# Disclosure---Kentucky---Round 1

## 1NC

### OFF

#### Interpretation---prohibit means to forbid a given practice---that’s distinct from restriction.

Kennard 93 – Judge, California Supreme Court

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

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

#### Violation---exemptions based on the rule of reason means practices are not prohibited.

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

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

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

#### That’s a voter for limits and ground---allowing exemptions on the rule of reason lets the aff straight turn core topic DAs and get advantages based off clarifying vague statutes.

### OFF

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

Lucas 88 – Judge, California Supreme Court

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

\*\* Italics in original.

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

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

#### Violation---the aff regulates single acts.

#### That’s a voter for limits and ground---allowing aff teams to police specific mergers allows thousands of small affs that skew out of core topic generics.

### OFF

#### The United States Federal Trade Commission should:

#### determine that, under Section 5 of the Federal Trade Commission Act, “unfair methods of competition” includes potential anticompetitive business practices in the technology sector

#### issue cease and desist letters to companies engaging in potential anticompetitive business practices in the technology sector stating that their conduct constitutes a violation of Section 5 of the FTC Act.

#### Broad FTC authority means the counterplan solves

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau

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

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

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

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

#### Maintains incentives for innovation

Dagen 10 – Special Counsel to the Director, Bureau of Competition, Federal Trade Commission.

Richard Dagen, August 2010, “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT,” Boston University Law Review, http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

d. Efficiency Considerations Weigh in Favor of Use of Section 5 Enforcement, but Not Sherman Act

Critics might argue that Section 5 enforcement has resulted in at least one firm leaving a standard-setting organization. Rambus’s counsel advised Rambus of the risks of equitable estoppel well before the Dell decision, yet Rambus continued to participate in JEDEC.260 It was very soon after Dell that Rambus withdrew from JEDEC.261 Thus, if the FTC enforces equitable estoppel principles, a firm with an intent to engage in “bad” conduct may leave.262 But this is not an undesirable thing – particularly in the case of Rambus, which gained valuable information during SSO deliberations but provided none.

Section 5 enforcement might increase the likelihood that potential hold-up victims participate in standard setting. Enforcement would encourage “innocent” firms to participate because they would be less likely to suffer from opportunistic behavior. The net would be an increase in standard setting.

Conversely, finding the negligent IP holder liable for treble damages under Section 2 could significantly deter firms from participating in standard setting or cause overinvestment in patent tracking. Treble damages for negligence (over and above an injunction) will generally exceed any patent law remedy.

If treble damages were available, unintentional conduct could be penalized significantly more than under laches. Rather than risking treble damages in addition to the loss of IP, firms might choose not to participate in standard setting.

In summary, monopoly gained through conduct that is within the control of the monopolist and not on the merits resembles monopolization, as the term is used by courts and in common parlance, rather than historic accident or luck. Such conduct is proscribed by patent law defenses and other external norms. Where external norms already exist, the incentive to engage in that conduct is already affected. The existence of a patent law defense, in conjunction with relief that is similar in nature to the patent law defense, mitigates any risk of harm to incentives. Using these defenses as one potential limiting principle ensures that no skill, foresight, or business acumen is involved. The deadweight social welfare loss associated with monopoly can be eliminated with minimal concern for false positives. The use of Section 5 in this way is consistent with Supreme Court precedent.263

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#### Text: The United States federal government should---

---restrict occupational licensing requirements,

---repeal laws restricting dumping, export subsidies, and violation of U.S. companies’ intellectual property rights, and

---repeal all international tariffs imposed by the Trump administration.

#### Solves competition without relying on antitrust enforcement

Litan 18 – Nonresident senior fellow in the economic studies program at the Brookings Institution. Former senior fellow, director of the economic studies program, and vice president at Brookings.

Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation,” *Progressive Policy Institute*, September 2018, pp. 46-47, https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI\_AntitrustandDataLaws\_2018.pdf.

OTHER WAYS TO PROMOTE COMPETITION

Robust economic competition does not and should not rest entirely on effective antitrust enforcement. Other policies can also make the economy more competitive.

First, it is important that unnecessary occupational licensing requirements – which now cover almost 30 percent of the workforce, up from just 5 percent in the 1970s – be pruned and eliminated. As Professor Morris Kleiner of the University of Minnesota concludes, “There is little evidence to show that the licensing of many different occupations has improved the quality of services received by consumers; although, in many cases, it has increased prices and limited economic output.”96

A federal law preempting unnecessary state and local licensures, benefitting from a federal commission identifying which occupations no longer should have a license, would be the easiest solution to this problem, substantively. Politically, however, it is almost surely a nonstarter. Congress is unlikely to enact a statute that takes away protections benefitting almost one-third of the workforce, even if many of these protections hurt consumers.

An alternative, less sweeping federal solution would be to require reciprocity among the states; namely, if someone has a license to be a nurse, doctor, or hairdresser in one state, he or she would be able to have license to the same thing in any other state. This would greatly enhance worker mobility – a central problem affecting millions of Americans displaced or threatened with displacement in rural areas and smaller cities who would like to move to places offering greater opportunities, but currently can’t without going through retraining and recertification elsewhere.

Many states would be likely to object to a reciprocity mandate, however, fearing a “race to the bottom” in certification qualifications – even if those qualifications objectively are anti-competitive and unnecessary to protect health and safety. Furthermore, the Supreme Court’s recent decision in Murphy v. NCAA, allowing sports gambling, contains quite explicit language condemning as unconstitutional (in violation of the 10th Amendment) federal laws requiring states to act: “Congress cannot issue direct orders to state legislatures.” This language could be invoked to invalidate a federal law mandating reciprocal recognition of other states’ licensing regimes as an unconstitutional “direct order” to a state.

If reciprocity is ruled out – politically or constitutionally – then the only other way to eliminate unnecessary licenses is through state legislative action. This will be a painstaking process, requiring not only that each of the states mount a politically difficult effort, but also one that presents the substantively difficult challenge of going through all currently mandated licenses and removing the ones that aren’t required to protect the public. Nebraska has approached this problem by requiring its legislature to review 20 percent of its required licenses each year. An alternative approach is for each state to appoint a commission – modeled after the federal government’s base closing commission – and then for the commission’s list of suggested license eliminations to be given an up-or-down vote in a state’s legislature. Other states should experiment with either of these approaches, or perhaps others.

Second, foreign competition is not often thought of as part of the regime for protecting U.S. consumers and the competitive process; but, in an increasingly global economy, companies abroad – selling products and services here – are an essential part of the competitive ecosystem. Foreign competition can discipline any price-setting power dominant firms or firms in concentrated industries in the U.S. may otherwise have. It can also encourage domestic companies to be more innovative.

At the same time, however, U.S. law has special rules for foreign competitors, consistent with international rules of the World Trade Organization, which are designed to prohibit or offset the effects of three specific “unfair” trade practices (“dumping,” export subsidies, and violations of intellectual property rights of U.S. companies) but which also can insulate U.S. firms from foreign competition in ways that do not apply to domestic firms.98 In addition, upon a finding that certain imports from specific countries are harming U.S. industries, the President (under Section 201 of the Trade Law of 1974) can impose temporary “safeguard” tariffs on those goods. Also, under Section 232 of the same trade law, upon a finding by the Commerce Department that certain imports are threatening national security, the President can impose more lasting duties on those imports, as the Trump Administration has done for aluminum and steel imports from several countries and has threatened to do on foreign automobiles.

The price increases generated by the tariffs imposed by the Trump Administration on steel and aluminum, however, could easily swamp any increases due to collusion of domestic competitors, which the tariffs make more likely. Supporters of vigorous antitrust enforcement to benefit consumers must also, if they are to be philosophically consistent, oppose the turn toward protectionism of the current Administration, and instead support a return to pre-Trump era efforts of all other administrations since the end of the World War II at removing remaining trade barriers. At the same time, free trade advocates should also support a more generous and effective system for assisting workers displaced by trade, outsourcing, and automation to transition to other jobs and careers.99 As a society, we are paying the price for not doing a good job at this in years past. The result, at least in part, is the extreme political divisiveness we now see and lament.

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#### Text: The fifty states and all relevant United States territories should establish a presumption of anticompetition for potential anticompetitive business practices in the technology sector

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

HLR 20 – Harvard Law Review

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

I. THE ANTITRUST FEDERALISM LANDSCAPE

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

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

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#### M&A activity is high now because Biden’s executive order won’t be implemented for years.

David French and Sierra Jackson, Reuters, July 12, ‘21, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

#### Internal link goes one way---large-firm dynamism is the only way to maintain tech leadership vis-à-vis China---key to competitiveness and AI.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Tech innovation prevents nuclear conflict---U.S. leadership key.

Kroenig and Gopalaswamy 18 – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

Rather, we should think **more broadly** about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict.

International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full displayin its ongoing intervention in Ukraine.

Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war.

If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member.

Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly.

When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

### OFF

Text: The United States federal government should substantially increase its funding of the Federal Trade Commission.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Long term per-person healthcare costs will collapse the economy from a bubble burst or terminal budget overstretch---no alt causes---restoring competition in hospital markets is key to reduce costs.

Evan Horowitz, Fivethirtyeight, January 11, 2018, The GOP Plan To Overhaul Entitlements Misses The Real Problem, <https://fivethirtyeight.com/features/to-cut-the-debt-the-gop-should-focus-on-health-care-costs/>

There is no wide-reaching entitlement funding crisis, no deep-rooted connection between runaway debts and the broad suite of pension and social welfare programs that usually get called entitlements. The problem is linked to entitlements, but it’s much narrower: If the U.S. budget collapses after hemorrhaging too much red ink, the main culprit will be rising health care costs.

Aside from health care, entitlement spending actually looks relatively manageable. Social Security will get a little more expensive over the next 30 years; welfare and anti-poverty programs will get a little cheaper. But costs for programs like Medicare and Medicaid are expected to climb from the merely unaffordable to truly catastrophic.

Part of that has to do with our aging population, but age isn’t the biggest issue. In a hypothetical world where the population of seniors citizens didn’t increase, entitlement-related health spending would still soar to unprecedented heights — thanks to the relentlessly accelerating cost of medical treatments for people of all ages.1

What’s needed, then, is something far more focused than entitlement reform: an aggressive effort to slow the growth of per-person health care costs. Or — if that’s not possible — some way to ensure that the economy grows at least as fast as the cost of health care does.

Diagnosing the debt: It’s not about demographics

America’s long-term budget problem is very real. Already, the federal government has a pile of publicly held debts amounting to around $15 trillion, or about 75 percent of the country’s entire gross domestic product. That’s the highest level since the 1940s, yet the debt burden is expected to double by 2047 and reach 150 percent of the GDP, according to the Congressional Budget Office.2

It makes sense to list entitlement spending among the culprits for the growing national debt, given that these programs have grown from costing less than 10 percent of the GDP in 2000 to a projected 18 percent in 2047. Part of this is simple demographics: As America ages, more of us become eligible for Social Security and Medicare, thus driving up expenses.3

But there’s a crack in this demographic explanation: It only makes sense for the next 10 to 15 years. That’s the period of rapid transition when graying baby boomers will boost the population of seniors from around 50 million to more than 70 million. A change like that should indeed produce a surge in entitlement spending as those millions submit their enrollment forms.

By 2030, however, this wave will start to ebb, leaving the elderly share of the population at a roughly stable 20 to 21 percent all the way through 2060, based on the size of the population following the boomers and slower-moving forces like lengthening lifespans.

But think what this should mean for entitlement spending. As the population of seniors levels out in those later years, costs should naturally stabilize — at least, if demographics were really the driving factor.

This is exactly what you see for Social Security. The CBO expects total Social Security spending to leap up over the next decade but then settle at just over 6 percent of the GDP, at which point it will cease to be a major contributor to rising entitlement spending or growing debts. Social Security is thus a minor player in our long-term budget drama; if you cut the program to the bone, shrinking future payouts so that they won’t add a penny to the deficit, the federal debt would still reach 111 percent of the GDP in 2047.4

Likewise, cuts to welfare and poverty-related entitlements like food stamps and unemployment insurance are unlikely to improve the debt forecast. In fact, spending on these entitlements has been dropping since the high-need years around the Great Recession and is expected to shrink further in the decades ahead — partly because payouts aren’t adjusted to keep up with economic growth, and partly because the birth rate has been falling and several programs are geared to families with children.5

But the scale of the problem is totally different when you turn to health care. Spending on entitlement-related health programs — including Medicare, Medicaid and subsidies required by the Affordable Care Act — will never shrink or stabilize, according to projections. The CBO predicts these costs will grow over 65 percent between now and 2047 — and then go right on growing after that, heedless of the fact that the percentage of the population that’s over 65 should no longer be increasing.

Why is health care eating the budget? Per-person costs

Demographics aren’t responsible for the projected explosion in health care costs. More important than the growing number of elderly Americans is the growing cost per patient — the rising expense of treating each individual

The CBO found that the lion’s share — 60 percent — of the projected increase in health spending comes from costs that would continue to increase even if our population weren’t getting older.

The reasons for this are many, including the rising cost of prescription drugs and the fact that hospital mergers have reduced competition. But since 2000, per capita health costs in the U.S. have, on average, grown faster than the GDP. And while these costs rose more slowly after the Great Recession and the implementation of the Affordable Care Act, analysis from the Centers for Medicare and Medicaid Services suggests this slower growth rate won’t last.

Which is bad news for these programs, because if the problem were demographic, it’d be easier to solve. By mixing the kind of program cuts Republicans generally support with targeted tax increases favored by some Democrats, you could meet the short-term challenge posed by retiring baby boomers and raise enough money to cover the larger — but stabilizing — population of eligible seniors. But with ever-rising costs, there is no stable future to prepare for. To keep these programs funded, you’d need a wholly different approach — indeed a whole new perspective on mounting federal debt and the role of entitlements.

The future is a race between rising health care costs and economic growth, a race that the economy is losing. Each time health costs outpace the GDP, it creates what the CBO calls “excess cost growth,” which feeds the federal debt. If the government could close this gap, the long-term budget outlook would be a lot rosier.

There are two ways to solve this issue: Either contain health care costs — say through price regulation or more competitive markets — or boost economic growth enough to pay for this expensive health care. Success on either front would make health care spending look more manageable over future decades and lighten the debt load.

Entitlement reform needs health care reform to work

Few of the proposals that commonly fall under the heading of entitlement reform target the health care cost problem, which limits their ability to reduce the long-term debt.

Even when they do address health care, often the result is to shift — rather than solve — the problem. Say lawmakers decide to dramatically cut Medicare. That would indeed ease the government’s debt problem. But the underlying dynamic — the race between health costs and the GDP — wouldn’t really change. Seniors would still need health care, and per-person costs would likely still grow (maybe even faster, since Medicare is a relatively efficient program).

On top of all this, there’s also a deep-seated political barrier: It’s no good if one party picks its favored solution only to watch the other party dismantle it when they next take over. You need political consensus to make changes stick, and America is notably short on consensus right now.

In the end, though, it won’t do to just throw up our hands. Absent some workable solution, spending on health care will sink the federal budget, generating levels of debt that would hold back the economy and potentially spark a global crisis of confidence in the United States’ ability to borrow.

#### Healthcare driven budgetary overstretch causes global instability

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(Stuart S., “Global Power: Key Issues,” in *The Future of US Global Power: Delusions of Decline*, Palgrave, p. 57-58)

In the first instance, structural26 budget deficits are more likely to be symptoms of incipient overstretch then prima facie evidence of national decline. Overstretch suggests a need to realign commitments and resources, hence spending and revenues. In principle, persistently large deficits demand adjustments that need not materially impact the underlying drivers of longer-term prosperity. In contrast, if fiscal imbalances prove sufficiently chronic, they can eventually trigger growth-inhibiting alterations in microeconomic incentives. In such cases, incipient overstretch can mutate into a more primary threat to the system's underlying dynamism.

In its classical formulation, “imperial overstretch” refers to unrestrained and exorbitant foreign military campaigns. The latter can be said to redound to the detriment of great powers by crowding out more productive capital investments. Yet in contrast to widespread impression, the US fiscal challenge does not primarily reflect out-of-control defense spending and the burden of foreign entanglements. If this were the case, then the feasibility of financing an ever-expanding global power projection would be brought into question. This neither minimizes the sizable resources the US commits to military-related spending nor denies that cutbacks in such spending can help facilitate overall fiscal adjustment. Rather, the point is that an endemic failure to rein in explosive economy-wide health care costs with the latter's implications for public sector health insurance programs – the real fiscal challenge – will do more to endanger macroeconomic stability and eventually erode the material foundation of US power (see chapter 8).

By viewing (health-care driven) fiscal deficits as a necessary manifestation of overstretch is misguided for a more basic reason. The root of the US fiscal problem involves unsustainable commitments – particularly in the area of health expenditure – made by government to its citizens. It is decidedly not a question of any dearth of national resources to adequately meet the health needs of the population at large. As the richest country in the world, the US possesses more than enough resources to achieve this goal. The relevant political and social question is whether the population’s basic health requirements are best met via ever-expanding entitlements requiring increasingly higher levels of taxation.

### Innovation Adv.

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

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

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

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

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

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

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

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

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

For instance:

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

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

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

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

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

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

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

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

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

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

#### Zero empirical evidence for killer acquisitions in tech markets.

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

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

B. Killer Acquisitions in the Tech Sector

A natural extension of Cunningham et al.’s killer acquisitions work is to question whether mergers of this sort also take place in the tech industry. Interest in this question is driven by the prominent place that digital markets currently occupy in competition policy discussion, but also by the significant number of startup acquisitions that take place in the tech industry.

Existing studies provide scant evidence that killer acquisitions are a common occurrence in these markets, however. This is not surprising. Unlike the pharmaceutical industry, where drugs must go through a lengthy and visible regulatory pipeline before they can be sold, incumbents in digital industries will likely struggle to identify their closest rivals and prevents firms from rapidly pivoting to seize new commercial opportunities. As a result, the basic conditions for killer acquisitions to take place (i.e., firms being in a position to share monopoly profits) are less likely to be present—and it is also harder to design research methods that detect these mergers.

The empirical literature on killer acquisitions in the tech sector is still in its infancy. In fact, as things stand, no study directly examines whether killer acquisitions actually take place in digital industries (i.e., whether post-merger project discontinuations are more common in overlapping than non-overlapping tech mergers).

In one of the only empirical papers on this topic, Axel Gautier and Joe Lamesch look at 175 acquisitions by Amazon, Apple, Facebook, Google, and Microsoft.202 The authors observe that acquired firms’ products were discontinued in 60% of these mergers.203 On this basis the authors conclude that “the possibility of killing acquisitions cannot be leaved [sic] aside and it is important that competition authorities take into account the competitive potential of these young startups.” 204

As the authors themselves concede, however, their study sheds no light on the occurrence of killer acquisitions, as opposed to mere product discontinuations. 205 Indeed, the paper does not show that incumbents’ acquisitions are discontinued at a higher rate than the competitive baseline, or even that the discontinued mergers disproportionately concerned overlapping products that may threaten the acquirer’s market position. 206 Accordingly, the authors’ conclusion that authorities should pay closer attention to mergers that take place below existing notification thresholds appears premature. This is all the more true given that the paper says nothing about the relative benefits and costs of this policy change.

Similar issues also affect other empirical research on this topic. A recent paper by Elena Argentesi and her co-authors, for example, surmises that “merger control enforcement has not proved able so far to cope with several of the new challenges posed by digital markets,” and concludes that “[m]ore can and should be done. It might be that this will require a change in the legislation or the establishment of a new regulator.” 207

This conclusion rests mainly on two cases studies, and a more superficial analysis of almost 299 acquisitions by Google, Amazon, and Facebook.208 The authors collect several descriptive statistics about these transactions, and group these mergers by the target firm’s main business segment (however, as the authors observe, this is not a good proxy for actual overlaps between the acquirer and target firms’ businesses). 209

While this study sheds a fascinating light on the M&A activities of large tech firms, it says little about the potential occurrence of killer acquisitions. The authors find that a majority of the 299 scrutinized Big Tech acquisitions are spread between communication apps and tools (50), developer tools (40), physical goods and services (51) and AI & analytics (43).210 Moreover, the study shows that all three of Google, Amazon, and Facebook have, to varying degrees, invested in these sectors.211 This suggests these acquisitions might be better framed as “moligopoly” competition— where large platforms compete for control of markets outside of their core business areas—rather than killer acquisitions.212

Crucially, there is no sense that these acquisitions face higher termination rates than those made by other acquirers (such as venture capital firms), or that the activities of targets systematically overlap with those of incumbents. There is thus little reason to believe that they were “killer acquisitions,” and even less that they ultimately harmed consumers. In fact, the authors even observe that many of the target companies were likely complements, rather than substitutes:

However, most transactions do not have a clear horizontal element for each of Amazon, Facebook, and Google. Acquisitions target companies spanning a wide range of economic sectors and whose products and services are often complementary to those supplied by Amazon, Facebook, and Google. . . . Transactions that can be characterized as more horizontal in nature would seem to be the minority. 213

This tends to exclude the killer acquisition theory of harm. The authors supplement this empirical work with two case studies: one concerning Facebook’s purchase of Instagram; the other about Google’s acquisition of Waze.214 Crucially, in both cases, the authors fail to reach a conclusion as to whether the underlying merger ultimately harmed consumers, 215 and in the case of the Facebook/Instagram acquisition, the authors concede anecdotal evidence may even cut in the opposite direction.216

#### “Innovation decline” from mergers is wrong.

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

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

The bigger picture is that it is extremely difficult, even with hindsight, to determine whether these mergers might have been detrimental to competition and consumers. Perhaps more problematically, there are no obvious heuristics to identify mergers that are, on balance, more likely to harm competition.

Scholars have also published several theoretical papers concerning potential killer acquisitions in the tech sector. Mark Lemley and Andrew McCreary, for instance, argue that the acquisition of startup companies by large platforms leads to concentration in the tech industry and averts the Schumpeterian competition that would otherwise enable the acquired startups to compete with, and ultimately displace, incumbents.217 The authors substantiate this claim by citing evidence that acquisitions have gradually gained in importance, relative to IPOs.218 In other words, in a world without startup acquisitions, the authors believe thar far more companies would opt for IPOs and ultimately compete head-on with incumbents.

But the authors gloss over several critical counterarguments. For a start, it is not clear that VC funding would remain at its current levels if exit by acquisition were taken off the table. 219 Put simply, acquisitions may offer an exit to early investors in cases where IPOs are not a realistic prospect, thus increasing the incentive to invest in startups in the first place; barriers to market exit have been known to slow investments. 220

Likewise, it is far from clear that market concentration is a problem in and of itself. For example, economic analysis of the relationship between market structure an innovation suggests there is an ambiguous relationship between both variables, or at the very least a nonmonotonic one.221

Finally, the authors are dismissive of potential efficiency justifications that may underpin startup acquisitions. But the fact that startups routinely opt for acquisition instead of IPOs suggests the former is often more lucrative. While, in some cases, this could be due to market power reinforcing effects, in other cases superior efficiency of acquirers (or the inefficiency of targets) may play a larger role. This is almost by definition the case when the acquiring and target firms are not competitors or potential competitors.222 The managerial efficiency of incumbents223 , economies of scale224, and complementary dynamic capabilities225 are but a few potential explanations for these purchases. In short, the authors thus fail to adequately substantiate their claim that startup acquisitions reduce consumer welfare.

To summarize, while studies of this sort may indeed suggest that the clearance of certain mergers may not have been optimal, it is hardly a sufficient basis on which to argue that enforcement should be tightened. The reason for this is simple: As explained above, the fact that some anticompetitive mergers may have escaped scrutiny and/or condemnation is never a sufficient basis to tighten rules. For that it is also necessary to factor in the administrative costs of increased enforcement, as well as potential false convictions to which it might give rise. As things stand, economic research on killer acquisitions in the tech sector does not warrant tougher antitrust enforcement, though it does show the need for further empirical research on the topic.

#### Big tech is the single largest host for startups and sustains productivity growth.

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

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

But what about the market power of the tech platforms? Don’t they inhibit competitors – new and existing companies – from challenging them? A recent article in The Economist warns that the tech platforms have become so powerful and threatening that they have established “kill zones” around their markets – arenas where startups know they will be squashed if they try to compete with the existing platforms, and thus can only sell out to them. “Ninety percent of the startups I see are built for sale, not for scale,”12 one venture capitalist told the magazine. In addition, the article worries about the absence of new platforms to challenge (and ideally disrupt) the incumbents.

There are several responses to this critique. First, each of the major tech platform companies acts as a host for startups and smaller existing businesses – creating markets for their services or products where none may have existed before, or extending their reach far beyond where they may be physically located. As already noted, Amazon hosts more than 1 million businesses selling all kinds of goods on its platform, including used books and other items that compete with Amazon’s own offerings. Indeed, more than 50 percent of the non-food items sold on the Amazon platform are derived from independent merchants’ sales.13 Apple and Google collectively host millions of applications on their mobile platforms (iPhone and Android). Facebook’s advertising model, despite the criticism it has drawn, has spawned a whole industry of advisers on social media advertising and marketing to companies, large and small.

Second, the pattern of the decline in startups is also inconsistent with the rise of the tech platforms being the villain in the overall startup decline. As a recent Brookings study documents, the drop of startup activity is spread across all major industry categories14 and is not concentrated in tech, as one would expect to see if the tech platforms were principally to blame for the overall drop in startup activity.

Third, my own research with Ian Hathaway, which documents the decline in the startup rate (the percentage of the total number of firms that are less than five years old) in all but one of the roughly 350 metropolitan areas in the United States, identifies two other potential explanatory factors that are statistically related to startup trends. The decline in startup rates is steeper in metro areas where population has not been growing (suggesting both supply and demand factors at work), and where the concentration of firms at the local level regardless of industry is relatively high.15

In other work, we also found – as did the later Brookings study just noted – that firms are “aging” in America, with a greater percentage of firms being at least 15 years old.16 We did not find the age increase to be related to measures of local business consolidation, and we didn’t have the data to link it at that time to measures of industry concentration. Nonetheless, the aging of the firm structure in the economy could help explain some of the decline in productivity growth about which many economists have worried – and which I discuss in the next section – in at least two ways.

Firms may be like individuals, being less innovative as they grow older (past a certain point) – reflecting the stifling effects of growing bureaucracy, with multiple approvals and associated delays and second-guessing of anything new. In addition, the increasing share of businesses represented by older firms may reflect advantages of incumbency, which may have resulted from superior efficiency, but may also reflect the fact that the growing numbers and compliance costs of local, state and federal rules put a disproportionate burden on newer firms – historically the source of much disruptive innovation.

President Obama’s Council of Economic Advisers has pointed to similar factors in its attempt to explain the decline in startup activity:

“The reasons for declining firm entry rates are not well understood, but a partial explanation is that barriers to entry may have increased in many industries. These barriers could be in the form of federal, state, or local licenses or permits, including occupational licenses … While such regulations serve a valuable role in protecting public well-being, they can also add fixed costs to an entrepreneur wanting to open a new business. Barriers to entry may be related to various advantages that have accrued to incumbent firms over time. For example, economies of scale may mean that incumbent costs are far below those of new entrants, making it difficult for entrants to compete. Or demand-side network effects may tip the market to a single provider of the network good. But incumbent advantages could also be political in nature; for example, if existing firms successfully lobby for rules protecting them from new entrants.”17

Fourth, whatever impacts the tech platforms may be having in their markets, they do not appear to have adversely affected annual venture capital funding, which, by 2017, had almost tripled from levels before the dot-com crash (from $55 billion to $150 billion).18 It may be true that the power of tech platforms has diverted VC funding into spaces away from platforms and their surrounding markets (though the launch of companies for “sale” rather than “scale” is inconsistent with that claim), and toward other unrelated markets, such as electric vehicles, blockchain apps, e-sports, robotics, or synthetic biology. But this redirection of venture money is not necessarily a bad thing. It may portend breakthrough innovations in other markets of greater potential value to the economy and society that may never have occurred – at least, not as rapidly – had VC money continued to fund more Web-based platform companies.

Finally, even if the tech platforms are using their “kill zones” to deter or buy new competitors, that doesn’t warrant their breakup. It does, however, call for a change in merger law that will tilt the existing platforms to entering new markets on their own rather than through acquisition, which should encourage innovation by the platform companies.

#### Tech firms fail to meet the most basic legal standards for breakups, but doing so would only hurts consumers.

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

I recount my own personal history and involvement with different phases of the Microsoft investigations and litigation of the 1990s and early 2000s in the accompanying box to indicate my own sympathy, based on my professional experience, with breakup or structural remedies in monopolization cases for firms that have consistently abused their market power. So far, however, calls for the breakup of some of today’s large tech platform companies – Amazon, Facebook and Google, in particular53 – do not meet the antitrust standard required for breakup, nor is there any principled justification for breaking up the platform companies for nonantitrust reasons.

There are both economic and legal reasons for this conclusion. As a matter of economics, all three platform companies have benefited hugely from economies of scale and/or network externalities (the notion that a network tends to monopoly because the value to users rises as more join). Breaking up such enterprises into smaller pieces would bring only temporary change, because the markets in which they compete are subject to either or both these forces. Eventually, the market structure in each case would move back toward a single dominant firm (or, at most, two). As an economic matter, society gains from a breakup only if – during the transition back toward monopoly or oligopoly – reintroducing competition induces the ultimate winner(s) to provide even better and/or lower cost services to purchasers that outweigh the potentially higher costs that breakup very likely would entail during the transition (reduced benefits of network externalities and economies of scale). My own judgment is that cloning Microsoft Windows OS into three pieces, as discussed in the box, would have met this test. Breaking up any of the major tech platform companies would not. At the very least, I have seen no compelling evidence to the contrary.

While the economics of breakup are interesting, ultimately the law is what matters most. Under the antitrust laws – and the judicial decisions that have interpreted them through the years – we can’t even get to the breakup question unless it is established that a monopoly has somehow abused its dominant position through some bad conduct, and that the harm to the marketplace can be cured only by breaking up the monopolist rather than prohibiting its bad behavior (perhaps with some supplemental “fencing in” requirements to keep it from happening again). The antitrust laws do not – nor should they – punish a firm for acquiring dominance in a market because of a superior product or service and/or luck.

Let’s go through each of The Four and see, first, if there is any evidence of consistent abusive conduct of monopoly power of the kind evidenced by Microsoft in the 1990s, and second, if that conduct (assuming it is present) justifies an extreme breakup remedy. I haven’t seen a credible claim or evidence that either Apple or Facebook has abused any of their market power. Facebook’s mishandling of its users’ data, which I discuss later, can and should be addressed through other means, and is not an antitrust violation. In theory, an argument can be made that companies like Facebook and Google (to be considered shortly) benefited from approvals of various acquisitions along the way. But, at the time of these mergers, given the state of applicable merger law, it is difficult to claim that any court would have blocked such acquisitions.

Consider Amazon next. In a later section, I rebut claims that Amazon has abused its alleged monopoly power through alleged predatory pricing. I note here that, even if online retailing is its own distinct relevant market – and this is a subject for dispute – Amazon reportedly controls 44 percent of the spending in that “market.”54 This market share is well below the minimum 60-70 percent courts have required in a successful attempt-to-monopolize or monopolization cases brought under Section 2 of the Sherman Act.

To be sure, there are narrowly defined product markets, such as U.S. e-books, where Amazon’s market share likely exceeds 80 percent, and clearly is dominant. In such markets, the question then is whether the company is doing anything to abuse that dominant position. On the surface, it is hard to detect a problem. Amazon displays its own new books directly with offers for used books at much lower prices (even with shipping included) offered by a range of third-party sellers. There is not even a question of “search bias” in these displays.

Nonetheless, one complaint about Amazon in other product markets is that it is “destroying” the business of brand-name suppliers by offering Amazon’s own (expanding) private label goods.55 This is no different from practices by other retailers like Costco and Kroger. The article that raises this issue has a quote from Galloway essentially acknowledging – to the extent Amazon’s private labels are cutting into sales of branded products – that they are wringing out a price premium those brands have long enjoyed but which many economists have also long criticized for penalizing consumers. In other words, Amazon’s success in devaluing brands benefits rather than harms consumers.

Moreover, Amazon does not appear to exclude other name brands from its site. I tried entering several popular consumer products in Amazon’s search engine – such as televisions and even batteries (which are mentioned in the article) – and found nothing of the sort. It is true that Amazon may show its own private label brands first, but immediately below are brand names. This practice is analogous to the way Google displayed results from its own product comparison “vertical search engine,” until it changed its practice after the EU’s decision condemning it, as discussed next.

But Amazon’s landing pages are designed very differently from Google’s. Amazon shows products in order as one scrolls down the page; it doesn’t have the equivalent of a “righthand side” for the company’s own products or third-party ads, which don’t fit with Amazon’s business model – which is to sell products directly and earn the revenue therefrom, rather than from hosting ads as Google and Facebook do.

Yet how is Amazon’s showing of its brand names first in its page formats an antitrust violation? Amazon’s share of online sales for certain products in which it offers its own private label goods may be substantial enough to constitute dominance or even a monopoly, but it is far from clear whether a court would define the relevant antitrust market so narrowly, rather than taking account of offline sales as well – which certainly would bring down Amazon’s market share (name-brand batteries, like other brands, are sold in a wide number and variety of physical retail locations such as grocery stories and pharmacies).

Moreover, where else would a court have Amazon’s private label brands shown – third, fourth or fifth – and on what basis would a court engage in such micro-managing? The same goes for ordering the company to completely redesign its Web site pages to look like Google’s or Bing’s search engines and show results of third-party offerings on the left-hand of each landing page, and the company’s offerings only on the right, as Google now does. Would this fundamentally change things? And does it really make any difference if a customer – who is looking for an item such as batteries, and prefers a name brand like Duracell – is shown those options right below the cheaper Amazon private label brand? These are the kinds of questions a court would have to answer in determining whether Amazon’s private label displays somehow constitute abuse of any market power it would have in narrowly-defined online-only product markets.

But, if a court could somehow reach such a finding, would it merit breaking up Amazon? Into what? One company and Web site that offered only third-party items – in markets where the company’s online market share rose above some threshold level, which would require constant monitoring and readjustment – and another Web site offering only Amazon’s private label goods?

That separation would destroy a fundamental advantage to consumers of being able to browse a single site and comparison shop across all brands. To pose such hypotheticals almost self-evidently answers whether a court would seriously entertain breaking up the company in this or any other manner. I seriously doubt even the most pro-plaintiff judge – let alone the Supreme Court – would order a breakup of the company for this reason.

#### Market competition lowers incentives for innovation – dooms productivity growth

Klenow, Li and Naff 19 – Peter J. Klenow is a professor of economics at Stanford University and a visiting scholar in the Economic Research Department of the Federal Reserve Bank of San Francisco. [Huiyu Li](https://www.frbsf.org/economic-research/economists/huiyu-li/) is a senior economist in the Economic Research Department of the Federal Reserve Bank of San Francisco. Theodore Naff is a research specialist at the National Bureau of Economic Research.

Peter J. Klenow, Huizu Li, and Theodore Naff, November 4 2019, “Is Rising Concentration Hampering Productivity Growth?” Federal Reserve Bank of San Francisco, https://www.frbsf.org/economic-research/publications/economic-letter/2019/november/is-rising-concentration-hampering-productivity-growth/?

If the initial rise in concentration benefited productivity growth, why did productivity growth eventually slow down? Aghion et al. (2019) link IT expansion to the current low pace of growth in two steps: first, IT expansion increased competition, and second, increased competition eventually deterred innovation.

For the first link, Aghion et al. (2019) argue that firms choose to innovate and introduce new products when the potential profit exceeds the cost of innovation. As a result, the costs of maintaining an additional product or market affect the degree of competition because such costs are akin to innovation costs. High costs discourage firms from innovating to enter new markets and shield existing businesses from competition. When the IT revolution first hit, it reduced the costs of adding new products and encouraged firms to innovate. As large firms expanded, however, they became more and more likely to compete with each other. For example, as Walmart and Target added new locations, they eventually became closer neighbors and competed more directly with each other. Similarly, as Amazon, Apple, and Netflix expanded innovations in video streaming, they began to compete with each other.

This idea that rising concentration in the U.S. economy occurred together with increasing competition is consistent with the findings of Rossi-Hansberg, Sarte, and Trachter (2019). They found that, while large companies have gained shares of national sales, concentration within local markets has actually declined. To the extent that markets are local and firms primarily compete with neighboring firms, concentration measured at the local industry level may be a better proxy for competition than concentration at the national industry level.

However, why does more competition reduce long-run growth? The second leg of the Aghion et al. (2019) hypothesis is that an increase in competition among efficient firms may have lowered how much profit could be gained from further innovation. This, in turn, may have resulted in a slowdown of innovation activities and productivity growth. Indeed, using firm-level data from the Census Bureau, Autor et al. (2019) find the rise in concentration was accompanied by decreasing profit margins within firms.

#### Big tech is key to innovation---cloud capabilities can’t be replicated at smaller scales.

Tucker 20 – Technology editor for Defense One

Patrick Tucker, “Busting Up Big Tech is Popular, But Here’s what the US May Lose,” Defense One, July 2020, https://www.defenseone.com/technology/2020/07/busting-big-tech-popular-heres-what-us-may-lose/167326/

From the Pentagon’s perspective, American tech giants do offer a unique technological resource, one that does produce innovation and that arguably would not exist if they were broken up. Consider the Pentagon’s JEDI cloud program. Smaller cloud providers complained that the program’s requirements were tilted toward Amazon, the only company that many believed could meet them. Part of the reason that the JEDI contract came down to a race between Microsoft and Amazon (after Google pulled out) is because those are the companies with the largest cloud offerings, able to provide the highest level of security. It was only after visiting them that former Defense Secretary James Mattis realized that what American’s private big tech firms were doing with cloud computing was decades ahead of what the government was doing with smaller, patchwork capabilities. He also realized that cloud computing at enterprise scale was essential to real innovation in AI.

The size of that cloud capability and the amount of data available plays a big role in a company’s ability to develop next-generation AI products. Google’s compute power, and access to a massive dataset of online video footage via YouTube, was vital to the development of deep learning technologies. Facebook’s compute power and its access to billions of biometric facial records — pictures of faces — allowed it to create unique facial recognition technology to rival the human brain.

These companies developed the world’s largest compute capabilities in order to become the world’s largest companies. Busting them up could eliminate something that doesn’t exist anywhere else and actually is a driver for innovation, one that arguably requires more regulation and oversight but also that can’t be replicated at a smaller scale.

#### BUT, the status quo solves all their internal links---unprecedented productivity growth, innovation, and new firm entry is driving robust tech competition.

**Petit 21** – Nicolas Petit European University Institute, Florence. David J. Teece, Institute for Business Innovation U.C. Berkeley and Berkeley Research Group Institute

Nicolas Petit and David Teece, “INNOVATING BIG TECH FIRMS AND COMPETITION POLICY: FAVORING DYNAMIC OVER STATIC COMPETITION,” July 2021, https://ssrn.com/abstract=3229180

The rise of Big Tech firms is having the welcome effect of causing a resurgence of interest in industrial organization. The emerging scholarship is mixed. On the one hand, there is a tendency to treat big tech firms as different because innovation in general (both technological and business model), and technical inputs in particular (big data, intelligent algorithms, and skilled engineers), clearly impact market structure and economic performance. On the other hand, industrial age explanations like monopoly power, anticompetitive leveraging, and predatory mergers are often used to supply theories for the durability and diversification of big tech firms. There is little or no mention of the role of entrepreneurship and management or of new operating models which deliver value in new and better ways.

We are skeptical about the power of these narratives to account for the totality of the competitive circumstances at hand. Our skepticism is aroused by the record of the big tech firms.2 There are many indicators suggesting that dynamism, not a base of monopoly power, is what is at work. The digital economy shows unprecedented productivity growth, rapid innovation, and new firm entry. In consumer digital goods and services in telecommunications and broadcasting, output has risen, quality has increased and prices have declined (Byrne and Corrado, 2020). This state of affairs could not reasonably exist if big tech firms were dominant players that suppressed competition by using scale, supposedly like the large iron, oil and steel trusts of the industrial age. Admittedly, it is theoretically possible that absent big tech firms, the development and growth of the digital sector would be even higher, and welfare benefits greater. However, proponents of the monopoly argument are yet to articulate the “but for” ideal world that they imply would otherwise exist.3 Our intuition thus, strays, from the monopoly explanation. Instead, we might be observing a group of diversified big tech firms coexisting and competing in oligopoly with each other vigorously, and with new and adjacent firms entering the fray from time to time. One of us referred to this broad-spectrum competition as the “moligopoly” hypothesis (Petit, 2020). A similar interpretation was given in 2021 by The Economist, which noted that monopoly explanations were “getting harder to sustain” as digital markets in the US are “shifting towards oligopolies in which second and third firms compete vigorously against the incumbent” (The Economist, 2021).

### Antitrust Foundationalism Adv.

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

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

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

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

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

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

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

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

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

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

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

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

The Big Tech Firms Are Devoting Resources to Antitrust Compliance

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

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

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

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

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

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

The Feds Don’t Have Time on Their Side

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

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

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

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

Any Penalties Are Likely to Be Insufficient

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

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

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

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

#### Market concentration doesn’t reduce competition and is *positively correlated* with productivity gains.

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

National market concentration measures, however, do not necessarily prove that actual competition is declining. Carl Shapiro, one of the nation’s leading industrial organization economists and former chief economist for the Justice Department’s antitrust division, has shown that national concentration measures of product or service markets do not always constitute a relevant geographic market where competition takes place.23 Shapiro identifies several industries where this difference is important. Although national chains may account for larger shares of revenue in these industries, there is (yet) no evidence of reduced competition at the local level where these firms tend to compete: accommodations and food, finance, health care, professional services, property, retail trade, transport and warehousing, utilities, and wholesale trade.24

Nonetheless, the growth rate of labor productivity in the U.S. has remained low by historical standards – at around 1 percent – over the past decade. This is worrisome because productivity growth is the key to rising living standards.

One reason for the productivity growth slowdown may be the decline in the rate of formation of new firms, which, over the past two centuries, have been disproportionately responsible for commercializing disruptive innovations.25 Likewise, workers are moving less frequently than they once did – either between firms in the same city or between cities.26

The temptation is great also to blame poor productivity performance on increasing industry concentration, but it should be resisted for several reasons. For one thing, as already noted, trends in national concentration statistics are poor measures of the state of competition. Moreover, as Shapiro has noted, even the increases in concentration that have occurred in narrowly defined industries at the national level – some of which can be attributed to relaxed merger enforcement by the Department of Justice after it updated its Merger Guidelines in 1982 – are mostly in unconcentrated industries and not of a magnitude that would indicate any material diminution of competition.27 And, if competition has not materially declined, then the state of competition cannot be linked to the decline in productivity growth or other measures of economic “dynamism” such as startup activity or worker mobility.

Statistical studies also do not support any connection between the modest increases in national industry concentration and the decline in productivity growth. David Autor and colleagues, who have been critical of increased concentration for its impacts on the labor market, have found a statistically positive relationship between an industry’s concentration level and its productivity improvements.28 Likewise, there is evidence linking investment in information technology (which is productivity enhancing for the firms making the investment), with more industry concentration. However, Bessen argues that – because much IT investment is proprietary and not diffusing to the rest of the economy – the economy-wide impact on productivity may be less than optimal.29

#### No solvo – economy’s too complex

Crane 16 – Professor of law at the University of Michigan.

Daniel Crane, “Antitrust and Wealth Inequality,” *Cornell Law Review*, vol. 101, 2016, pp. 1184-1186, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2793&context=articles.

C. Why the Monopoly Regressivity Claim Is Misguided

The argument that antitrust violations are regressive and hence that antitrust enforcement is progressive is founded on two, sometimes unstated, axiomatic assumptions: (1) relatively rich classes of producers, in particular shareholders and senior corporate managers, capture the majority of the monopoly rents generated by anticompetitive behavior and (2) relatively poorer consumers bear the brunt of monopoly overcharges.56 These assumptions may be generalizable in some circumstances—particularly in the developing world—where the means of production are concentrated in a very small number of private hands and the vast bulk of society interacts with capital only as an employee and a consumer.57 But they are far more difficult to generalize in more economically developed societies where ownership of the means of production is widely distributed, both in terms of active management and passive investment, and there exists a broad middle class capable of appropriating monopoly rents as entrepreneurs, managers, investors, employees, and sellers of assets. As the case for each of the axioms weakens, the case for the progressivity of antitrust enforcement correspondingly diminishes.58

It is doubtful that antitrust violations involve systematic transfers from comparatively poor consumers to comparatively wealthy producers. Almost everyone, both rich and poor, who participates in markets does so both as a consumer and as a producer. People participate as producers in their capacities as employees, sole proprietors, and shareholders. They participate as buyers in their capacities as end consumers, business purchasers, and taxpayers. Thus, any assertion about the regressivity of antitrust violations cannot rest on the bare claim that such violations involve wealth transfers from consumers to producers.

In order to sustain the claim, there would need to be a further specification of the ways in which identified classes of producers skim money from identified classes of consumers. When the actual operation of market power exercises in developed economies and antitrust enforcement seeking to curtail them is explored, it becomes apparent that general claims about the wealth redistribution effects of antitrust violations and enforcement are extraordinarily difficult to sustain. Monopoly rents are not systematically borne by the poor or collected by the wealthy. Rather, in a complex, advanced economy, the lines of exploitation and profit run in too many complicated and crosscutting directions to permit broad generalizations.

#### Competition makes disinformation worse---consumers prefer bad news.

Hurwitz 17 – Assistant professor of law and co-director of the Space, Cyber, and Telecom law program at the University of Nebraska College of Law.

Gus Hurwitz, “Fake News’s Not-So-real Antitrust Problem: Content Remains King,” *Competition Policy International Antitrust Chronicle*, 2017, pp. 3-4, https://laweconcenter.org/wp-content/uploads/2018/01/CPI-Hurwitz.pdf.

II. NEWS COMPETITION IN ABUNDANCE

A central aspect of Hubbard’s thesis is that Facebook and news compete with one another and that, in light of this, Facebook is using its dominant position in various markets to harm the news media. This argument is important in order to bring the thesis into an antitrust framework. If Facebook isn’t abusing a dominant market position – if there is no harm to the competitive process – then we are not operating in the realm of antitrust. But while Facebook competes in the “news” market, as discussed above it is far from dominant. It arguably competes in the more generalized “attention” market, but it is not dominant there, either. News is an input into the social media market. But Facebook has no incentive to harm news producers if they are creating a valuable input. And while Facebook’s significant share of the online advertising market has certainly harmed the traditional news industry, Facebook has little incentive to use that power to further harm the industry. In other words, neither horizontal nor vertical theories of harm present concerns about Facebook’s relationship with the traditional news media.

The best way to see the problems with Hubbard’s argument is to start with her proposed solution. Generally, she advocates a need for more competition between big tech platforms. She presents a hypothetical in which “there were five Facebooks and five Googles, all with different algorithms.” She posits that this would make it more difficult for purveyors of fake news to game the algorithms (because it is more costly to game ten than two, a reasonable assumption) and that consumers would reward the platform that developed the best algorithm with their patronage. She goes on to argue that, because consumers would reward platforms that sent them to higher quality news sources, those news sources would be in a better bargaining position against the platforms so they could negotiate more favorable deals with the platforms that returned higher-quality results.

This hypothetical points to a serious problem in how Hubbard imagines competition in social media – and in much of the modern news industry – works. Consumers do not reward the platform that provides them the best information any more than they reward fast food restaurants that have the best fruits and vegetables or dentists that provide the most thorough tooth cleaning. Changing the assumption from one in which consumers reward news providers and platforms for providing high quality news content to one in which they provide attention-grabbing reverses the outcome of Hubbard’s hypothetical: competitive platforms will work to develop the most attention-grabbing content, eschewing quality for that which grabs the most attention at the lowest cost. Their algorithms do not need to be “gamed” in order for fake news to outperform real news. They are designed precisely to ensure this outcome. And, in turn, purveyors of quality news will be in a weaker bargaining position, both in absolute terms and compared to those purveyors of attention.

Antitrust law is about protecting the process of competition. It is therefore important to understand what that process looks like in a given market. It turns out that competition doesn’t always yield pretty results in media markets – an idea to which we will return below. The consumer is the sine qua non of competition – the process of competition caters to maximizing what consumers what. The basic problem of fake news isn’t that a lack of competition causes the market to under-produce the high quality information that consumers want. It’s that consumers prefer interesting, attention-grabbing, simple to understand, entertaining fake news. Competition is causing the market to produce exactly the fake news that consumers do want.

There is no concern about a lack of horizontal competition driving this process. Rather, in the social media market – the market for attention – the platforms are rewarding, and the traditional news media is increasingly producing, a low-quality product because this is what the marginal consumer wants. This is a process that is driven by horizontal competition. Facebook competes with news producers for the attention of consumers; and Facebook competes with other social and search platforms to provide consumers attention-drawing content. High quality news is too costly and insufficiently interesting for the marginal consumer, so the market produces and directs consumers to something else. That’s no more Facebook’s fault than the decline of cobblers is the fault of industrial-scale shoe manufacturing.

## 2NC

### Innovation DA

#### Tech leadership is also good in the context of AI---Chinese AI dominance causes extinction and outweighs.

Allison 20 **–** Professor of Government, Harvard Kennedy School

Graham Allison, August 2020, "Is China Beating the U.S. to AI Supremacy?," Belfer Center for Science and International Affairs, <https://www.belfercenter.org/publication/china-beating-us-ai-supremacy>

An AI Arms Race?

During the Cold War, the stakes in the nuclear arms race with the Soviet Union were obvious. In today’s Thucydidean rivalry between a meteorically rising China and a colossal ruling United States, what are the risks of an escalating AI arms race?

Like it or not, future war will be AI-driven. As Secretary of Defense Mark Esper recently noted at the conference of the National Security Commission on AI, “Advances in AI have the potential to change the character of warfare for generations to come. Whichever nation harnesses AI first will have a decisive advantage on the battlefield for many, many years.” AI’s ability to accelerate decision cycles in conflict will compel militaries to adopt it. In air-to-air combat, pilots begin with an ooda loop: observe, orient, decide, act. If A can “get inside B’s OODA loop,” A wins—since he can maneuver to escape A’s fire and attack where he calculates B’s path will leave him when A’s missile arrives. Because AI can observe, orient, decide and act at multiples of a human pilot, it will become irresponsible to send a human pilot into battle with an AI piloted aircraft.51 As former Chairman of the Joint Chiefs of Staff Joeseph Dunford put it: “Whoever has the competitive advantage in artificial intelligence and can field systems informed by artificial intelligence, could very well have an overall competitive advantage.”52

The demonstrated success of AlphaGo, and more recently, AlphaStar, in defeating all competitors in one of the world’s most complex real-time strategy video games suggests that in any structured contest between offense and defense, AI will dominate humans. The company, country or team with the best AI will win. As an example, consider American football. In what commentators often discuss as a “chess match,” the offense and defense coordinators know that if the defense guesses correctly whether the next play will be a pass or a run, most nfl teams’ defenses can successfully stop most opponents’ offense. Reading all the variables in a situation, AI should be able to tilt the scales on the field—or in analogous military competitions on land, sea, and in the air and space.

The domain’s leader will also be the first to know which of today’s military mainstays AI will upend. Germany discovered the power of submarines before World War I because it led in their development. British admirals did not wake up to their deadly efficiency until a lone German U-boat in 1914 sank three armored cruisers on a single morning. By then, it was too late—the British had already invested their treasure in building battle fleet that had become largely obsolete. The coordination of drones and cruise missiles that successfully attacked Saudi Arabia’s most valuable target and cut its oil exports by half is suggestive. Will AI-empowered drone swarms make aircraft carriers equally obsolete, all for one one-thousandth of the cost? Will AI analysis of data from all sources pierce the invisibility of stealthy systems like the F-35 in which the United States has invested so substantially? The first country to know will be the one driving the research and development frontier.

#### Antitrust liability is distinct from other forms of liability---the ability to obtain final judgements increases the potential cost of all conduct and undermines industry deal-making.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### New M&A restrictions specifically crush startups and innovation---turns case.

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Gary Dushnitsky and Daniel Sokol, "Competition laws could be a death knell for startup mergers and acquisitions," The Hill, 7-22-2021, <https://thehill.com/opinion/white-house/564321-competition-laws-could-be-a-death-knell-for-startup-mergers-and?rl=1>

Technology entrepreneurs and innovations yet to be imagined are in the crosshairs of **misguided antitrust legislation**. Antitrust policy is under the microscope from both political parties.

The Biden administration’s Executive Order on Promoting Competition in the American Economy lays the groundwork for the first-ever antitrust regulations for technology companies and internet platforms, and proposed legislation by Sens. Amy Klobuchar (D-Minn.) and Josh Hawley (R-Mo.) would rewrite antitrust law. Both bills and the order seek to limit merger activity focused on acquisitions of smaller companies by larger technology companies, with their proposals ranging from presuming anticompetitive effects to outright prohibitions.

However, these proposals likely will have **unintended consequences** that would **hamper innovation** and entrepreneurship. The result is that certain potential deals will **never leave the boardroom** and others will be **abandoned** because the risks of antitrust intervention are **too high**.

For deals that do move forward, many will be challenged under more stringent merger laws. Such a change in the law will fundamentally alter the ability of U.S. companies to innovate in the technology sector, and result in **collateral damage** across a wide range of traditional industries such as biotech, consumer goods and finance, along with sustainability-focused or previously neglected sectors.

Investors and founders must be able to realize returns on their investments and efforts, commonly referred to as ‘entrepreneurial exit,’ or they will **not take the risk of investing** in startups and commercializing emerging technologies. Without the ability to exit, neither founders nor investors will be able to reap the gains of entrepreneurial value creation. If the proposed legislation becomes law, it will foreclose many **merger and acquisition exits** and thus **lessen the incentives** for founding and growing a business. It therefore makes investment in innovative ventures **less likely** since founders and investors cannot reap the rewards of a relatively timely exit at high valuations. When certain potential acquirers can no longer make acquisition bids, venture capital investors will lose the ability to make significant returns and funding to the entrepreneurial ecosystem may **wither**.

For the past two decades, acquisitions have constituted the most common entrepreneurial exit for U.S.-based VC-backed innovators. Not only do acquisitions account for the larger number of liquidity events, but they also cover a wide range of low and medium valuations. Why do larger companies acquire smaller ones? Most often, it is to unlock the power of complementary assets. That is, to combine the novel product or service from the startup with distribution channels, manufacturing capabilities, marketing prowess and regulatory expertise of the acquirer. These combinations are key to successfully and **rapidly introducing innovation** in the market, as has been demonstrated in numerous industries. But the proposed legislation would block a lot of the **value creation through complementary assets** that a combined company post-merger offers.

A change in merger rules also hurts efforts at diversity and inclusion. Many first-time VC funds introduce investors of more diverse backgrounds. Moreover, the new cadre of venture capitalists make it their mission to support founders of diverse backgrounds. As a result, smaller new funds often pursue innovation in companies, sectors or geographies that have been neglected in the past. Yet, it is these funds and companies that may be most affected by a decrease in rewarding acquisitions.

The proposed legislation may also change the structure of innovation. To the extent that large incumbents are precluded or delayed from accessing the broader universe of entrepreneurial ventures, legislation may create ‘walled innovation gardens.’ Within those walls, new ideas may be cultivated but only pre-selected startups can reach and win incumbents' attention. This runs the risk of **stifling innovation** (for incumbents) and also can impact scale-up opportunities (for startups) and compensation and longevity of the VC funds that backed them.

For incumbents, the risk is that they draw from a limited pool of innovators and, therefore, **miss out** on other/better innovations beyond the focal pool. For entrepreneurs, it implies that many would be **unable to scale or sell** their companies, especially if the acquisition route is blocked. Finally, for VC funds, the shift of incumbents' resources towards corporate venture builders can decrease capital availability and the prospects of future funds in two ways: first, a decrease in established corporations as an important source of limited partners in their funds, and second, a decrease in M&A activity.

The world of entrepreneurship is complex. There is a history of poorly thought-out legal rules negatively impacting business growth and innovation. The proposed antitrust legislation imposing limits on mergers by incumbent firms, motivated by a desire to increase the number of tech firms competing, will instead **reduce M&A exit opportunities** for founders and the VC investors who back them. It may also decrease the number of **new VC funds** founded, and could have a disparate impact specifically on social-based investing relating to sustainability and diversity that plays a large role in many first-time funds’ investment decisions. Policymakers should think carefully about these likely impacts before endeavoring to rewrite U.S. antitrust laws.

#### Goes neg---tech scrutiny decks private sector innovation.

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Pentagon subcontractors refuse to prioritize small businesses.

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(Scott Maucione, 5-17-2018, "Military not giving small business subcontractors a fair shake, DoD IG says," Federal News Network, <https://federalnewsnetwork.com/defense-main/2018/05/military-not-giving-small-business-subcontractors-a-fair-shake-dod-ig-says/>)

The military services are not giving small businesses a fair shake when it comes to awarding contracts.

The Defense Department Inspector General Office unearthed some disturbing trends over the past few years for small business owners trying to do business with the military.

“We’ve done five different audits,” said Michael J. Roark, assistant inspector general for readiness and global operations at DoD IG, while testifying before the House Small Business Subcommittee on Contracting and Workforce on May 17. “The consistent challenges contracting officials face is monitoring prime contractors’ compliance with individual subcontracting plans and determining why individual contractors with subcontracting plans did not meet their small business subcontracting goals.”

Two of the DoD IG audits were performed on the Marine Corps, two others were on the Air Force and the final on the Army.

The requirements overlooked are mandated by the Small Business Act to help small companies work with the government and give them a chance to inject their ideas into the government’s procurement.

Tiffany Scroggs, president of the Association of Procurement Technical Assistance (PTAC) said the trends the DoD IG found are consistent with PTAC’s experience not only in military procurement, but across all agencies and buying activities.

“In the broader context of government acquisitions, expanding access to small business subcontracting opportunities is often not treated as a priority at any level, not by buying offices, not by agency leadership, and not by policy. As a consequence, it is not a priority for prime contractors either. But it should be,” Scroggs said.

The most recent audit by DoD IG found two Army Contracting Commands (ACCs) did not comply with rules requiring them to administer subcontracting plans, which ultimately denied small businesses about $915 million in subcontracting opportunities.

“The Inspector General investigated 50 contracts for this report. Extrapolate this across the entire Army procurement system and the damage to small businesses could be devastating. Make no mistake, these are disturbing and egregious errors made by the Army that should not have occurred,” Subcommittee Chairman Rep. Steve Knight said during the hearing. “Perhaps most alarming is the IG’s finding that administering subcontracting plans is not a high priority at the ACC. This is a short-sighted view, failing to take into account the enormous cost the loss of qualified, high-performing small business contractors would have on our industrial base.”

#### Break ups disadvantage data collection---that’s key to innovation.

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

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

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

#### Also decks R&D---funding of new tech is key.

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

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

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

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

#### Smaller firms are less likely to engage in federal procurement, which means the government won’t have access to future innovations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Innovation Adv.

#### No killer acquisitions and the aff is worse for startups.

Manne 20 – President and founder of the International Center for Law and Economics

Geoffrey Manne, “Invited Statement of Geoffrey A. Manne on House Judiciary Investigation Into Competition in Digital Markets: Correcting Common Misperceptions About the State of Antitrust Law and Enforcement,” International Center for Law & Economics, April 2020, https://laweconcenter.org/wp-content/uploads/2020/04/Manne\_statement\_house\_antitrust\_20200417\_FINAL3-POST.pdf

Concerns are often raised about the possibility of incumbent firms engaging in so-called “killer acquisitions”—the acquisition of nascent or potential competitors in order to thwart any competitive effect these rivals may exert before it grows too large.

These fears are often rooted in hindsight bias. Most small acquisitions either fail outright or have a negligible impact on the acquirer’s business. In the small minority of cases where the acquisition becomes hugely successful, it is almost impossible to know whether the acquired company could have achieved the same level of success in the counterfactual scenario. For example, Instagram arguably lacked a meaningful revenue-building business model before its acquisition, so it is not obvious that the company would have succeeded without Facebook’s advertising expertise. Asserting that enforcers may have missed one or two anticompetitive mergers in the tech market is entirely speculative, and insufficient evidence for severely altering the doctrinal balance of the current system.

An enhanced potential competition merger doctrine would entail thinking that deterring mergers, on balance, would deter more of these harmful mergers than procompetitive ones. But if we think this is true, then we also must think there is far more competition and entry in digital markets than is credited by critics—thus undermining durable market power assumptions in the first place.

If, as is often claimed, Instagram’s product represented a future or potential constraint on Facebook when Facebook purchased it in 2012, then, as John Yun notes, “what makes other differentiated social networks such as LinkedIn, Pinterest, Snapchat, Twitter, TikTok, and YouTube different from Instagram? They must also be considered actual, potential, or nascent competitors to Facebook.”12 Yet this is clearly not what is meant when critics declare that Facebook faces no competitive constraints. The two positions are mutually exclusive, however.

Without sufficient evidence, proposals to ban large technology companies from acquiring nascent or potential competitors could do much more harm than good, resulting in significantly lower levels of innovation and consumer welfare, including deterring start-up activity. In addition to halting welfare-enhancing integrations and potentially leaving many small companies to fail in the long run, regulatory intervention that reduces the likelihood of reaching a profitable exit could reduce the incentive for venture capitalists to invest in startups and may inhibit new business formation. A research paper analyzing venture capital investments and M&A activity found that “the number of [VC] deals scaled by the number of public firms . . . declines by about 27% in . . . states that enact an antitakeover law.”13 As the authors conclude, “an active M&A market is important for encouraging venture capital investments, entrepreneurship and growth.”14

#### Acquisitions aren’t anticompetitive---they bolster smaller firms’ innovations.

**Foreman 20** – Kate Foreman, PhD in resource economics from UC Berkeley and Senior Consultant at NERA Economic Consulting. Kelly Fayne, JD from UChicago, associate at Latham & Watkins LLP.

(Kate Foreman and Kelly Fayne, “To Catch a Killer: Could Enhanced Premerger Screening for “Killer Acquisitions ” Hurt Competition?,” *Antitrust*, Vol. 34, No. 2, Spring 2020, <https://www.lw.com/thoughtLeadership/premerger-screening-killer-acquisitions>)

The probability of a startup carrying out an IPO has dropped significantly in recent years. The number of IPOs in the United States has declined from 486 in 1999 to 159 in 2019. 41 Besides planning toward acquisition as an exit strategy, firms might want to be acquired if they come up against the constraints that often face small innovative firms. For example, startups often face limits on the venture capital they can raise and the timing of when that capital comes in. Without cash on hand, it is hard to attract a competent workforce— offering a share in the venture can only go so far. As small firms get bigger, they also run into more regulation. For example, tipping from 49 to 50 employees sets off HR-related compliance requirements. Smaller firms also run into limitations on their legal resources and ability to comply with other regulations, such as the EU General Data Protection Regulation and the recently enacted California Consumer Privacy Act. Thus, using its small size and agility to get started and then selling itself to a larger firm to launch or grow can make a lot of sense for a small firm.

Motivations for Acquiring. The data on R&D spending seems to suggest that Big Tech companies are not acquiring competitors so that they can refrain from innovating. In 2017, the top spenders on R&D were Amazon.com at about $22 billion per year, 42 Alphabet at about $17 billion, followed closely by Samsung Electronics, Volkswagen, Microsoft, Huawei, Intel, and Apple. 43 Trailing them are a handful of pharmaceutical companies, such as Roche, Johnson & Johnson, Merck, and Novartis. 44 While internal spending on R&D is an excellent means to innovation, outsourcing innovation can also be a winning strategy for large companies. Smaller companies are more agile, and each can try something different, show at least the promise of proof of concept, and then be acquired by an established firm to let the technology take flight. Thus, the large firms can let the smaller firms compete for winning ideas and then the large firms can acquire the winners and launch the technology in a way that would have been difficult for the smaller firm to do alone.

#### Big tech platforms are crucial to small businesses expanding their markets.

**Jamison 21** – Mark Jamison is a nonresident senior fellow at the American Enterprise Institute. He is concurrently the director and Gunter Professor of the Public Utility Research Center at the University of Florida’s Warrington College of Business. PhD in Economics.

Mark Jamison, 4-26-2021, "Senator Hawley’s ‘trust-busting’ bill would actually bust consumers and small business," American Enterprise Institute - AEI, https://www.aei.org/technology-and-innovation/senator-hawleys-trust-busting-bill-would-actually-bust-consumers-and-small-business/

Small business would also suffer if the legislation succeeded in creating less innovative and less aggressive Big Tech companies. Big Tech benefits small businesses in at least two ways. One way is that entrepreneurs can build businesses on platforms built by Facebook, Google, Apple, and Amazon. These companies created the app economy, and — according to ACT | The App Association — 82 percent of app developers are small businesses, some of which reached over $1 billion in valuation in less than five years. And college graduates in the app economy earn more than twice what the average college grad makes.

Big Tech also helps small businesses expand their markets: In 2019, 95 percent of small businesses planned to increase their digital marketing. According to Deloitte, more of this is needed: Digitally advanced small businesses earn twice the revenue per employee and experience four times the annual revenue growth of their less digital counterparts. These benefits shrink if new laws hamper the effectiveness of Big Tech.

#### The plan is independently awful for startups.

Dushnitsky and Sokol 21 – Dushnitsky is an associate professor of Strategy and Entrepreneurship at London Business School. He also serves as a senior fellow at the Mack Institute for Innovation Management at the Wharton School of the University of Pennsylvania. Sokol is a professor of Law and affiliate professor of Business at the University of Florida

Gary Dushnitsky and Daniel Sokol, "Competition laws could be a death knell for startup mergers and acquisitions," The Hill, 7-22-2021, <https://thehill.com/opinion/white-house/564321-competition-laws-could-be-a-death-knell-for-startup-mergers-and?rl=1>

Technology entrepreneurs and innovations yet to be imagined are in the crosshairs of **misguided antitrust legislation**. Antitrust policy is under the microscope from both political parties.

The Biden administration’s Executive Order on Promoting Competition in the American Economy lays the groundwork for the first-ever antitrust regulations for technology companies and internet platforms, and proposed legislation by Sens. Amy Klobuchar (D-Minn.) and Josh Hawley (R-Mo.) would rewrite antitrust law. Both bills and the order seek to limit merger activity focused on acquisitions of smaller companies by larger technology companies, with their proposals ranging from presuming anticompetitive effects to outright prohibitions.

However, these proposals likely will have **unintended consequences** that would **hamper innovation** and entrepreneurship. The result is that certain potential deals will **never leave the boardroom** and others will be **abandoned** because the risks of antitrust intervention are **too high**.

For deals that do move forward, many will be challenged under more stringent merger laws. Such a change in the law will fundamentally alter the ability of U.S. companies to innovate in the technology sector, and result in **collateral damage** across a wide range of traditional industries such as biotech, consumer goods and finance, along with sustainability-focused or previously neglected sectors.

Investors and founders must be able to realize returns on their investments and efforts, commonly referred to as ‘entrepreneurial exit,’ or they will **not take the risk of investing** in startups and commercializing emerging technologies. Without the ability to exit, neither founders nor investors will be able to reap the gains of entrepreneurial value creation. If the proposed legislation becomes law, it will foreclose many **merger and acquisition exits** and thus **lessen the incentives** for founding and growing a business. It therefore makes investment in innovative ventures **less likely** since founders and investors cannot reap the rewards of a relatively timely exit at high valuations. When certain potential acquirers can no longer make acquisition bids, venture capital investors will lose the ability to make significant returns and funding to the entrepreneurial ecosystem may **wither**.

For the past two decades, acquisitions have constituted the most common entrepreneurial exit for U.S.-based VC-backed innovators. Not only do acquisitions account for the larger number of liquidity events, but they also cover a wide range of low and medium valuations. Why do larger companies acquire smaller ones? Most often, it is to unlock the power of complementary assets. That is, to combine the novel product or service from the startup with distribution channels, manufacturing capabilities, marketing prowess and regulatory expertise of the acquirer. These combinations are key to successfully and **rapidly introducing innovation** in the market, as has been demonstrated in numerous industries. But the proposed legislation would block a lot of the **value creation through complementary assets** that a combined company post-merger offers.

A change in merger rules also hurts efforts at diversity and inclusion. Many first-time VC funds introduce investors of more diverse backgrounds. Moreover, the new cadre of venture capitalists make it their mission to support founders of diverse backgrounds. As a result, smaller new funds often pursue innovation in companies, sectors or geographies that have been neglected in the past. Yet, it is these funds and companies that may be most affected by a decrease in rewarding acquisitions.

The proposed legislation may also change the structure of innovation. To the extent that large incumbents are precluded or delayed from accessing the broader universe of entrepreneurial ventures, legislation may create ‘walled innovation gardens.’ Within those walls, new ideas may be cultivated but only pre-selected startups can reach and win incumbents' attention. This runs the risk of **stifling innovation** (for incumbents) and also can impact scale-up opportunities (for startups) and compensation and longevity of the VC funds that backed them.

For incumbents, the risk is that they draw from a limited pool of innovators and, therefore, **miss out** on other/better innovations beyond the focal pool. For entrepreneurs, it implies that many would be **unable to scale or sell** their companies, especially if the acquisition route is blocked. Finally, for VC funds, the shift of incumbents' resources towards corporate venture builders can decrease capital availability and the prospects of future funds in two ways: first, a decrease in established corporations as an important source of limited partners in their funds, and second, a decrease in M&A activity.

The world of entrepreneurship is complex. There is a history of poorly thought-out legal rules negatively impacting business growth and innovation. The proposed antitrust legislation imposing limits on mergers by incumbent firms, motivated by a desire to increase the number of tech firms competing, will instead **reduce M&A exit opportunities** for founders and the VC investors who back them. It may also decrease the number of **new VC funds** founded, and could have a disparate impact specifically on social-based investing relating to sustainability and diversity that plays a large role in many first-time funds’ investment decisions. Policymakers should think carefully about these likely impacts before endeavoring to rewrite U.S. antitrust laws.

#### Smaller firms are less likely to engage in federal procurement, which means the government won’t have access to future innovations.

Foster 20–Visiting Researcher at Georgetown’s Center for Security and Emerging Technology (CSET). Graduate student in the Department of War Studies at King’s College London. B.A. from Amherst College.

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

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

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

### Antitrust Foundationalism Adv.

#### The vast majority of innovation comes from firm improvement, not competitors.

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

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

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

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

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

We reach four conclusions from our indirect inference based on LBD data. First, most growth appears to come from incumbents rather than entrants. This is because the employment share of entrants is modest. Second, most growth seems to occur through quality improvements rather than brand new varieties. Third, own-variety improvements by incumbents loom larger than creative destruction (by entrants and incumbents). The contribution of creative destruction is around 25 percent of growth, with the remainder mostly due to own innovation by incumbent firms. Fourth, the contribution of entrants and creative destruction declined from 1983–1993 to 2003–2013, while the contribution of incumbent firms, particularly through own innovation, increased.

#### Digital monopolists face *constant* competitive pressure---and break ups reduce competition.

**Dolmans 18** – LLM, Columbia Law School. Partner at Cleary Gottlieb.

(Maurits Dolmans and Tobias Pesch, “Should we disrupt antitrust law?” 2018, https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf)

Indeed, so-called “digital monopolists” do not enjoy a “quiet life” like classical monopolists. The constant innovation suggests there is plenty competitive pressure.29 This suggests that there could in fact be both strong competition (between online firms, and between online and offline firms) and increased concentration. If so, intensified competition enforcement based on an assumption of inadequate competition may not be the answer. Breaking up online firms may not increase competition either.30

First, large platforms engage heavily in R&D and release new features constantly.31 If we (threaten to) break them up, we reduce incentives to keep innovating.

Second, under the modern consumer welfare standard, competition law is primarily concerned with controlling abusive conduct. “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices–at least for a short period–is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.” 32 A concentrated market structure alone does not warrant intervention.

Third, it is by no means clear how a break-up could be achieved without undermining two-sided business models (for instance, when separating advertising from a service) or even undermining the benefits of vertical integration; or whether breaking up would have any effect (where there are no causal links between market power in one area and activities in another). A split could in fact reduce competition, for instance, if a market platform provider like Amazon were prohibited from itself selling products online.

Fourth, international law and comity stand in the way: could a US authority break up Baidu or the EU break up Facebook? This extraterritorial exercise of jurisdiction would create legal issues and international tension.33 Breaking up Western IT firms while leaving Chinese or Indian firms untouched is not a solution either, since it could skew online competition in the long term.

Finally, and most importantly, it is unclear whether breaking up digital companies would be a solution at all. If it is true that they benefit from network, scale, and scope effects, and “winner takes all” or “tipping” dynamics, one of the successor entities would simply regain the market share of their former parent company.34 That process of eliminating efficiencies is at best inefficient with little social and political benefits, and at worst leads to capital destruction and undermines trust in Government.

#### Every measure of tech competition runs counter to monopolistic behavior.

**Lane 19** – JD, University of Florida. Bachelor’s from UF. Senior Director, InSight Public Affairs.

Matthew Lane, 7-29-2019, "How Competitive Is the Tech Industry?," https://www.project-disco.org/competition/072919-how-competitive-is-the-tech-industry/

How competitive is the tech industry?

These traits of the tech industry make measuring competition challenging. By some metrics, competition is poor. By others, competition is robust. Some tech companies tend to be very different from each other as a whole but can compete vigorously in different product or service categories. For example, Android has by far the biggest overall install base, but Apple seems to own the high income market. This could be why average app revenue has been much higher on iOS. This nuance means that there is much stronger competition for app developers than one would expect from looking purely at shares of mobile operating system installs.

New companies have also been able to carve out successful markets and challenge established tech firms in specific categories. The Atlantic called TikTok the biggest star of YouTube’s VidCon, and perhaps for good reason. It’s the third most installed app worldwide. Indeed, it was TikTok that gave us the summer’s biggest hit – Lil Nas X’s Old Town Road. The song was originally released independently and gained its popularity on TikTok. That led to a deal with Columbia Records, and now the single is dominating worldwide.

Other young companies are bringing fierce competition to narrow products that may generally be seen as features in other companies’ offerings. Dropbox, for example, is a successful cloud backup and file sharing company. There are cloud storage services provided by Apple, Google, and Microsoft as part of other products, and yet Dropbox still managed to double its revenue to $1.2 billion from 2015 to 2018. Slack is also doing well providing what is essentially just a messaging platform, something that has been offered as part of other services since AOL Instant Messenger. But Slack focused on a new experience, providing the simplest and easiest way for teams to collaborate and engage in high volume chat. Microsoft has made a strong push to compete by bundling its messaging service with Office 365, but Slack CEO Stewart Butterfield said he wasn’t worried and compared the effort to Bing or Google+.

Tech doesn’t display the typical symptoms of monopolies

There is one other problem with writing big tech off as simple monopolists. Monopolists are generally known for their laziness, it’s one of the key consumer harms antitrust laws seek to protect against. Their quality drops, their prices rise, and they innovate less. There is very little motivation for a company to develop and release a new product when consumers have no choice but to buy their current product.

However, the biggest R&D spenders worldwide are fairly consistently large tech companies. Amazon and Alphabet top the list with Apple, Microsoft and Facebook not far behind. What’s more, many of these companies greatly increased their R&D spend from 2017 to 2018. Amazon’s R&D spend jumped from $16.1 billion to $22.6 billion, and Facebook’s from $5.9 billion to $7.8 billion. So if these companies face no competition, what are they spending to get ahead of? Amazon and Google are also the most loved brands of 2019, which doesn’t seem to indicate that they are skimping on quality or charging outrageous prices. Michael Mandel of the Progressive Policy Institute found that tech seemed to outperform the rest of the private sector on certain competitive factors.

What does this data tell us? One answer could be that big tech is afraid of being replaced by the next big thing. New technologies can claim markets in ways that are hard to predict and the innovation process usually brings disruptive new products and services to the markets. Voice assistants, for example, could replace many searches that consumers would ordinarily do through the search bar. [1] [2] Or maybe they won’t, and it will be a different technology that incumbents have to worry about. It could even be something that seems straight out of science fiction, like Elon Musk’s company that promises to build direct computer-brain interfaces.

BBC writes about another rising competitor – applications. Many companies are creating apps with new ways of interacting with data, like Tinder’s swipe function or Netflix’s recommendation engine. Companies like Uber and Lyft use their own algorithms to match drivers and riders. These applications allow access to information directly and used without any assistance from other internet onramps like Google Search, meaning less search bar searches are needed.

Maybe the main reason big tech seems so unbeatable is that they continue to compete based on the fear that they will get replaced in the same way they unseated other companies to get where they are now. Whether real or imagined, having companies compete to stay where they are isn’t a bad thing for consumers as long as they aren’t blocking new companies from getting their chance to try to win the market.

#### Their stats underestimate the *inherent instability* of tech dominance.

**Murray 18** – Iain Murray, Vice President for Strategy and senior fellow at the Competitive Enterprise Institute, Master of Business Administration from the University of London and an Master of Arts from the University of Oxford. Ryan Khurana, research associate.

Iain Murray and Ryan Khurana, 2-21-2018, "Competition In Technology Is More Vibrant Than It Looks," Investor's Business Daily, <https://www.investors.com/politics/commentary/competition-in-technology-is-more-vibrant-than-it-looks/>

At first glance, digital markets do seem fairly concentrated in just a few companies. Facebook owns the top three social media apps: Facebook, WhatsApp, and Messenger, all of which exceed 1 billion unique monthly active users. The company captures 20.9% of total U.S. digital ad revenue, putting it only behind Alphabet's 42.2%. And given the fast growth rate of Amazon, this looks like it is only a matter of time before the three control the entire market.

Viewing these numbers in perspective, however, makes the picture a lot more complicated.

Apple's native iMessage service, which does not show up in social media download statistics, shows much higher user engagement than Facebook Messenger, especially among younger demographics. Facebook is actually competing in messaging with a company whose interface it depends upon to gain access — and Facebook is losing.

This reveals one of the difficulties in seeing who is competing against whom online. Facebook competes not only against other social media sites like Snap, but also against the likes of Google, Apple, and Microsoft in various domains. Online competition requires the firm to provide for a variety of user demands — or cede ground to rival startups. Unless a firm like Apple can provide a messaging service that its users enjoy, it would allow Facebook to gain ground, which weakens the long-term prospects of Apple's business.

These "platform wars" mean that competition between tech giants takes place over many different products and services, at various tiers. To understand the level of concentration properly, one cannot specify the market too narrowly. While Snapchat has less than one third of Instagram's users, those under the age of 25 use Snapchat much more heavily.

Taking a snapshot of one moment does not tell you about how demographics will affect market position in the next.The competition is fierce. Today's startups are tomorrow's giants, just like Facebook and Amazon once were — and not very long ago.

That means the current market positions of Big Tech firms are inherently unstable, despite the best efforts of these firms to prepare for the future. Facebook's attempt to kill off Snapchat with its Camera app is now regarded as a failure, as is Google's attempt to kill Facebook with Google Plus, and Amazon's attempt to branch into mobile with the Fire phone.

Having lots of data and users is not enough for these companies to branch out into new territories. If platforms fail to develop ecosystems that adapt to user demands, they can fall from seemingly dominant positions rapidly — as recent history amply demonstrates.

When the competitive pressure on these firms is put into perspective, they look less dominant. Amazon currently makes 2.5% of U.S. digital ad revenue compared to Alphabet and Facebook's near 70%, but looking at total U.S. ad revenue shows these firms together make only 20%.

Just consider that if tech giants are increasing their revenues to the detriment of newspapers, it still exaggerates the concentration to neglect newspapers' print ads entirely. It is also possible that some recent decisions, such as Facebook's news feed changes, will drive away users in the long-term. This is a dynamic market.

#### Antitrust enforcement increases inequality

Crane 16 – Professor of law at the University of Michigan.

Daniel Crane, “Antitrust and Wealth Inequality,” *Cornell Law Review*, vol. 101, 2016, pp. 1209-1210, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2793&context=articles.

A. The Arc of Competition Does Not Bend Toward Equality

There is something odd in the monopoly regressivity claim that lax antitrust enforcement contributes to wealth inequality. The critique implicitly assumes that more market competition—the virtue that antitrust law is supposed to produce— means more equality.157 But that assumption cannot be squared with a plethora of redistributive social welfare programs, which are predicated on the assumption that when income is based solely on the value of the participants’ marginal contributions to impersonal markets, gross income inequality results. For example, if competition achieved a desirable income distribution, then minimum wage laws would be unnecessary. Those laws are necessary because the interaction between downstream product market competition and upstream competition for labor inputs results in wages that are deemed socially unacceptable.158 Organizing unions had to be exempted from the antitrust laws because requiring competition for employment among the laboring classes would result in lower income and poorer working conditions.159 The entire social welfare state is predicated on redirecting the paths of markets from the outcomes otherwise determined by competitive exchange.

The arc of competition does not inherently bend toward equality. To the contrary, competition tends to concentrate wealth in the hands of those with the resources valued most by the market. To the extent that resources are unevenly distributed—think of intelligence, skill, family upbringing, and educational opportunity—competition often exacerbates inequality as compared to systems that allocate wealth based on some principle of equal desert. As previously noted, for example, increased product market competition tends to lead to wage increases for skilled workers and wage reductions for unskilled workers.160 Similarly, unregulated markets for executive talent lead to high wages for corporate managers based on competitive benchmarking.161 Further, increases in product market competition might lead to an increase in CEO compensation since managerial talent might be most valuable to corporations when product market competition intensifies.162 In sum, competition tends to distribute wealth unevenly and regulatory intervention is often required to alter these inequality effects.

#### Procompetitive crackdowns can’t solve disinfo and squo solves bc no incentives---Hurwitzz AND…

**Epstein 17** – Antitrust attorney based in DC

Mark Epstein, 1-3-2017, "Tackle Internet censorship directly — not through antitrust law," TheHill, <https://thehill.com/blogs/pundits-blog/technology/312536-tackle-internet-censorship-directly-not-through-antitrust-law>

Sewlyn Duke’s recent op-ed for The Hill, “Antitrust should be used to break up partisan tech giants like Facebook, Google,” addresses the serious problem of how a few privately owned internet companies have unprecedented control over the distribution of information.

As Jeffrey Rosen has noted, “lawyers at Google, YouTube, Facebook, and Twit­ter have more power over who can speak and who can be heard than any president, judge, or monarch.”

However, using antitrust laws to address this would be ineffective and likely illegal without new legislation.

While Duke does not propose how to break up the companies, presumably the government would force them divest their subsidiaries such as Facebook’s Instagram and WhatsApp and Google’s Youtube and Android. However, smaller companies are not necessarily more conducive to free speech.

Twitter, which is only the fraction of the size and value of Google or Facebook, is continually embroiled in controversy over its speech policies. All other significant, but still comparably small, social media platforms such as Pinterest, LinkedIn, Tumblr, Four Square, and Reddit have similar speech restrictions as Facebook and Google.

Breaking up the actual platforms would seriously harm consumers. Google’s algorithm improves with more searches and Facebook’s users value the ability to connect with the other billion people on the network.

Reducing their size eliminates these benefits without increasing free speech. Antitrust regulators recognize this type of economy of scale, known as network effects, when evaluating a company’s market concentration.

Increased social media censorship did not result from the market share of any company or even the political ideology of its executives.

Facebook initially resisted calls to suppress “fake news,” while Twitter once called itself the “free speech wing of the free speech party.” Google refused to remove the controversial “Innocence of Muslims” film from Youtube, even when the White House pressured it to do so.

Over the last year, many in the media along with advocacy groups like the Anti-Defamation League and the Southern Poverty Law Center have increasingly demanded the platforms remove supposed hate speech and, more recently, fake news. Politicians, including Barack Obama and Hillary Clinton, recently criticized Facebook for facilitating fake news.

This bad publicity creates financial pressure for social media platforms to restrict their content. Disney and Salesforce cited reputation concerns when declining to purchase Twitter.

Additionally, many European countries require social media platforms to remove hate speech and are considering legal penalties against fake news. Some social networks set their global terms of service to comply with the more restrictive laws. Breaking up Facebook or Google into smaller companies does not remove these incentives.

Even if it were desirable, the government lacks legal authority to use antitrust law to promote free speech.

Over the years, activists have asked the Federal Trade Commission to consider tangential concerns such as privacy, employee wages, and environmental impact into antitrust regulation.

The Commission explained in its Google/Doubleclick merger statement that while:

“Such issues may present important policy questions for the Nation, the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition.”

The Federal Communications Commission considers public interest concerns, including viewpoint diversity, in merger review, but its jurisdiction does not extend to internet content providers.

#### Disinformation has existed forever---no evidence it’s gotten worse.

Sacher and Yun 17 – Seth B. Sacher is an economist and John M. Yun is the director of economic education at the Global Antitrust Institute, Antonin Scalia Law School, George Mason University.

Seth B. Sacher and John M. Yun, “Fake News is Not An Antitrust Problem,” *Competition Policy International Antitrust Chronicle*, 2017, pp. 3-4, https://poseidon01.ssrn.com/delivery.php?ID=790086090127101092028065127099113117016083053010057028103075006126104106078100004074010017029060104024054109104067100082004104005023049082020121111079087110115127065007060101082025070104091106114091007106004122008120087126107116091075098099088026121&EXT=pdf&INDEX=TRUE.

While use of the term “fake news” has spiked, it is not a new phenomenon. Figure 2 indicates that the frequency of the term “fake news” in books written in English and scanned by Google spiked in 1940 and also more markedly in 2008 (which is the end of the sample).10

Corroborating Figure 2, according to a Merriam-Webster article, the term fake news began to enjoy “general use at the end of the 19th century.”11 The generation and distribution of intentionally false stories is not a new phenomenon even if it went under different names such as “false news” or even outright “lies.” For instance, in Figure 3, we compare the frequency of the phrase “fake news” and “false news” in English books.

Thus, Figure 3 suggests the problem of “fake news” and “false news” is not a new one. Before the rise of the Internet, tabloids publishing outlandish claims have fueled conspiracy theories for decades (e.g., assertions the Apollo moon landings were fake; Elvis sightings). Importantly, it is not clear that fake news is having any greater or more harmful impact today than in previous times.

### 1NR

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

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

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

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

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

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

Peter Groves, Sourcebook on Intellectual Property Law, Google Books

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

#### And, their ev is about a congressional statute regarding cell phone servies—not precise

Sandra L. Lynch 2, Judge on the United States Court of Appeals, First Circuit, “Second Generation Props., L.P. v. Town of Pelham”, 313 F.3d 620, 634, 2002 U.S. App. LEXIS 25904, 12/17/2002, Lexis >Blucas

§ 332(c)(7)(B). We start with the fact that Congress used "services" and not "service." A straightforward reading is that "services" refers to more than one carrier. Congress contemplated that there be multiple carriers competing to provide services to consumers. That one carrier provides some service in a geographic gap should not lead to abandonment of examination of the effect on wireless services for other carriers and their customers. Next, the phrase "have the effect of prohibiting" may well refer to actions that mostly prohibit. For example, B.A. Garner, A Dictionary of Modern Legal Usage 256 (2d ed., 1995), gives as the first definition of effective "having a high degree of effect." (emphasis added). Accord B.A. Garner, A Dictionary of Modern American Usage 237-38 (1998). Moreover, a common reading of the word "prohibition" standing alone would apply to a situation of denial of services to the vast majority of users. See, e.g., Oxford English Dictionary (2d ed. 1989) (defining [\*\*33] "prohibit" as "to prevent, preclude, hinder") (emphasis added). Thus Congress may well have meant the effective prohibition clause to reach certain situations in which there is some coverage in a gap.

[rest of their card]

One might hypothesize that the “unreasonable discrimination” language of the Act would adequately address situations where customers of some but not all carriers lack service in an area.   The argument would proceed that the anti-prohibition clause should be strictly read as applying only to de jure and de facto absolute prohibitions.   This court has not yet explicated the unreasonable discrimination clause and we do not do so here.   Nevertheless, the law from other circuits gives little reason to think this clause will effectively safeguard congressional efforts to promote the building of a nationwide cellular network.   Some courts have held that towns can discriminate against proposals that have different aesthetic or safety ramifications, Willoth, 176 F.3d at 638-39;  see also H.R.Rep. No. 104-458 (1996), reprinted at 1 Federal Telecommunications Law, supra, doc. 5, at 208;  S.Rep. No. 104-230 (1996), reprinted in 1 Federal Telecommunications Law, supra, doc. 6, at 208, or a different structure, placement, or cumulative impact, see Nextel W. Corp. v. Unity Township, 282 F.3d 257, 267 (3rd Cir.2002).   See generally AT & T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423, 427 (4th Cir.1998) (some discrimination between providers of functionally equivalent services is allowed).

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

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

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

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

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

Hadley 1909 – Judge

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

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

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

#### The term “prohibitions” is unambiguously applicable to bans.

Espa 17 – Senior Assistant Professor of International Economic Law at the Università della Svizzera italiana (USI), Senior Research Fellow at the World Trade Institute (WTI), Adjunct Professor at the Law Faculty of the Università Cattolica del Sacro Cuore

Ilaria Espa, “Climate, energy and trade in EU–China relations: synergy or conflict?,” China-EU Law Journal, Vol. 6, June 2017, https://link.springer.com/article/10.1007/s12689-017-0076-0

7 The term ‘prohibitions’ unambiguously applies to measures that impede exports outright (i.e. export bans). Hence, it has not created interpretative problems. Ibid., p. 170.

#### “Prohibition” suggests specific actions disallowed by a formal governing authority.

Stevens 92 – United States Supreme Court Justice

John Paul Stevens, Cipollone v. Liggett Group, 505 U.S. 504, Supreme Court of the United States, June 1992, LexisNexis

Although the plurality flatly states that the phrase "no requirement or prohibition" "sweeps broadly" and "easily encompasses obligations that take the form of common-law rules," ante, 505 U.S. at 521, those words are in reality far from unambiguous and cannot be said clearly to evidence a congressional mandate to pre-empt state common-law damages actions. The dictionary definitions of these terms suggest, if anything, specific actions mandated or disallowed by a formal governing authority. See, e. g., Webster's Third New International Dictionary 1929 (1981) (defining "require" as "to ask for authoritatively or imperatively: claim by right and authority" and "to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)"); Black's Law Dictionary 1212 (6th ed. 1990) (defining "prohibition" as an "act or law prohibiting something"; an "interdiction").

#### Independently, “by” imposes an *accompanying* condition

Prewitt et al. 2k (James K. Prewitt, judge. Phillip R. Garrison, judge. Robert S Barney, judge. Per Curiam. “Little Portion Franciscan Sisters, Inc. v. Boatright, 26 S.W.3d 443,” Court of Appeals of Missouri, Southern District, Division Two, 2000)

In so concluding, we note that the preposition "by" is defined as "with the use of; through," "to the extent of," or "through the agency or action of." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1978). The same source states that a synonym for "by" is "through" and that the preposition "by" indicates the agency or means by which something is accomplished. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) defines "by" as "through the means or instrumentality of, [\*\*10] " "through the direct agency of," "through the medium of," or "through the work or operation of," and that it is "used as a function word to indicate something that forms an accompanying setting or condition . . . or that constitutes a manner . . . often with an added sense of means." For the ballot proposition to have had the meaning espoused by Defendants, the voter would have had to ignore the important word "by." To do so is to ignore the plain and ordinary reading of the words used.

#### It’s a distinction with a difference---‘rule of reason’ and ‘per se’ have precise meanings AND access literature with completely different base assumptions.

Donald L. Beschle 87, Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law. March. CURRENT TOPIC IN ANTITRUST: "What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality., 38 Hastings L.J. 471

In response to recent attacks on per se rules, courts have clung to the term and to its absolutism by steadily narrowing the definitions of the types of behavior subject to those rules. The result has been not only much confusion, with words being used to designate things far narrower than their commonly understood meanings, but also the application of permissive rule of reason treatment to some behavior which, while not meriting absolute prohibition, clearly deserves careful antitrust analysis.

The proper response to this confusion is to retain the valid insight of per se jurisprudence, that certain types of behavior should be treated as more suspect than others, while abandoning the indefensible absolutism of the term "per se." However, since terms carry with them not only precise meanings, but also more general attitudes, "per se" must be replaced with a term which does not carry the permissive connotations which have become associated with the "rule of reason."

The best available term for this new test is strict antitrust scrutiny. The use of such a term, and the type of analysis it suggests, is well known in constitutional law, where it by no means is associated with leniency. When faced with conduct which would traditionally be labelled per se illegal under the antitrust laws, courts should apply strict antitrust scrutiny. They should ask whether the defendant can carry the heavy burden of demonstrating that its conduct is narrowly tailored to achieve a procompetitive end. By replacing a system which places absolute prohibitions on types of conduct which can be defined so narrowly as to be irrelevant with a system which places, not absolute prohibitions, but heavy negative presumptions, on a larger set of behaviors, strict scrutiny should, on the whole, lead to more vigorous antitrust enforcement.

#### There’s a clear test: can the practice described by the AFF ever legally occur after the plan? If it’s ever still allowed, it’s not prohibited!

Martin G. Vallespinos 20, LLM, University of Michigan Law School; Manager at Ernst & Young Detroit, “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO,” 40 Va. Tax Rev. 93, Lexis

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251

#### Has to be widespread among those who had the opportunity to do the practice, AND enduring over time

Ori Pomson & Yonatan Horowitz 15, Pomson has an LLB, Hebrew University of Jerusalem; Horowitz is a Legal Intern at S Horowitz & Co, LLB Interdisciplinary Program of Law and Economics, Hebrew University of Jerusalem, “Humanitarian Intervention and the Clean Hands Doctrine in International Law,” 48 Isr. L. Rev. 219, Lexis

[\*222] The state practice element requires general and uniform conduct for a certain period of time. 20 Generality concerns the number of states that have participated in a course of conduct. It requires wide-spread, although not necessarily universal, practice. 21 However, the generality of the conduct is relative, whereas the practice 'must have been applied by the overwhelming majority of states which hitherto had an opportunity of applying it'. 22 Thus, the conduct of states most affected by a potential norm, and thereby having the greater opportunity to apply the norm, is most pertinent. 23

Uniformity relates to the essence of the term 'practice', which is defined as 'habitual action or performance'. 24 Although not universally accepted, 25 in assessing habitualness a variety of forms of conduct are relevant, including statements. 26 Thus, the statements of states in their written and oral pleadings before courts and tribunals constitute relevant conduct in assessing the existence of state practice. 27

The time element of custom also relates directly to the concept of habitualness inherent in the term 'practice'. However, in reality the time element is flexible. 28 Considering that the duration element of custom relates to the habitualness of the conduct, a short passage of time may be compensated for by the uniformity of the conduct. 29

#### 1) ‘ANTICOMPETITIVE’---deeming a practice anticompetitive under antitrust law means declaring it per se illegal

Lewis Franklin Powell Jr., 77, US Supreme Court Justice, delivered the opinion of the Court. Cont'l T.V. v. GTE Sylvania, 433 U.S. 36. Argued February 28, 1977 ; June 23, 1977; as amended No. 76-15

[\*\*\*\*23] LEdHN[3] [3]LEdHN[4] [4]LEdHN[5A] [5A]LEdHN[6A] [6A]The traditional framework of analysis under § 1 of the Sherman Act is familiar and does not require extended discussion. Section [\*\*\*580] 1 HN1 prohibits "[e]ery contract, combination…, or conspiracy, in restraint of trade or commerce." Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis. Standard Oil Co. v. United States, 221 U. S. 1 (1911).Under this rule, the fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. 15 [\*\*\*\*25] HN2 Per se rules of [\*50] illegality [\*\*\*\*24] are appropriate only when they relate to conduct that is manifestly anticompetitive. As the Court explained in Northern Pac. R. Co. v. United States, 356 U. S. 1, 5 (1958), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are 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." 16 [Note 16 HN3 Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see Northern Pac. R. Co. v. United States, 356 U.S. 1, 5; United States v. Topco Associates, Inc., 405 U.S. 596, 609-610 (1972), but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law.]

In [\*\*\*\*26] essence, the issue before us is whether Schwinn's per se rule can be justified under the demanding standards of Northern Pac. R. Co. The Court's refusal to endorse a per se rule in White Motor Co. was based on its uncertainty as to whether vertical restrictions satisfied those standards. Addressing this question for the first time, the Court stated: S

"We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on [\*\*2558] competition and lack… any redeeming virtue' ( Northern Pac. R. Co. v. United States, supra, p. 5) and therefore should [\*51] be classified as per se violations of the Sherman Act." 372 U. S., at 263.I

Only four years later the Court in Schwinn announced its sweeping per se rule without even a reference to Northern Pac. R. Co. and with no explanation of its sudden change in position. 17 We turn now to consider Schwinn in light of Northern Pac. R. Co.

[\*\*\*\*27] The market impact of vertical restrictions 18 is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. [\*52] 19 Significantly, the Court in Schwinn did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers. The pivotal factor was the passage of title: All restrictions were held to be per se illegal where title had passed, and all were evaluated and sustained under the rule of reason where it had not. The location restriction at issue here would be subject [\*\*\*582] to the same pattern of analysis under Schwinn.

[\*\*\*\*28] It appears that this distinction between sale and nonsale transactions resulted from the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions. The per se rule for sale transactions reflected the view that vertical restrictions are "so obviously destructive" [\*\*2559] of intrabrand competition 20 that their use would "open the door to exclusivity of outlets and limitation of territory [\*53] further than prudence permits." 388 U. S., at 379-380.21 Conversely, the continued adherence to the traditional rule of reason for nonsale transactions reflected the view that the restrictions have too great a potential for the promotion of interbrand competition to justify complete prohibition. 22 [\*54] The Court's opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions [\*\*\*583] is significantly affected by the form of the transaction. Nonsale transactions appear to be excluded from the per se rule, not because of a greater danger of intrabrand harm or a greater promise of interbrand benefit, [\*\*\*\*29] but rather because of the Court's unexplained belief that a complete per se prohibition would be too "inflexibl[e]." Id., at 379.

#### 2) ‘SUBSTANTIAL’---it means per se illegal

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A federal district court in Florida adopted this view in Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976), rev'd on other grounds, 586 F.2d 530 (5th Cir. 1978). A group of fee-for-service obstetricians allegedly conspired against a low fee, outpatient abortion clinic by discouraging physicians from working at the clinic and by refusing to provide requested backup services at the obstetricians' hospital. The defendants claimed that their actions were motivated by a concern that the clinic was providing inferior quality services. Id. at 1269-70. On a motion for a preliminary injunction, the district court rejected this defense because there was no evidence of inferior quality and because there was a substantial difference between the fees charged by the clinic and those charged by the fee-for-service physicians for the same services. Id. The court in effect held that the defendants had acted with an anticompetitive purpose and that the plaintiff properly relied on a per se theory. See id. at 1263, 1270.

Commentators have noted other cases in which fee-for-service physicians have denied hospital staff privileges to physicians who were associated with prepaid medical practices (HMOs) that threatened to compete with the fee-for-service physicians. See, e.g., Goldberg & Greenberg, supra note 36, at 59-62; Havighurst, Health Maintenance Organizations and the Market for Health Services, 35 LAW & CONTEMP. PROBS. 716, 777-81 (1970). There is no reason why an antitrust court should not apply the per se rule summarily in these cases if there are substantial anticompetitive purposes behind the exclusionary act. See Kissam, supra note 188, at 503.

#### A smaller topic leads to more in-depth topic education which boosts disciplinary thinking – that spills over to the broader topic which solves their offense

**Conley 15** (Oct 13 2015, David T. Conley is a professor of educational policy and leadership and director of the Center for Educational Policy Research in the College of Education at the University of Oregon, "Breadth vs. Depth: The Deeper Learning Dilemma", <https://blogs.edweek.org/edweek/learning_deeply/2015/10/breadth_vs_depth_the_deeper_learning_dilemma.html>) MT

Few people overtly object to the idea that students should understand what they are learning at a deep level so that they might retain and use the knowledge and skills they are taught. To do so, however, almost always requires students to spend more time on a topic or concept. Spending more time in one area almost always means exposing students to less of the curriculum as a whole. This fundamental tug-of-war must be addressed for students to achieve the dual goals of acceptable performance on tests that cover the breadth of the curriculum and on assessments that plumb the depths of student understanding. Standardized tests are built around the concept of domain sampling. A test is constructed by creating items that are drawn from the overall knowledge domain of the subject or course. Ideally, the items taken as a whole are a representative cross-section of the knowledge and skills in the domain. The test does not gauge all that could conceivably be learned about the domain, but by sampling in an unpredictable but systematic fashion from the domain, the test purports to determine the degree to which the test taker has mastered the domain as a whole. Performance assessments take a different approach. They select a key subset of the knowledge in the domain and explore student understanding and facility within that subset. Such assessments are often multidimensional. In other words, they end up gauging both content knowledge and other skills essential to the subject area. While the results from one performance assessment cannot be used to judge the test taker's mastery of the entire domain, it is not unreasonable to assume that performance on a challenging performance assessment focused on key content and skills says a lot about overall student mastery of the domain without testing each and every part of it. The greatest challenge for teachers who wish to incorporate deeper learning is to balance the amount of content they cover with the depth to which students explore what they are learning. It's not practical for students to go to deeper levels on all the content they learn, and it may not be necessary for them to do so. The key is for teachers to determine which concepts or skills are the keystones that unify or connect the subject area. If students can go deep in those areas, they can gain insight into disciplinary thinking, the way experts in that subject go about applying their content knowledge.