Creative Alternatives

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

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

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

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

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

a. Enabling Competition Within the Platform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

over 15,500 members.357

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

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

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

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

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

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

C. Plaintiffs Already Bear the Burden on Balancing

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

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

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

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

## acquisition adv – 1ac

Advantage 2 is Acquisition –

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rozga, JD, Counsel, Davis Wright Tremaine LLP, former Federal Trade Commission attorney, Guest Lecturer, Boston University School of Law, ‘20

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

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

Antitrust in tech markets after American Express

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

Sabre/Farelogix

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

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

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

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

Qualcomm

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

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

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

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

Down the competitive effects rabbit hole

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

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

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

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

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

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

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

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

A modern antitrust in peril

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

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

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

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

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

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

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

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

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

#### Prospect of big tech acquisition dampens innovation

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

E. Whither Innovation?

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

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

CONCLUSION: “ANTITRUST IS GREEDY”

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

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

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

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

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

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

TECH GIANTS LEAD IN AI ACQUISITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NEW TECHNOLOGIES, OLD PROBLEMS

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

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

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

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

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

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

THE MILITARIES OF TOMORROW

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

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

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

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

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

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

A LOSING GAME

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

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

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

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

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

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

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

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

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

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

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

#### Ensures cyberattacks go nuclear

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Which creates clear, enforceable guidelines

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

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

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

Fine-tuning the proper aims of a nonpredictive antitrust

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

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

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

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

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

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

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

Nonpredictive antitrust enforcement in practice

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

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

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

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

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

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

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

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

# 2AC

## t per se – 2ac

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

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

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

#### By LOWERING the threshold for plaintiffs, the aff directly mandates that conduct that is currently lawful is now unlawful

Popofsky, Antitrust Partner at Ropes and Gray, Served as Senior Counsel to DOJ Antitrust Division, Adjunct Professor of Advanced Antitrust Law and Economics at Harvard Law School and the Georgetown University Law Center, ‘06

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

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

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

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

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

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

#### Prohibitions can be regulations---that distinction is one of words, not substance.

Tobriner 80 – Judge, California Supreme Court

Matthew O. Tobriner, Metromedia, Inc. v. San Diego, 26 Cal. 3d 848, Supreme Court of California, April 1980, LexisNexis

For the reasons we shall offer, however, we believe that this doctrine, too, conflicts with reality and with current views of the police power. The distinction between prohibition and regulation in this case is one of words and not substance. "[Every] regulation necessarily speaks as a prohibition." ( Goldblatt v. Hempstead (1962) 369 U.S. 590, 592 [8 L. Ed. 2d 130, 133, 82 S. Ct. 987].) In the present case, for example, plaintiffs describe the ordinance as a prohibition of off-site advertising, while the city describes it as a regulation of advertising, one which limits advertising to on-site signs. Surely the validity of the ordinance does not depend on the court's choice between such verbal formulas.

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

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

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

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

## States

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

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

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

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

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

State Levels of Adherence

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

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

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

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

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

#### Links to the net benefit…

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

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

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

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

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

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

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

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

State Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

Workarounds

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

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

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

State-to-State Conflicts

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

A Case Study

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

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

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

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

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

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

## 2AC—AT: Common Law CP

#### B – Doesn’t compete – Expands the scope of the category ‘core antitrust laws’ by adding a new one

Sleet 99 – Judge, United States District Court, Delaware

Gregory M. Sleet, Scriptgen Pharms., Inc. v. 3-Dimensional Pharms., Inc., 79 F. Supp. 2d 409, United States District Court for the District of Delaware, December 1999, LexisNexis

Noting that the term "extent" is not defined in either one of the patent specifications, 3-DP contends that the ordinary meaning of the word should control. See, e.g., Zelinski, 185 F.3d at 1315; Desper Prods., 157 F.3d at 1336. Because "extent" in this instance would appear to serve as synonym for "amount" or "degree," 3-DP purports to advance this interpretation.3 While Scriptgen appears to take issue with this proposed definition, it fails to provide an alternate construction. After reviewing the language of the representative claim, which discusses "the extent to which the target protein occurs in the folded state, the unfolded state or both in the test combination and in the control combination," the court will afford the term "extent" its ordinary meaning, i.e., as meaning "amount" or "degree."

#### The CP makes it part of the ‘core’ antitrust laws

Clark 04 – Judge, United States District Court, Texas Eastern

Ron Clark, Motorola, Inc. v. Analog Devices, Inc., 2004 U.S. Dist. LEXIS 31301, United States District Court for the Eastern District of Texas, Beaumont Division, June 2004, LexisNexis

The definition offered by Motorola from the 1996 IEEE Dictionary is actually for the term "processor," rather than "core processor." The word "core" is defined as "the innermost or most important part: heart." Webster's II New College Dictionary (1995). The term "core processor" suggests something less than a "processor" as a whole.

## FTC DA – 2ac

#### Pounder—slew of antitrust litigation now

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

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

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

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

Collectively, the Biden administration and the FTC have sent a clear message to the business community: aggressive antitrust enforcement is back. Companies should expect to see an increase in antitrust investigations, stiffer penalties for violations, more burdensome merger reviews, and new rules targeting a range

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

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

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

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

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

#### agency resources are ineffective because they drive away the best talent

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

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

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

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

## Regulation CP – 2ac

#### Legal standards key—enforcement with existing authority fails

Posner, professor at the University of Chicago Law School, ‘21

(Eric, “The Antitrust War’s Opening Salvo,” July 21, <https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07>)

The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

Still, the Biden administration’s antitrust agenda will face significant judicial obstacles. Over the past 40 years, an increasingly business-friendly Supreme Court has gutted antitrust law. In ruling after ruling, it has weakened the standards used to evaluate anti-competitive behavior; raised the burden of bringing an antitrust case; limited the types of antitrust victims who are allowed to bring cases; allowed businesses to use arbitration clauses to protect themselves from class action lawsuits; and much else.

On top of that, the Supreme Court has disseminated throughout the judiciary a generalized suspicion of antitrust claims. Judges at all levels have absorbed an academic skepticism about antitrust law that is now 30 years out of date. Accordingly, business plaintiffs are usually seen as sore losers who have resorted to the law because they were beaten in the marketplace. Consumer cases are attributed to the machinations of trial lawyers. The pretexts businesses offer for their anti-competitive practices are swallowed whole.

So, while Biden is right that “federal government inaction” is partly to blame for the decline in antitrust enforcement, there is little that his (or any) administration can do unless it has the courts on its side. This probably accounts for the order’s careful language. Agencies like the DOJ and the FTC would surely like to enforce antitrust laws more vigorously than in the past, but they are not going to commit resources to bringing cases that will fail in court.

## Infra – 2ac

#### No link—the plan is a niche alteration to antitrust to a court decision NO ONE knows about

Franklin 19 – Professor of law and public policy at Marquette and director of the Marquette Law School Poll.

Charles H. Franklin, “Public Views of the Supreme Court,” 21 October 2019, pp. 2-3, https://law.marquette.edu/poll/wp-content/uploads/2019/10/MULawPollSupremeCourtReportOct2019.pdf.

At the same time, the Court is also the least-well-known branch. While the Court has often been caught up in intense legal and political questions, it is shielded from direct election, and lifetime tenure further insulates sitting justices from political pressure. The subject matter of the Court is far from the ordinary experience of citizens. While written decisions of the Court provide the explicit bases of rulings (and of dissenting views), few among the mass public ever read those decisions, and news accounts can at best provide a simplified summary. This barrier to public understanding derives from the Court’s subject matter and structure but also ensures that citizens rarely are exposed to legal arguments and instead are most likely to judge decisions based on the outcomes, not the reasoning behind those decisions.

The public work of the Court is also episodic in comparison to that of the other branches. The actions of the president and Congress are the subject of numerous daily news stories, public events, and explicit efforts to persuade the public. In contrast, the Court accepts written briefs and hears oral arguments, only a few of which are covered in the general interest news media; deliberates privately; and hands down decisions on a handful of days a year, with a rush near the end of the term in June. These characteristics further separate the Court from the public eye and attention span.

#### Courts Shield

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

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

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

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

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

#### Manchin and other moderates vote for infrastructure now – only progressives can torpedo the deal

Carney 9/13 – Jordain Carney is a defense reporter at National Journal. She previously worked as a staff writer for the Hotline.

Jordain Carney, September 13 2021, “Democrats brace for battle on Biden's $3.5 trillion spending plan,” The Hill, https://thehill.com/homenews/senate/571905-democrats-brace-for-battle-on-bidens-35-spending-plan

Chris Evans, a spokesman for Rep. [Pramila Jayapal](https://thehill.com/people/pramila-jayapal) (D-Wash.), the chairwoman of the Congressional Progressive Caucus, told The Hill that the Senate bill and the $3.5 trillion spending plan are “integrally tied together” and that House progressives “will only vote for the infrastructure bill after passing the reconciliation bill.”

Rep. [Alexandria Ocasio-Cortez](https://thehill.com/people/alexandria-ocasio-cortez) (D-N.Y.) predicted during an interview with CNN that she and “many, many members of the progressive caucus simply will not vote for Sen. Manchin’s infrastructure bill unless it is tied together with the Build Back Better Act.”

Sen. [Joe Manchin](https://thehill.com/people/joe-manchin) (D-W.Va.) backs the infrastructure bill but has called for a pause to work on the $3.5 trillion package amid reports he only supports a much smaller bill.

Both the House and Senate passed a budget resolution last month that greenlights a spending package of up to $3.5 trillion by a simple majority in both chambers. The budget rules prevent the GOP from filibustering the measure in the Senate, though those rules could also limit what Democrats put in it.

Manchin and other moderates have warned privately and publicly for weeks that they are uneasy about the price tag, which Democrats are pitching to pay for, in part, by raising taxes on corporations and some high-income earners.

Manchin and Sen. [Kyrsten Sinema](https://thehill.com/people/kyrsten-sinema) (D-Ariz.) have both said they can’t back the $3.5 trillion figure. Manchin reiterated during an interview on Sunday with CNN’s Dana Bush that Schumer “will not have my vote” for $3.5 trillion “and Chuck knows that."

Democratic leaders are vowing to move forward, but some aren’t ruling out that the top-line figure could get lowered.

Asked about going below $3.5 trillion, Schumer acknowledged that there was a split within the caucus about if it was too much or too little. While he predicted Democrats would unify, he didn’t specify a number.

House Majority Whip James Clyburn (D-S.C.) opened the door during an interview with CNN’s [Jim Acosta](https://thehill.com/people/james-jim-acosta) to going lower, describing $3.5 trillion as a “ceiling” and saying there was “a lot of room for people to sit down and negotiate.”

#### Progressives torpedo infrastructure passage – they demand more expansive programs or nothing

Trudo, Wong and Marcos 8/25 – Writers for the Hill.

[HANNA TRUDO](https://thehill.com/author/hanna-trudo),[SCOTT WONG](https://thehill.com/author/scott-wong) AND [CRISTINA MARCOS](https://thehill.com/author/cristina-marcos), 8/25/2021, “Progressives dig in for fall fight with centrists,” The Hill, https://thehill.com/policy/transportation/569425-progressives-dig-in-for-fall-fight-with-centrists

Progressives are digging in for a fall fight with centrists following a House budget deal to advance the party’s top social priorities, with some on the left threatening to vote against the bipartisan infrastructure bill if it comes to the floor before the $3.5 trillion reconciliation package.

Democrats close to House liberals believe Speaker [Nancy Pelosi](https://thehill.com/people/nancy-pelosi) (D-Calif.) and Rep. [Pramila Jayapal](https://thehill.com/people/pramila-jayapal) (D-Wash.), the Congressional Progressive Caucus leader, have so far jointly handled the intraparty standoff in a way that favors the left flank over moderates.

Now, leading progressives are signaling they plan to use their collective voting power to keep the pressure on leadership and their centrist colleagues to ensure the sweeping social benefits package passes Congress and becomes law.

Rep. [Rashida Tlaib](https://thehill.com/people/rashida-tlaib) (D-Mich.), a key member of the so-called squad of liberal lawmakers of color, warned that she would not vote for the Senate-passed bipartisan infrastructure bill by a new Sept. 27 deadline that Pelosi promised to moderates if that comes ahead of the $3.5 trillion package. Both measures have [President Biden](https://thehill.com/people/joe-biden)’s full backing.

“Let’s move them together,” Tlaib told reporters on Tuesday.

“It’s very obvious that I’m not going to do a [Sept. 27] deadline” without a reconciliation package, she added. “I want to work on what’s going to go into reconciliation. That’s a priority for me. They can put all these deadlines all they want, but they’ve got to bring all of us along.”

Another prominent House progressive, Rep. [Alexandria Ocasio-Cortez](https://thehill.com/people/alexandria-ocasio-cortez) (D-N.Y.), made clear she would vote against the infrastructure bill if the larger package isn’t ready by the late September deadline.

“We’ve been very clear and very consistent from the beginning that the only way that this infrastructure plan has a chance is if reconciliation comes through,” Ocasio-Cortez said.

The firmness of that position was shared among other Democrats who have been adamant about passing legislation that would massively expand the social safety net.

Rep. [Ilhan Omar](https://thehill.com/people/ilhan-omar) (D-Minn.) used the term “fiasco” to describe the tense scene on Capitol Hill this week.

“I think it's important for people to remember that the strategy of simultaneously moving these two pieces of legislation is one that the president himself, [Senate Majority Leader Charles] Schumer [D-N.Y.] and the Speaker, with 100-plus members of Congress on the Democratic side, believe is the right strategy,” she said.

Liberals have long argued that tackling social spending before infrastructure is crucial to help scale back systematic inequality on multiple fronts. But a vocal group of 10 centrists, led by Rep. [Josh Gottheimer](https://thehill.com/people/joshua-josh-gottheimer) (D-N.J.), publicly called for holding an immediate vote on infrastructure before adopting the budget resolution for the $3.5 trillion package.

Pelosi ultimately struck a deal with the moderates — which she later downplayed as a “clarification” —  by saying the House would vote to send the infrastructure bill to Biden’s desk before October.

She noted that some surface transportation programs are set to expire on Sept. 30, creating the impetus for the House to pass an infrastructure bill that invests in roads, bridges and other transit programs.

"So, we're talking about a couple of days earlier," Pelosi said on Wednesday.

House lawmakers are slated to return from their summer recess on Sept. 20.

Progressives have characterized Pelosi's pledge as nothing more than a symbolic placation that has little practical impact given that the House was already poised to act on renewing transportation programs next month.

“I think this was meaningless,” Omar said of the agreement Pelosi reached with centrists. “It's not binding. There's no leverage that I believe was gained by them. I actually think they lost leverage by doing this little fiasco.”

## Court clog – 2ac

#### Courts clogged now – reopening from COVID isn’t happening fast enough

Smith 6/14 – Criminal justice reporter for WBEZ. His reporting has won awards from the Associated Press, the Chicago Headline Club, the Radio Television Digital News Association, the Chicago Bar Association and others.

Patrick Smith, “As The Nation’s Courthouses Reopen, They Face Massive Backlogs In Criminal Cases,” *NPR*, 14 July 2021, https://www.npr.org/2021/07/13/1015526430/the-nations-courthouses-confront-massive-backlogs-in-criminal-cases.

Criminal courthouses across the United States are confronting massive case backlogs as they begin slowly reopening after long pandemic shutdowns. It has some prosecutors preparing to drop so-called "low-level cases" because they will not be able to handle the expected crush of speedy trial demands.

Prosecutors in Chicago, for example, are preparing to drop a large number of criminal cases when the courts fully reopen later this year.

Thousands of criminal cases have built up in Cook County over the past 15 months, as the county's massive court system has been all-but shut down because of the COVID-19 pandemic. That means thousands of people locked up in jail, on electronic monitoring or out on bond have essentially had their cases on hold. But the waiting caused by the pandemic could mean many people accused of nonviolent crimes will get off scot-free.

"I think we should be prepared for a system that is going to be overwhelmed," Cook County State's Attorney Kim Foxx said.

Foxx said that will likely mean dropping a large number of lower-level cases in order to prioritize cases involving violent crime.

"We cannot allow for violent cases to fall through the cracks," Foxx said. "And so using that calculus, [we have to make] sure that those cases that could be dealt with outside of the system are in fact purged from the system so we can focus our attention on violence."

Courthouses are likely to see a steep increase in speedy trial requests

The Illinois Supreme Court announced June 30 that courthouses will return to normal in October, and defendants will once again be able to assert their Constitutional right to a speedy trial, a right the Illinois Supreme Court suspended in March 2020 amid COVID-19.

Chicago-based defense attorney Adam Sheppard said he expects to see "a flood of speedy trial demands" across the system.

"It is gonna be overwhelming," Sheppard said.

Foxx said there is no way her prosecutors — or the court system overall — will be able to deal with that coming crush.

"In a scenario where everyone demands [a trial], potentially 30,000-plus cases needing to go to trial within the span of several months, and the reality is our court system, I don't think there's any court system in the world that would be prepared to have that many trials just logistically, staff wise, all of it, it would overwhelm the system," Foxx said.

That pattern could be repeated in jurisdictions across the country, as courthouses try to return to normal with thousands of people who have been waiting months or more for their day in court.

Dropping cases sends the message that "you don't matter"

Meg Garvin, executive director of the National Crime Victim Law Institute at Lewis and Clark Law School, said she's heard of other jurisdictions that are also considering dropping a large number of cases because of backlogs. She's concerned about the message that could send to victims.

**Checks prevent floodgates**

**Levy 13**

Martin K. Levy, Associate Professor of Law, Duke University School of Law. JD 2007, Yale Law School, The University of Chicago Law Review, 2013, “Judging the Flood of Litigation”, 80:1007

Now, it is important to recognize that counseling Courts against considering caseload volume in this kind of decision making does not mean that there is no recourse when it comes to docket concerns. Our system provides **several ways to relieve caseload pressure** short of the courts not recognizing causes of action or deciding not to hear particular sets of cases. Specifically, our constitutional system gives Congress the authority to adjust laws so as to stem that flow.305 [Footnote 305 begins here] 305 Furthermore, Congress, of course, has the power to create additional judgeships, **which would** serve to **reduce the burden** on any single judge. [Footnote 305 ends here] And Congress has indeed exercised that power. As noted earlier, Congress passed the Supreme Court Case Selections Act306 **to alleviate the Court’s** then “unmanageable **workload**” by eliminating most of the Court’s mandatory jurisdiction.307 With respect to the rest of the federal court docket, Congress has repeatedly enacted targeted legislation to **reduce frivolous filings.** For example, Congress passed the PLRA precisely as a way of “addressing a flood of prisoner litigation in the federal courts.”308 Similarly, part of the purpose of the Private Securities Litigation Reform Act of 1995 309 was to limit frivolous securities claims.310 This is not to suggest that Congress could not do more in this vein; rather the point is simply that there is still a branch of government that has the clear authority to take the courts’ caseload into account in substantive decision making and has done so **repeatedly in the past.**

This does not leave the courts defenseless against the rising tide, however; they **have many tools besides substantive law** with which **to keep themselves afloat.** Perhaps most prominently, both the district courts and the courts of appeals can avail themselves of various procedural rules **to** help cope with, and indeed **limit, their dockets.** Most plainly, the Federal Rules of Civil Procedure employ what have been called three **basic** pretrial “**discouragement mechanisms.**”311 The first mechanism is the pleading stage itself, with the possibility for a motion to dismiss. Although pleadings obviously have several purposes, scholars have come to identify a significant one as “allowing a court to screen cases for merit.”312 At this juncture, courts can siphon off some of the frivolous cases that come before them. The second mechanism is summary judgment. The main goal of Rule 56 has been said to be “filtering out cases not worthy of trial,”313 and that rule is now regarded as a “powerful tool for judges to control dockets.”314 A third mechanism is the possibility of Rule 11 sanctions, which were developed to “punish lawyers for advancing meritless contentions that wasted the courts’ attention”315 and to deter such litigation from coming into court in the first place.316 [Footnote 316 begins here] 316 FRCP 11, Advisory Committee Notes to the 1983 Amendments (“Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should **discourage** dilatory or **abusive tactics and** help to **streamline the litigation process by lessening frivolous claims** or defenses.”). [Footnote 316 ends here] In short, the district courts have at their disposal **several critical procedural rules** that have been **fashioned**, at least in part, **so that** district **courts can** more **quickly dispose of frivolous filings** and streamline the litigation process more generally.

Many of the mechanisms that exist at the district court level have analogues at the courts of appeals. Through the Federal Rules of Appellate Procedure, the circuit courts have several key ways to manage their dockets and reduce the time taken by frivolous filings. Rule 34 permits appeals courts to decide cases without oral argument317—a powerful time-saving mechanism.318 Additionally, courts of appeals can rely on staff attorneys to help draft summary dispositions.319 Finally, per Rule 38, if a court of appeals determines that a particular filing was frivolous, **the court can award damages and costs to the appellee.**320

Moreover, these mechanisms of the federal courts are not static—**if they are insufficient to curb the flow of frivolous cases, they can be altered, and** indeed **have been** so altered **in the past.** Rule 34, for example, was amended in 1979 to authorize the resolution of an appeal without oral argument whenever a panel agrees that argument is unnecessary because, inter alia, an appeal is frivolous.321 Similarly, Federal Rule of Civil Procedure 11 was amended in 1983 precisely to reduce the number of frivolous filings.322

And although this has been more controversial, the Supreme Court itself has shifted the meaning of various procedural rules in its own opinions.323 In 1986, the Court in a trilogy of cases324 solidified Rule 56 as “a powerful tool for the early resolutio of litigation.”325 And of course, more recently, the Court altered pleadings with its decisions in Bell Atlantic Corp v Twombly326 and Ashcroft v Iqbal.327 There can be disagreement about the propriety of the way these rules have shifted over time, but the point remains that the federal courts have an extensive set of procedures to manage their dockets, and these procedures can be ratcheted up if they prove insufficient.

# 1AR

## 1AR---T-Prohibitions

### EXT---W/M

#### We INCREASE what is BANNED. Undermining consumer welfare on ONE side of the platform is now ILLEGAL.

**Hovenkamp 20** --- James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School.

Herbert, 1-17-2020, "Herbert Hovenkamp ‘Platforms and the Rule of Reason: The American Express Case’ (2019) Columbia Business Law Review, 1 34," Antitrust Digest by Pedro Caro de Sousa, https://antitrustdigest.net/herbert-hovenkamp-platforms-and-the-rule-of-reason-the-american-express-case-2019-columbia-business-law-review-1-34/

This links to the author’s criticism of the market definition. The majority places production complements (i.e. the two sides of the platform) into the same market, simply because making a deal requires both. This jettisons economically coherent conceptions of the relevant market as a group of substitute goods or services. Superior techniques exist for evaluating the pricing relationship among substitutes and complements, and their effects on market power that do not require abandonment of sensible economics, as the court has done.

In any event, market definition and market share are only the starting points in the analysis of market power by indirect measures. If there is direct evidence of anticompetitive effects – as there was here – no market definition may even be required. However, if one is to look at market definition, the way to go about is to identify substitutes – not complements such as card user and merchant services. Even if the presence of a second market side may affect the ability of the first side to exercise market power – as with complements – no part of that determination requires a conclusion that the second side is in the same market where market power is being exercised.

This leads to the appropriate means to identify anticompetitive harm. No one denies that properly conducted antitrust law already requires analysis of two sides in cases of vertical interbrand restraints, including the tying of complementary products. However, this does not require – and has never required – anything as economically incoherent as putting them into the same relevant market. The law of tying and exclusive dealing both assess competitive effects by examining power in a primary market and foreclosure in a secondary market. Typically, as in Amex, the two products are complements. It is true that the Amex majority concluded that the two sides of the transaction were not complements because they were not purchased by the same buyers; their mistake is that the two sides were clearly complements in production, i.e. goods or services that are produced together, such as oil and natural gas, lumber and sawdust, or voice services and messaging services.

#### Previously, conduct harming consumers on one side would have been sufficient to violate Sherman. Now, because of Amex, it only applies to conduct on two sides. That means our AFF makes currently legal conduct ILLEGAL.

**Hovenkamp 20** --- James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School.

Herbert, 1-17-2020, "Herbert Hovenkamp ‘Platforms and the Rule of Reason: The American Express Case’ (2019) Columbia Business Law Review, 1 34," Antitrust Digest by Pedro Caro de Sousa, https://antitrustdigest.net/herbert-hovenkamp-platforms-and-the-rule-of-reason-the-american-express-case-2019-columbia-business-law-review-1-34/

In conclusion, stated in rule of reason terms, the question was whether the plaintiff had presented enough evidence of competitive harm to require the defendant to offer a defence. The harms were clear: cardholders were denied an opportunity to obtain lower prices, and merchants were denied the opportunity for a less costly transaction. From a consumer welfare perspective, the directly affected consumers were worse off, as well as other consumers who were forced to pay higher product prices regardless of the form of payment they chose. While Amex itself benefitted by preserving the transaction to its own system, this was at best a wealth transfer from whatever payment method or platform lost the transaction.

The paper closes with a discussion of what are the implications of this decision for the future.

Grouping both sides of a platform into a single relevant market in cases such as this may be economic nonsense, but it is now the law. The Supreme Court held that not every two-sided platform qualified for its unique approach, but noted that transactional platforms in which there is a simultaneous one-to-one correspondence between the transactions on one side of the platform and those on the other side are “different”.

### AT: Business Practices

#### “Business practices” must be done repeatedly over a significant period of time in a systemic manner---this is a direct response to 2NC contextualization.

Wohl 17 – Partner at Paul Hastings LLP

Jeffrey D. Wohl, Halley V. Target Corporation, Declaration of Jeffrey D. Wohl and Request for Judicial Notice in Support of Defendant Target Corporation’s Motion to Dismiss or, in Alternative, to Stay Because of Earlier-Filed Litigation, LexisNexis

51. DEFENDANTS' violations of California wage and hour laws constitute a business practice because DEFENDANTS' aforementioned acts and omissions were done repeatedly over 2 a significant period of time, and in a systematic manner, to the detriment of PLAINTIFF and 3 CLASS MEMBERS.

### ---AT: “ROR Not T”

#### The text of the Sherman Act prohibits practices that restrain trade. But, WHAT restrains trade is determined by the COURTS through the Rule of Reason. This arrangement was the EXPLICIT intent of Congress AND is the only way that the Sherman Act retains coherency.

**Quinn 11** --- Patent attorney and a leading commentator on patent law and innovation policy. Mr. Quinn has twice been named one of the top 50 most influential people in IP by Managing IP Magazine, in both 2014 and 2019.

Gene, 11-17-2011, "Antitrust Law Basics: A Primer on Patent and Copyright Misuse," IPWatchdog, https://www.ipwatchdog.com/2011/11/17/antitrust-law-basics-a-primer-on-patent-and-copyright-misuse/id=20458/

The antitrust laws, which can be found at 15 U.S.C. § 1 et seq, apply to virtually all industries and to every level of business, including manufacturing, transportation, distribution, and marketing. They prohibit a variety of practices that restrain trade, such as price-fixing conspiracies, corporate mergers likely to reduce the competitive vigor of particular markets, and predatory acts designed to achieve or maintain monopoly power.

The historic goal of the antitrust laws is to protect economic freedom and opportunity by promoting competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice. Competition provides businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anticompetitive restraints. Competition also tests and hardens American companies at home, the better to succeed abroad.

The Sherman Antitrust Act, the first of the major antitrust laws, makes illegal every contract, combination, or conspiracy, in the restraint of trade. Unfortunately, Antitrust Law is not so simple as a cursory reading of the statue would otherwise suggest.

One problem presented by the language of §1 of the Sherman Act is that it cannot mean what it says. The statute says that “every” contract that restrains trade is unlawful. But, as Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, §1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets — indeed, a competitive economy — to function effectively.

Congress, however, did not intend the test of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition. The so-called Rule of Reason, for example, has its origins in common-law precedents long antedating the Sherman Act. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.

### EXT---Precision

#### c] This is the single job of courts in antitrust cases

Popofsky, Antitrust Partner at Ropes and Gray, Served as Senior Counsel to DOJ Antitrust Division, Adjunct Professor of Advanced Antitrust Law and Economics at Harvard Law School and the Georgetown University Law Center, ‘06

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

That courts craft Section 2 legal tests to minimize expected legal pro- cess and error costs is not just evident from comparing different Section 2 legal tests on the spectrum; it is also *expressly* the task in which antitrust courts are engaged. This is well illustrated by Trinko.88 The Trinko Court did not stop upon concluding that plaintiffs refusal-to-deal claim "does not fit within the limited exception [s]" to the principle that a monopolist generally has no duty to deal.89 The Court further assessed whether "traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors."90

## 1AR---States CP

### XT 2AC – 4---Rogue State DA

#### That uncertainty stops businesses in their tracks.

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

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

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

### ---AT: Follow-On

#### No follow on legislation

Dave Perera, US antitrust legislation faces uphill battle despite unified Democratic government, MLex, March 12, 2021, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-antitrust-legislation-faces-uphill-battle-despite-unified-democratic-government

Those expecting — or fearing — more ambitious outcomes likely won’t see them enacted. So until America’s November 2022 election, scratch from the list of high probabilities reforms such as requiring dominant firms to separate lines of business, or shifting the burden of proof onto an acquiring company.

Put another way, unless a bill can attract significant Republican support, not even two years of unified Democratic government can guarantee reforms.

— American exceptionalism —

Single party control of both congressional chambers and the presidency is relatively rare in American politics. It has occurred in fewer than a third of legislative sessions since 1980. When it strikes, it doesn’t last long — typically just the two years between one congressional election and another.

Historically, unified control is a fertile period for new regulations. President George W. Bush overhauled Medicare. President Barack Obama ushered in financial sector reforms and the Affordable Care Act. Indications are that President Joe Biden is emboldened by his party’s last-minute capture of the Senate.

History, of course, isn’t a blueprint. Even a brief look at past episodes of unified control reveals that not even single-party capture of the executive and legislative branches of the US government can assure the enactment of a partisan agenda.

For one thing, neither political party is a monolith. Although far more politically aligned than when Democratic conservatives found common cause in the 20th century with Republicans, the major American parties nonetheless are coalitions of centrist and activist wings. For Democrats, the tensions inherent in appeasing all sides became apparent earlier this month when centrists trimmed benefits in the $1.9 trillion coronavirus stimulus package.

Neither is single party grip on power secure unless it commands an overwhelming majority in the Senate, thanks to a uniquely American institution: the filibuster. In the Senate, the rules mandate a three-fifths vote before debate over a bill is cut off. In recent decades, it’s become a weapon routinely wielded by the minority party to kill legislation.

The upshot is that policy legislation needs supermajority support before it can proceed, meaning the 50 Democrats of today’s Senate have little choice but to resign themselves to the grind of finding Republican supporters. There are limited exceptions. Assuming Democrats stay in unison, they don’t need Republican votes to appoint judges, approve executive branch nominations or pass fiscal legislation such as the coronavirus stimulus that just became law.

It’s within Democrats’ power to abolish the filibuster, but for now, the maneuver appears safe. Asked just days ago about the matter, White House spokeswoman Jen Psaki told reporters that the president’s preference is for it to stay in place. “The president is an optimist by nature,” Psaki added.

— Hunting for bipartisan consensus —

Not every bill introduced in Congress, nor even every bill approved by a committee or even an entire single chamber, makes it through the process because its sponsors believe it’ll become law. There are a host of bills drafted with the intent of sending a message to industry, to independent regulators, to donors, to constituents.

There are bills that lawmakers view as setting out a position to influence an ongoing policy debate. Even if it won’t become law this year, it might the next year, or the next, reintroduced and refined along the way.

Telltale signs of whether a bill is a serious attempt at law are the number of cosponsors, and whether that list of names includes members of both parties in good stead with their party’s leadership.

Bipartisan support is important even in the House, where Democrats have the votes to completely bypass Republicans. Because the House doesn’t have the filibuster to contend with, those with the majority of seats control the chamber. House Democrats can and do pass bills in the face of absolute House Republican opposition, but — special exceptions for fiscal bills aside — those bills are dead on arrival in the Senate.

As long as the filibuster exists or Democrats lack a Senate supermajority, the House Judiciary antitrust subcommittee must court Republican support if its intention is to make new law.

Finding clues of what House Democrats might seriously achieve, then, may be little more difficult than looking up the policy prescriptions House Republicans favor: giving regulators more resources, shifting the burden of proof in merger cases and boosting data portability and interoperability.

A report issued by now-ranking Republican Ken Buck as a rejoinder to last year’s Democratic House Judiciary antitrust subcommittee staff report on competition in digital markets allowed that the GOP shares other Democratic concerns, including predatory pricing, monopoly leveraging and control over marketplace platforms.

That conciliatory signal also came weighted, with warnings that Congress should be wary of “handing additional regulatory to agencies in an attempt to micromanage.” Instead, try instead telling enforcers they should return to first principles, the Colorado lawmaker advised.

Whether Republicans and Democrats in the Senate can find common cause is an even more fraught question. Unlike its House counterpart, the Senate Judiciary subcommittee on antitrust hasn't conducted a 16-month investigation into digital monopolization. The subcommittee’s senior Republican, Utah’s Mike Lee, is prone to touting the importance of the consumer welfare standard and rails against online platforms “eager to impose the ideological censorship called for by their political benefactors.”

Lee also says he’s open to working with subcommittee Chairwoman Amy Klobuchar on strengthening enforcement, adding the caveat that current antitrust laws are sufficient.

Klobuchar, a Minnesota Democrat, doesn’t need Lee to get a bill through her subcommittee, but failing to find consensus with Republicans imperils her chances of making law. The prospects for her Competition and Antitrust Law Enforcement Reform Act becoming law as current written aren't good.

— 'Big tech is out to get conservatives' —

A looming question hanging over any bill, even one tailored to win bipartisan support, is whether it could be derailed by Republican anger at online platforms for alleged anti-conservative bias.

A right-wing trope especially spread by President Donald Trump during his last year in office — the belief that platforms use their content moderation powers to silence conservatives — has mainstream acceptance in Republican circles. It’s a refrain almost obligatory for Republican lawmakers to repeat when discussing any issue related to online platforms. “Big tech is out to get conservatives,” House Judiciary Committee ranking member Jim Jordan of Ohio has said more than once.

Democrats have their own share of anger at online platforms’ content-moderation practices, to be sure. They accuse online platforms of circumventing consumer protections, undermining civil rights laws and not doing enough to stymie disinformation.

It’s Republicans, though, who appear the angriest, and are the more likely to insist that any legislative reform touching online platforms address content moderation, with the intention of making it harder, not easier, for online platforms to remove users, potentially imperiling a compromise measure.

There is one bill that just might thread that narrow opening between antitrust and content. It has a bipartisan coalition in the House and the Senate. Attached are House antitrust subcommittee Chairman David Cicilline of Rhode Island, Representative Buck, Senator Klobuchar and Senator John Kennedy, a Louisiana Republican. It’s the Journalism Competition and Preservation Act, and it would establish a four-year safe harbor from federal and state antitrust laws for news organization to collectively negotiate with online platforms.

It isn't antitrust reform. Critics say it’s the opposite of reform, as the answer to monopoly shouldn’t be the mere suspension of antitrust law. But it’s something they agree on, and for lawmakers looking to lodge a win, it might suffice.

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#### Biden antitrust already killing deals—derails current merger boom

Anirban Sen, Biden's antitrust crackdown adds to anxiety of merger investors, Reuters, 8/6/21, <https://www.reuters.com/business/bidens-antitrust-crackdown-adds-anxiety-merger-investors-2021-08-05/>

U.S. President Joe Biden's tougher regulatory stance on big corporate mergers has fueled a rise in investor bets on some deals not being completed, threatening to push the brakes on a record-setting dealmaking boom.

Spreads between deal prices and the share prices of acquisition targets widened this week after the U.S. Federal Trade Commission said on Tuesday that a surge in mergers and acquisitions (M&A) would delay antitrust reviews, and that companies that did not wait for their outcome completed their deals at their own risk.

On Wednesday, the Information reported that the U.S. Department of Justice was weighing a lawsuit to block UnitedHealth Group's (UNH.N) nearly $8 billion deal to acquire health care analytics and technology vendor Change Healthcare (CHNG.O). Such a move would follow its lawsuit to block Aon's (AON.N) $30 billion acquisition of Willis Towers Watson (WTY.F), which resulted in the insurance brokerages abandoning their deal last month.

"The fact that spreads have widened is the understatement of the year," said Roy Behren, managing member of Westchester Capital Management, which currently has $5.1 billion of assets under management, 85% of which is invested in merger arbitrage.

The White House did not immediately respond to a request for a comment.

Widened spreads include the proposed $33.6 billion deal between railroad operators Canadian National Railway (CNR.TO) and Kansas City Southern (KSU.N), as both companies await approval from the Surface Transportation Board. Shares of Kansas City are currently trading at $262 apiece, well below the agreed cash-and-stock deal of $325 per share. read more

#### Enforcement is inevitable and immediate—only question is whether it is effective

Farrington, JD, antitrust partner @ White & Case, ‘21

(Rebecca, “US dealmaking braces for more challenging antitrust environment,” July 30, <https://www.whitecase.com/publications/insight/us-ma-2021/us-dealmaking-antitrust>)

President Joe Biden has made antitrust enforcement a policy priority for his administration, with stricter oversight of the US’s large technology companies among his policy priorities.

Biden named Lina Khan, an antitrust academic and prominent critic of Big Tech, as Federal Trade Commission (FTC) chair and appointed Tim Wu, a Columbia University law professor and also a Big Tech critic, to the National Economic Council as a special assistant to the president for technology and competition policy.

A proactive approach

These appointments signal the White House's intention to take a more proactive approach to antitrust enforcement, with a focus on the technology sector.

Tighter scrutiny of the technology industry is an issue that precedes the Biden administration, with the Department of Justice and FTC launching antitrust lawsuits against Google and Facebook during the Trump administration. These efforts are expected to continue, and may see the scope expanded, under the Biden administration.

Legislative changes

In addition to the Biden administration's appointments, Congress is considering five antitrust bills with bipartisan support that could lead to additional scrutiny of larger technology businesses.

These legislative efforts are still nascent and should be watched carefully as they develop, both for their focus on merger enforcement and on practices by businesses deemed to be dominant.

Slow but certain impact

Many of these initiatives from the White House and Congress may take time for the impact to be felt, but the scrutiny on technology transactions will likely be more immediate, adding complexities for technology companies considering transactions in this new environment of enhanced enforcement.

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

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

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

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

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

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