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## 1AC

### 1AC---Platforms

#### Platform companies facilitate transactions between two sets of users—think Amazon—the *Amex* decision made it extremely difficult to challenge anticompetitive conduct in platform markets

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

A. Against Platform Exceptionalism

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

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

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

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

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

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

#### SCENARIO ONE IS PRODUCTIVITY:

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

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

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

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

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

#### Tech concentration, specifically, creates downward productivity shocks throughout the economy, structurally limits business dynamism

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

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

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

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

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

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

#### Sustained productivity growth is the key determinant of great power conflict.

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

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

#### SCENARIO TWO IS FINTECH:

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

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

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

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

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

B. Private Sector Institutional Dynamics

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

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

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

Ii. The Competition Shortcomings

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

A. Entry Barriers

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

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

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

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

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

C. International Competitiveness

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

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

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

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

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

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

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

Maintaining U.S. Leverage

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

#### Strong sanctions cap all global conflict AND prevents great power war with Russia and China

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Dr. Salvatore, 10/3/2017, Professor of Sociology at the University of Sydney, “Money Talks: The Rise of Geoeconomics Is Playing Right Into Washington’s Hands”, World Politics Review, https://www.worldpoliticsreview.com/articles/23295/money-talks-the-rise-of-geoeconomics-is-playing-right-into-washington-s-hands

Geopolitics is dead. Long live geoeconomics. Since the turn of the millennium, the geoeconomics of sanctions and sweeteners has slowly been replacing the geopolitics of diplomacy and war. With U.S. forces actively engaged across a wide swath of Africa and the Middle East, the transition from geopolitics to geoeconomics may not seem all that obvious. But on closer inspection, it becomes clear that military intervention these days is limited to places that lack functioning economies that can be effectively sanctioned. Most of the world, and all of the economically productive world, lies in the sphere of geoeconomics.

That economically productive section of the world, spanning the Atlantic and Pacific basins with North America at its center, incorporates more than 80 percent of global GDP into an interwoven fabric of transnational production networks. In this zone of integration, outright war is obsolete as a tool of foreign policy. Those who suggest that the “great powers” of today might repeat the mistakes of 1914 and stumble into war fail to understand that 21st century economic integration is much deeper than the international trade of the early 20th century. It’s hard to imagine China invading Taiwan when Taiwanese firms employ more than 15 million people in China itself.

The U.S. still maintains by far the most powerful—and most expensive—military force in the world. China will find it very difficult to catch up, even more so as its economic growth slows. But military power is less and less the main source of American influence in the world. If the U.S. was the preeminent geopolitical power of the 20th century, it is the geoeconomic behemoth of the 21st. The U.S. may account for a declining share of global GDP, but its corporations increasingly dominate global value chains and its institutions hold overwhelming sway at international forums. Just as important, the U.S. is at the center of the financial, technological, educational and other networks that form the backbone of the 21st-century global economy.

The centrality of the U.S. in the 21st-century economy makes it a new kind of sanctions superpower.

Geoeconomic power is generated more by centrality than by sheer size, and the centrality of the U.S. in the 21st-century economy makes it a new kind of sanctions superpower. Few people are even aware of EU sanctions that are not part of larger American-coordinated efforts. Countries don’t worry much about being the target of Russian economic sanctions, and China tends to offer economic carrots rather than punish with economic sticks. The EU, Russia and China all have some geoeconomic power, but only the U.S. has the power to exclude individuals, firms or even entire countries from participation in the larger global economy. In the realm of geoeconomics, the U.S. isn’t just a major player, or even the lone superpower. Quite simply, it exercises many of the functions of a global government.

The New Middle Kingdom

The U.S. is in effect the spider at the center of the web of the integrated global economy. This position makes it disproportionately influential and by far the most powerful player in the new great power game of geoeconomics. The dominance of the U.S. dollar is well known, and the global financial system has been centered on the U.S. since the end of World War I, when France, Germany and the United Kingdom all found themselves financially dependent on New York, America’s financial capital. But today the virtual infrastructure of the internet, operating systems, app stores and the entire online economy is also centered on the U.S., as are the worlds of higher education, science, medicine, publishing, business services and a host of other “post-industrial” industries.

From Asia to Europe, the giants of China, Japan and Germany also host key nodes in the 21st-century economy, but American firms and institutions predominate because they occupy leading positions not just in one or two fields, but in nearly every field simultaneously. This generates network effects that multiply American influence. What’s more, many of the leading firms and institutions that are not American are based in countries that are closely allied to the United States. Twenty-two of the 28 EU member states are also members of NATO; Canada, Australia, Japan and South Korea are all close U.S. allies; Taiwan is in effect a U.S. protectorate.

The world’s only major economic power that is not a U.S. ally is China, but China is highly dependent on investment from and exports to the U.S. and its allies. Many of the most productive and profitable niches in China’s own economy are foreign-owned, with China’s moribund state-owned enterprises claiming the majority of what remains. Even China’s world-class internet companies are locked into an American-managed industrial infrastructure. Google search may be blocked in China, but 99 percent of Chinese mobile phones run Google’s Android or Apple’s iOS operating system.

The centrality of the U.S. in what has been called the “zone of integration” created by the globalization of the world’s economy is a new phenomenon, but it’s not unprecedented. In the premodern era, before the emergence of a single global economy, the world was fragmented into separate regional economies. One of those regional economies was the East Asian economy centered on China. The English word for China descends from the ancient Roman and Greek name, “Sinae,” or the “the land of the Qin,” named for China’s founding Qin Dynasty (221-206 B.C.). But in Chinese, China is simply Zhongguo, the “Central State” or, more poetically, the “Middle Kingdom.” Premodern China was always at the center of its own world.

In all the other major languages of East Asia, China is also called by some variant of Zhongguo. Some other countries even defined themselves in relation to China. Japan is the “land of the rising sun”—as seen from China. The “nam” in Vietnam means “south,” placing Vietnam to the south of China. Japan and Vietnam, along with Korea, Mongolia, Tibet and much of Southeast Asia, once formed an integrated economic region centered on China. The Chinese name for this area, which represented the world as seen from China, was tianxia, meaning “sky-encompassed” or “all under heaven.”

By the time of the Ming Dynasty (A.D. 1363-1644), the Chinese tianxia was an integrated economic zone covering all of East Asia and extending at times into the Indian Ocean as far west as Somalia and Tanzania. This precursor to globalization with China at the center was the historical inspiration for Chinese President Xi Jinping’s One Belt, One Road initiative, known as OBOR. The two components of OBOR—the Silk Road Economic Belt and the 21st-Century Maritime Silk Road—are explicitly designed to put China back at the economic center of the Afro-Eurasian landmass. The Chinese government clearly appreciates the geoeconomic value of centrality.

The problem for China is that although the OBOR strategy of “build it and they will come” might work for the physical infrastructure of ports and railways, it is not an effective way to improve China’s position in the virtual infrastructure of the 21st-century economy. Centrality in human networks depends very little on physical connectivity. China can send all the rail cars in the world chugging across Central Asia to Western Europe, but it won’t change the fact that Western Europeans are more likely to use Facebook than WeChat—and more likely to educate their children in North America than in China.

The fact that Chinese parents are themselves beating down the doors to educate—and even give birth to—their children in North America makes the prospect of a new Chinese tianxia even more remote. Instead, as Chinese individuals seek out the most advantageous positions for themselves and their families in global economic networks, they reinforce the centrality of the U.S. in those networks. As a result, the U.S. is becoming a kind of new Middle Kingdom of what might be called an American Tianxia. The emerging American Tianxia is very different in language, culture and politics from the old Chinese tianxia, but it does share one crucial trait: the leveraging of network centrality into world-spanning geoeconomic power.

The Zone of Irrelevance

The historian Wang Gungwu, writing in 2013, was the first to suggest that the Chinese term tianxia might be applied to today’s American-centered world. He described the word tianxia as depicting “an enlightened realm that Confucian thinkers and mandarins raised to one of universal values that determined who was civilized and who was not” and suggested that today’s American Tianxia performs the same function. Replace “Confucian thinkers and mandarins” with “political pundits and NGOs” and you get the point.

The globalized people who participate in the networks of the American Tianxia—the journalists, think tankers, businesspeople, academics and other opinion leaders who are much more closely tied to the U.S. than to, say, Syria or North Korea—get to mold the image of nations and their leaders, with clear results. It’s no mystery what they think of Assad, Kim Jong Un or Abu Bakr al-Baghdadi—or even Vladimir Putin and Recep Tayyip Erdogan, who are skating on thin ice. By contrast, Saudi and Emirati attempts to stigmatize Qatar have fallen flat, since Qatar is in many ways the most liberal of the Gulf states. And with a reported 11,000 U.S. military personnel based in Qatar, it is unlikely that the U.S. would ever bring its full geoeconomic power to bear against the Qatari government. Reversing his initial condemnation of Qatar, even U.S. President Donald Trump is now offering to mediate the dispute.

China can send all the rail cars in the world chugging toward Western Europe, but it won’t change the fact that Europeans are more likely to use Facebook than WeChat.

The world may seem to be awash in conflict today, but terrible as those wars may be, they are concentrated in countries that are peripheral to the larger global economy. Conflict hotspots like Syria, Afghanistan, South Sudan, Ukraine, Myanmar and Yemen are only tenuously connected to the outside world and are completely excluded from sophisticated global production networks. They form what from a geopolitical perspective has been called the “zone of intervention” but which from a geoeconomic perspective might just as well be called the “zone of irrelevance.” Who wins these wars may make an enormous difference to the people who live in the countries affected, but it will have no meaningful impact on the larger global economy.

Geoeconomic stigmatization via the imposition of economic sanctions is also focused on countries that are relatively isolated from global economic networks. Autarkic Russia is routinely criticized for its democratic failures, yet globally networked China is not a democracy at all. It is perhaps no coincidence that while it costs the U.S. very little to sanction Russia, it would cost a fortune to sanction China. The distinction between civilization and barbarism in the American Tianxia may be based on the acceptance of universal values, but it is mainly American pundits and NGOs who make the distinction, and these days they’re much better networked with China than with Russia. As a result, China tends to get a pass from the Western expert class, at least for now. Russia does not.

The few remaining “hot” conflicts or crises that affect economically consequential areas of the world, like the ones in Iraq and North Korea, are legacies of 20th-century geopolitics. They also involve countries that are not themselves integrated into 21st-century value chains. Iraq may be oil-rich and North Korea surrounded by advanced economies, but neither is itself very well networked economically. Their very irrelevance, ironically, limits their susceptibility to geoeconomic pressure. Islamic State forces in Iraq must be confronted by military power precisely because they have no formal economy to govern, even if they have overseen a black market for oil. North Korea is similarly relatively immune to sanctions because its economy is so meager.

China is particularly careful to keep its geopolitical conflict zones clear of geoeconomic entanglements. China has broadly supported the U.S. in applying economic sanctions on North Korea because China no longer has any geopolitical use for North Korea. By contrast, in the South China Sea, where China does have geopolitical interests, it ensures that these do not interfere with the smooth functioning of important economic systems. It may be true that one-third of global ocean trade passes through the South China Sea, but it is less often pointed out that most of that trade is China’s. Thus China speaks loudly but carries a small stick when it comes to the possibility of real conflict in the South China Sea.

China’s recently resolved Doklam Plateau standoff on its border with India and Bhutan similarly illustrates China’s separation of geopolitics from economics. The Doklam Plateau is almost literally in the middle of nowhere. China’s road-building there was in many ways similar to its island-building in the South China Sea. Both represent the development of infrastructure in remote locations in order to establish a permanent Chinese presence in previously unoccupied territories. They are bold geopolitical provocations, but they are geoeconomically irrelevant. With China, as in the rest of the world, geopolitical conflicts are confined to the zone of irrelevance. In the parts of the world that matter, geoeconomics is the order of the day.

Belts and BRICS

With its OBOR initiative, China is at the forefront of moving from geopolitics to geoeconomics as the basis of its foreign relations. Unlike in the Doklam and the South China Sea, China has no territorial ambitions along its belt and road routes. Instead, it seeks to leverage economic statecraft for political gain. For example, not long after Chinese state-owned shipping company COSCO made a major investment in Athens’ port of Piraeus, the Greek government blocked an EU effort to criticize China’s human rights record. Similarly, at China’s behest the Dalai Lama has repeatedly been denied a visa to enter South Africa. South Africa is a major beneficiary of Chinese largesse that has gained entry into the BRICS summit club—joining Brazil, Russia, India and China—entirely at China’s behest.

The problem for China is that it does not control access to major global networks that people value for their own sake. As a result, China’s geoeconomic checkbook diplomacy is fundamentally transactional. This is very different from the classical Chinese tianxia, under which the countries of East Asia valued access to China’s learning, technology and unique products and thus were willing to accept the trappings of nominal Chinese suzerainty in exchange for the privilege of trading with China. In the old tianxia, China was the center of the world and could use that position to its advantage. In the new geoeconomics, China must pay full price to meet its foreign policy goals.

In its exercise of geoeconomic power, China rewards while the U.S. punishes.

The most recent BRICS summit in early September is a case in point. Just a week before the opening of the summit in Xiamen, in eastern China’s Fujian province, Chinese and Indian troops were facing off on the remote Doklam Plateau 1,700 miles to the west. But Xi presumably didn’t want to see the crisis disrupt an economic summit on his own home turf; early in his career he had served as deputy mayor of Xiamen and governor of Fujian. So he bought India off with a geopolitical withdrawal in order to meet his geoeconomic goals.

China can afford its many geoeconomic initiatives—the BRICS-sponsored New Development Bank, its own Asian Infrastructure Investment Bank, multiple OBOR initiatives, diplomatic offensives to isolate Taiwan—but the fact that it has to pay for them underlines the point that for China, geoeconomics is a costly game. China has to buy its friends. The U.S., by contrast, gets its friends for free. People are even willing to pay to join the U.S. “club,” as when countries buy U.S. airplanes or military hardware as the price of U.S. friendship.

In its exercise of geoeconomic power, China rewards while the U.S. punishes. That’s because the U.S. is in the enviable position that mere access to its geoeconomic infrastructure is valuable in itself. Countries are not paying China for the privilege of joining OBOR; China is paying them to join. China has effectively paid India to keep quiet and stay in the BRICS, paid Greece to plead its case at the EU, and paid dozens of African countries to allow Chinese state-owned firms to build infrastructure at below-cost rates. China even donated a new headquarters building for the African Union—and sent a Chinese crew to Addis Ababa to build it.

By contrast, more than a million international students—nearly a third of them Chinese—pay to study in the U.S., subsidizing American colleges while absorbing American values. More than 500 foreign companies are listed on the New York Stock Exchange, subjecting themselves to U.S. government oversight, and the U.S. dollar is on one side of the deal in 88 percent of all international currency transactions. The whole world relies on the American-dominated internet, the American-provided Global Positioning System (GPS) and American-owned computer and mobile phone operating systems. It is difficult to do business of any kind in today’s integrated economy without using U.S.-linked systems of one kind or another, which is why the U.S. is uniquely powerful in the imposition of economic sanctions.

Geoeconomics isn’t everything, and sanctions may not be able to solve all of the world’s geopolitical crises. Sometimes boots on the ground and missiles in the air are the only ways to achieve important policy and humanitarian goals. But geoeconomics is increasingly important, and in that realm, the U.S. is vastly more powerful today than postwar America was in its Cold War heyday. It is worth remembering that the U.S. at its geopolitical zenith struggled to contain an impoverished China in the Korean War and failed to contain an impoverished North Vietnam in Southeast Asia. Today, geoeconomic centrality gives the U.S. much more power to influence the policies and behaviors of other countries than military force ever did. Hegemony is dead. Long live centrality.

#### AND, new tech innovation key to stop NoKo sanctions evasion---causes prolif.

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

The Problem is Growing

North Korea raises money to support its nuclear and ballistic missile programs in various ways. Some methods are relatively new, even for seasoned North Korea watchers, and exploit countries and economic areas where there is very little, or absolutely no, awareness about their exposure to North Korean illicit activity.

The Kim regime maintains a sophisticated offensive cyber capability, which it uses to steal financial resources and move money around the global banking system. In the past, hacking groups credibly linked to North Korea have successfully penetrated central banks, cryptocurrency exchanges, and some of the largest corporate banks in the world. The United Nations North Korea Panel of Experts has accused North Korea of stealing up to $81 million from Bangladesh’s Central Bank and laundering the money through casinos in the Philippines. These North Korean criminals have also hacked ATMs in more than 11 countries, stealing hundreds of millions of dollars. Other North Korean–linked entities have sold information technology services, including website and application development services, to firms around the world as a strategy to covertly raise funds for Pyongyang’s illicit aims. Financial institutions are often reluctant to admit that they have been hacked, which makes it difficult for the financial community to absorb lessons learned and harden institutions from future intrusions. Conversely, governments, including the United States, suffer from poor interagency coordination and a lack of institutional knowledge and awareness of North Korea’s malicious cyber activities. Most high-level U.S. policymakers and members of Congress lack basic familiarity with the underlying technology and North Korea’s cyber heist and hacking activities, which makes developing policy and regulatory proposals to counter it difficult. This ignorance is coupled with a government aversion to share useful information with the private sector.

North Korea conducts illicit ship-to-ship transfers of energy resources in violation of United Nations sanctions. The transfers include the import of refined petroleum products, which serves as essential inputs for North Korea’s domestic economy. North Korea also exports coal, including to United Nations Security Council members China and Russia, in violation of the sanctions. An international network of shipbrokers, trading companies, and maritime operators aids North Korea in these efforts. Much of this activity takes place in international waters, making it difficult for the United States and its partners to shut down completely such activity.

North Korean laborers have long operated worldwide, in violation of United Nations Security Council Resolutions enacted in 2017 to curtail such activities. At the peak of North Korean laborers working abroad, 100,000 workers generated about $2 billion a year for the regime. The majority of workers had been concentrated in Russia and China, which the United States has frequently accused of lax enforcement. A deadline for repatriating all North Korean laborers came and went in December 2019, with reports suggesting that these workers continued to be employed in these countries. Future United Nations Panel of Experts reports will likely highlight continuing violations of the rules against employing North Korean overseas laborers.

All told, these strategies potentially deliver hundreds of millions to billions of dollars to North Korea. (United Nations estimates of cyberactivity alone state the total proceeds could be “up to 2 billion,” although the methods North Korea uses makes it difficult for analysts to say with certainty that North Korea’s hackers have been able to move all of that money back to Pyongyang). Through organized and persistent sanctions evasion, this rogue nation has shown the world that it is possible to sustain and continue to develop its nuclear weapons capability in the midst of severe economic constraints. Indeed, the broad nature of the sanctions regime is moving Pyongyang to successfully invest significantly more resources to improve and diversify its revenue generating and financial movement strategies. North Korea is gaining major ground in its use of cyber technologies to finance and conduct illicit operations because the international community is so weak at developing countermeasures in the cyber sector.

As for the tradecraft North Korea uses to stay miles ahead of global banks, companies, and regulators, the regime relies on technological tools of the trade as well as networks of trusted agents that constantly update aliases, shell companies, and front men. The Office of Foreign Assets Control (OFAC), the agency that leads sanctions implementation and enforcement for the U.S. government, works hard to keep up. It regularly discloses new aliases for North Korean proliferation agents, as well as new individuals engaged in this activity. The Financial Crimes Enforcement Network (FinCEN), the Financial Intelligence Unit of the United States, has also distributed advisories on North Korean typologies for illicit fundraising. But it is impossible for federal offices to collect, declassify, and publicly disclose the full array of North Korean sanctions evaders and proliferation fundraisers. Also, by the time that the U.S. government names them in formal sanctions actions, the North Korean agents have changed aliases, locations, and front companies.

Nevertheless, this information disclosure is important, not least because it makes painfully clear that North Korea never paused aggressively fundraising for its nuclear and missile programs when Chairman Kim and President Trump met in Singapore in June 2018. Though they may have committed to a diplomatic process, which included pledges to temporary freezes in bomb and missile testing, North Korea’s track record over the last few years demonstrates that it never intended to halt its race for a bigger and more lethal nuclear arsenal. A significant problem in the current environment is the inadequate international control regime to spot and stop North Korea’s money trail, particularly its blind spot on North Korea’s malicious, highly active, and unfortunately very successful cyber and information technology activities.

Given all of these challenges, is it even possible to halt the financing of proliferation by this dangerous nuclear state?

As a theoretical legal and regulatory matter, the answer is yes. However, such an effort would require two exceedingly difficult-to-achieve goals for every country. It must be every country because universal enforcement is essential to avoid circumvention and dodging by North Korea. The requirements are:

real, high-level political will, and

greater technical capacity to implement and enforce U.N. sanctions and other financial controls on North Korea and North Korean-linked entities.

The international community cannot allow the daunting challenge of making true progress to impede North Korea’s illicit money trail be an excuse for inaction. A small cadre of innovative thinkers from the financial industry and law enforcement community are figuring out targeted strategies for better catching North Korean financing of proliferation, notwithstanding today’s deficit of political will and technical capacity. Scaled up, these strategies could have an outsized impact in catching North Korean criminals and proliferators. Moreover, a handful of well-placed policy shifts in leading economies, starting in Washington, D.C., can also have a big effect.

What’s the Plan?

We know that the challenges are large. So, what’s the plan?

First, the international community must more accurately diagnose the problem. How is North Korea raising and moving money right now? Some bank compliance officials describe the effort to answer this question as looking for a needle in a stack of needles. Essentially, they suggest that scanning hundreds of millions of financial transaction records and pieces of client data against sanctions blacklists, and the known aliases for the blacklisted North Koreans, is a fool’s errand.

But other compliance officials in banking, global shipping, manufacturing, and insurance think the way to spot North Korean footprints lies in getting away from list-checking. They are pioneering approaches to create big lakes of data and sophisticated algorithmic methods, improved by machine learning and overseen by expert humans, to hunt down, and ultimately spot in real time, North Korean patterns of activity. Policymakers can augment these with declassified intelligence and produce shareable reports to inform other governments and companies also tracking proliferation finance. Analysts describe these efforts as exercises in behavioral analytics, trained on tracking North Korean financial footprints. And this work can create a feedback loop for national governments and the private sector to respond to the threats.

A few pathbreaking global firms are putting into practice these behavioral analytic models for tracking North Korean proliferation. They run into significant problems coping with data privacy rules that make it difficult to share data across borders and between institutions. Also, they cope with the skepticism of financial regulators and supervisors who are slow to get comfortable with these new analytics and require a lengthy process to validate computer models. This slow and skeptical approach can be a drag on innovation and creative strategies to catch North Korean proliferators.

Regulators are right to be cautious and to demand that companies to rigorously protect themselves and their customers from North Korean abuse. No global company should let up on sanctions pressure on North Korea for as long as the rogue regime presents a proliferation and regional destabilizing threat. But tough regulation and compliance should be compatible with innovative approaches to catching and halting North Korean proliferators.

Along with better understanding the problem, a second element to undercut North Korean financing of proliferation is for policymakers to embrace innovative approaches to tracking illicit finance as a top and public priority. Only through an evident sense of urgency can policymakers make it a top priority for companies. Companies will take their cue from clear, unambiguous law and regulation. Furthermore, if done right, policymakers will create the space for safe information sharing and a culture of collaboration to identify and halt the money trail for the nuclear threats emanating from North Korea. Dialing up the ingenuity through new policy approaches for identifying and sharing information on financing of proliferation is essential to stop North Korea’s money trail. In fact, it might be the only real path for progress when the diplomatic process between the United States and North Korea has stalled out and against the backdrop of Kim’s threats of renewed provocations.

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

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North Korean Nuclear and Missile Capabilities

Pyongyang’s evolving nuclear and missile forces increasingly provide the regime with the ability to conduct a surprise preemptive first-strike, retaliatory second-strike, and battlefield counter-force attacks. Pyongyang has:

• Produced 30–60 warheads,11 can create fissile material for 7–12 warheads per year,12 and successfully tested a hydrogen (thermonuclear) weapon at least 10 times as powerful as the Hiroshima and Nagasaki bombs;

• Expanded and refined manufacturing facilities for fissile material, nuclear weapons, missiles, mobile missile launchers, and reentry vehicles;13

• Created a new generation of more advanced, accurate, and survivable missiles for all ranges that escalates the nuclear threat against South Korea, Japan, US bases in Okinawa and Guam, and the continental United States;

• Developed mobile land-based and sea-based missile systems that are harder to detect and target;

• Produced several different solid-fueled missiles that reduce the time necessary for launch, thereby constraining warning time for the US and its allies; and

• Practiced missile launches under wartime conditions by firing multiple missiles from numerous locations throughout the country, simulated nuclear airburst attacks over South Korea and Japan, and conducted salvo launches of several missiles simultaneously.

Pyongyang has an extensive and diversified missile force to attack targets in South Korea, Japan, US bases in the Pacific, and the continental United States.

South Korean Ports and Airfields

To prevent the US from augmenting forces in South Korea during a conflict, North Korea would use nuclear weapons on South Korean ports and airfields. In 2016, Kim Jong-un oversaw several successful surface-to-surface (SCUD) and Hwasong-7 (No Dong) mobile missile launching exercises that simulated preemptive nuclear airburst strikes against South Korean ports and airfields to be used by the US military.14

South Korean Leadership and Military Targets

Pyongyang vowed to initiate a preemptive nuclear attack against the South Korean leadership, including the presidential Blue House, if the regime perceived even a “slight sign” of US or South Korean preparations for a decapitation strike on the North Korean leadership.15 North Korea warned that it could turn South Korea into a “sea of flames” with its long-range artillery force and “reduce all bases and strongholds of the US and South Korean warmongers…into ashes.”16 The regime has deployed SCUD missiles, Pukguksong-2 (KN-15), and Hwasong-7 (No Dong) medium-range missiles. North Korea achieved breakthrough successes with several short-range missile systems in development that emphasized survivability, accuracy, and ability to defeat allied missile defenses.

Defeating Ballistic Missile Defenses (BMD)

North Korea is developing several systems and tactics that would be more effective in degrading or defeating allied missile defenses. Pyongyang has launched missiles to a higher altitude and shorter range which could allow a warhead to arrive at a steeper angle of attack and faster speed which could exceed BMD interception capabilities. The KN-18 and KN-21 SCUD variants have maneuverable reentry vehicles and the KN-23 has a flight profile that showed evasive characteristics instead of a typical ballistic parabola. The KN-23 was flown at depressed trajectories, potentially between the upper reach of Patriot missiles and below the minimum intercept altitude for Terminal High Altitude Area Defense (THAAD), with a final pull-up maneuver that provides a steep terminal descent.17 The KN-23 could also be used in a first strike against leadership, hardened command and control, or high-value military targets. North Korea demonstrated the ability to fire several missiles at once which could enable salvo attacks by less accurate SCUD missiles to overwhelm BMD systems.18

SLBM Threat

North Korea has successfully tested the Pukguksong-1 (KN-11) and Pukguksong-3 (KN-26) submarine-launched ballistic missiles (SLBM) which could target South Korea and Japan, potentially with a nuclear warhead. South Korea does not currently have defenses against SLBMs. The THAAD BMD system radar is limited to a 120-degree view that is directed toward North Korea, precluding it from protecting against SLBMs arriving from either the East or West Seas.19 The SM-2 missile currently deployed on South Korean destroyers only provides protection against anti-ship missiles.

Establishing North Korean Area Denial

Pyongyang could use theater nuclear strikes against US bases in Japan and Guam to prevent the flow of forces and logistics to the peninsula that are planned in the time phased force deployment data (TPFDD) plan. Pyongyang has repeatedly threatened US bases throughout the Pacific, often citing Guam.20 The regime has developed the Hwasong-10 (Musudan) and Hwasong-12 (KN-17) intermediate-range missiles to hit US bases on Okinawa and Guam.

Threatening the US Mainland

Pyongyang has threatened to “reduce the US mainland to ashes and darkness.”21 Kim was photographed in front of a map labelled “US Mainland Strike Plan,” with missile trajectories aimed at Washington, DC, Indo-Pacific Command in Hawaii, San Diego (a principal homeport of the Pacific Fleet), and Air Force Global Strike Command at Barksdale Air Force Base in Louisiana.22

In 2017, North Korea conducted three successful tests of

the Hwasong-14 (KN-20) and Hwasong-15 (KN-22) ICBMs to replace the earlier, less capable KN-08 and KN-14 ICBMs. General Terrence O’Shaughnessy, commander of North American Aerospace Defense Command (NORAD), testified that North Korea demonstrated the capability to threaten the US homeland with thermonuclear-armed ICBMs capable of ranging most, or all, of North America.23 US Forces Korea assessed that the Hwasong-15 ICBM has a range of 8,000 miles and is capable of reaching anywhere on the US mainland.24

New War Plan

After assuming power, Kim Jong-un directed the North Korean military to develop a new strategy to invade and occupy Seoul within three days and all of South Korea within seven days. North Korea had studied US operations in Afghanistan and Iraq and concluded it must prevail quickly before US reinforcements arrived. This would necessitate early use of nuclear weapons.25

The Korean People’s Army General Staff declared that

“the first combined task units stationed in the eastern, central, and western sectors of the front will [carry] out the preemptive retaliatory strike at the enemy groups with ‘an ultra-precision blitzkrieg strike of the Korean style.’ ”26 North Korea has warned that “any military conflict on the Korean Peninsula is bound to lead to an all-out [nuclear] war, an ultra-harsh war of reaction targeting the entire US mainland.”27

Future Capabilities Open Dangerous Doors

North Korea’s continually advancing proficiencies suggest additional and more worrisome evolutions in its nuclear doctrine. Pyongyang may be on the path to developing capabilities that go beyond deterrence to a viable offensive warfighting strategy.

In a few years, North Korea could have 100–200 nuclear warheads, dozens of mobile ICBMs, and hundreds of improved, survivable short-, medium-, and intermediaterange missiles, as well as submarine-launched missiles. North Korea possessing a more formidable military threat would put allied forces at greater risk, augment the danger to the continental United States, and degrade military responses to North Korean actions.

Greater nuclear capabilities could undermine the effectiveness of existing war plans. For example, rather than fully implementing all phases of OPLAN 5015 after a North Korean attack, the allies may strive only for returning to the status quo ante rather than fully liberating North Korea. North Korea’s ability to target American cities with thermonuclear weapons could inhibit US responses or exacerbate growing allied concerns about the viability of the US extended deterrence guarantee. South Korea and Japan have already questioned US willingness to risk its cities for theirs.

The defense of the continental US is currently provided by 44 ground-based interceptors in Alaska and California. Several interceptors would likely be fired at each incoming North Korean missile since the current North Korean ICBM arsenal is small. However, continued North Korean ICBM production could overwhelm US missile defenses.

A more survivable North Korea nuclear force could create first-strike uncertainty for the United States of not being able to get all of Pyongyang’s North Korea’s nuclear weapons. Coupled with the risk of numerous American cities attacked by hydrogen bombs, Washington might be perceived as being hesitant to respond to North Korean actions. As the fictional nuclear strategist Dr. Strangelove opined, “Deterrence is the art of producing in the mind of the enemy, the fear to attack.”

If North Korea believes the US is unwilling to risk catastrophic civilian losses, the regime could feel emboldened to act more belligerently in pursuing its strategic objectives. A former North Korean official testified before Congress in 1997 that “Kim Jong-il believes that if North Korea creates more than 20,000 American casualties in the region, the US will roll back and that North Korea will win the war.”28

Pyongyang may even conclude that nuclear weapons provide the ability to fulfill its oft-stated goal of reunifying the Korean Peninsula on regime terms. Kim Jong-un declared that North Korea “should not allow the national split to persist any longer but reunify the country in our generation without fail.”29 The regime has repeatedly pledged to achieve the “final victory in a great war for national reunification.”30

Deterrence and Diplomacy:

Two Sides of the Same Coin

The arms control community argues that deterrence maintains the nuclear problem but does not solve it. They suggest that there is a need for the US to engage with North Korea to reach a diplomatic resolution to the long-standing nuclear problem.

The international community, including the United States, has repeatedly attempted to do so, having concluded eight denuclearization agreements with North Korea. All failed due to Pyongyang’s cheating or leaving obligations unfulfilled. During these and subsequent negotiations, Washington offered economic benefits, developmental assistance, humanitarian assistance, diplomatic recognition, declarations of non-hostility, turning a blind eye to violations, not enforcing US laws, and reducing allied defenses. Despite these concessions, North Korea still has an insatiable list of security, diplomatic, and economic demands. These include the conclusion of allied military exercises, withdrawal of all US troops from South Korea, abrogation of the US–South Korea defense treaty, ending the US extended deterrence guaranty, signing a peace treaty to end the Korean War, a security guarantee, non-criticism of the regime, and removal of all US and United Nations (UN) sanctions.

Currently, North Korea rejects all working-level diplomats as well as summit meetings with the United States. It is impossible to negotiate with a nation that will not pick up the phone. Until Pyongyang is willing to comply with 11 UN resolutions that require it to abandon its nuclear and missile programs, the US must maintain a comprehensive strategy of diplomacy, upholding UN resolutions, US law, and deterrence. Washington and its allies must keep their eyes open, their shields up, and their swords sharp.

Airmen must remain ever vigilant to maintain the decades long deterrence that has kept the peace on the Korean Peninsula. As George Orwell reportedly opined, “People sleep peacefully in their beds at night only because rough men stand ready to do violence on their behalf.”

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

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

The Value of the Alliance to the ROK and United States

It is imperative to understand the long-standing North Korean strategy. As a revolutionary nation, as described in its constitution, North Korea seeks to complete the revolution by ridding the peninsula of foreign military forces and unifying it under the domination of the “guerrilla dynasty and gulag state.” which is used to describe the idea the regime rests on the myth of anti-Japanese partisan warfare and incarcerates some 120,000 political prisoners in multiple prison camps or gulags. 210 In the calculus of the Kim family regime, unification on its terms is the only way to ensure its survival. The regime’s strategy is built on subverting the ROK to create political instability, using coercion and blackmail diplomacy to gain political and economic concessions, and, when conditions are right, using force to execute a campaign plan to occupy the entire Korean Peninsula.

To successfully execute its strategy and accomplish its goals, the North requires is a split in the ROK-US alliance. Specifically, it needs to drive US forces off the Korean Peninsula and end extended deterrence and the nuclear umbrella over the ROK and Japan. The regime has been pursuing this strategy for seven decades, and there is no evidence that it has abandoned it. Coincidently, this is also how it views the end of the US “hostile policy.” As long as there is a ROK-US alliance, the regime believes, the United States poses a threat.211

Due to this strategy, the ROK faces an existential threat from North Korea. The North Korean People’s Army (NKPA) has an active force of some 1.2 million personnel, 70 percent of whom are deployed between the Demilitarized Zone (DMZ) and Pyongyang. These forces are postured for offensive operations. The NPKA annual winter training cycle runs from December through March, with forces conducting echeloned training designed to achieve the highest state of readiness by its conclusion. March is the optimal attack time because the ground is still frozen, and the rice fields in the South would not obstruct a mechanized armored attack. The NKPA possesses not only nuclear weapons, but also chemical and biological weapons of mass destruction (WMD). In a war, North Korea would likely use all of its weapons, including these oft-ignored WMD.212 Therefore, the ROK depends on the alliance for combined defensive capabilities for its survival.

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

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

#### The aff solves—it enables tailored remedies that promote competition but maintain efficiency

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

More Creative Alternatives

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

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

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

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

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

a. Enabling Competition Within the Platform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

over 15,500 members.357

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

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

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

### 1AC---Plan

#### The United States federal government should prohibit platform conduct that fails under rule of reason without imposing heightened burdens on plaintiffs.

### 1AC---Mechanism

#### The aff removes *Amex*’s increased burdens for platform challenges—that solves because well-plead cases go forward and courts will reject anticompetitive conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Plaintiffs Already Bear the Burden on Balancing

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

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

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

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

### 1AC---Conduct

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

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

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

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

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

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

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

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

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

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

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

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

#### This trend is accelerating—two Circuit decisions doubled down and extended *Amex* to new sectors, and to mergers

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

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

Antitrust in tech markets after American Express

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

Sabre/Farelogix

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

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

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

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

Qualcomm

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

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

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

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

Down the competitive effects rabbit hole

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

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

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

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

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

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

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

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

A modern antitrust in peril

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

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

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

#### *Amex* undermines enforcement against nascent acquisitions

Salop, Professor of Economics & Law, Georgetown University Law Center and Senior Consultant, Charles River Associates, ‘21

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

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

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

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

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

#### Prospect of big tech acquisition dampens innovation

Allensworth, Professor of Law at Vanderbilt Law School, ‘21

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

E. Whither Innovation?

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

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

CONCLUSION: “ANTITRUST IS GREEDY”

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

#### SCENARIO ONE IS AI:

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

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

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

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

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

TECH GIANTS LEAD IN AI ACQUISITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The idea of a future military revolution became discredited amid nearly two decades of war after 2001 and has been further damaged by reductions in defense spending since 2011. But along the way, the United States has also **squandered** hundreds of **billions** of dollars trying to modernize in the **wrong ways**. Instead of thinking systematically about buying faster, more **effective kill chains** that could be built now, Washington poured **money** into **newer versions** of **old military platforms** and **prayed** for **technological miracles** to come (which often became acquisition debacles when those miracles did not materialize). The result is that U.S. battle networks are not nearly as **fast** or **effective** as they have appeared while the United States has been fighting lesser opponents for almost three decades.

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

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

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

NEW TECHNOLOGIES, OLD PROBLEMS

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

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

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

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

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

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

THE MILITARIES OF TOMORROW

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

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

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

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

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

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

A LOSING GAME

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

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

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

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

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

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

#### SCENARIO TWO IS CYBER:

#### Platform misuse enables a host of bad practices—undermines cyber security

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

So, the divergence in antitrust enforcement may reflect differences over these data-opolies’ perceived harms. Ordinarily the harm from monopolies are higher prices, less output, or reduced quality. It superficially appears that data-opolies pose little, if any risk, of these harms. Unlike some pharmaceuticals, data-opolies do not charge consumers exorbitant prices. Most of Google’s and Facebook’s consumer products are ostensibly “free.” The data-opolies’ scale can also mean higher quality products. The more people use a particular search engine, the more the search engine’s algorithm can learn users’ preferences, the more relevant the search results will likely be, which in turn will likely attract others to the search engine, and the positive feedback continues.

As Robert Bork argued, there “is no coherent case for monopolization because a search engine, like Google, is free to consumers and they can switch to an alternative search engine with a click.”

How Data-opolies Harm

But higher prices are not the only way for powerful companies to harm their consumers or the rest of society. Upon closer examination, data-opolies can pose at least eight potential harms.

Lower-quality products with less privacy. Companies, antitrust authorities increasingly recognize, can compete on privacy and protecting data. But without competition, data-opolies face less pressure. They can depress privacy protection below competitive levels and collect personal data above competitive levels. The collection of too much personal data can be the equivalent of charging an excessive price.

Data-opolies can also fail to disclose what data they collect and how they will use the data. They face little competitive pressure to change their opaque privacy policies. Even if a data-opoly improves its privacy statement, so what? The current notice-and-consent regime is meaningless when there are no viable competitive alternatives and the bargaining power is so unequal.

Surveillance and security risks. In a monopolized market, personal data is concentrated in a few firms. Consumers have limited outside options that offer better privacy protection. This raises additional risks, including:

Government capture. The fewer the number of firms controlling the personal data, the greater the potential risk that a government will “capture” the firm. Companies need things from government; governments often want access to data. When there are only a few firms, this can increase the likelihood of companies secretly cooperating with the government to provide access to data. China, for example, relies on its data-opolies to better monitor its population.

Covert surveillance. Even if the government cannot capture a data-opoly, its rich data-trove increases a government’s incentive to circumvent the data-opoly’s privacy protections to tap into the personal data. Even if the government can’t strike a deal to access the data directly, it may be able to do so covertly.

Implications of a data policy violation/security breach. Data-opolies have greater incentives to prevent a breach than do typical firms. But with more personal data concentrated in fewer companies, hackers, marketers, political consultants, among others, have even greater incentives to find ways to circumvent or breach the dominant firm’s security measures. The concentration of data means that if one of them is breached, the harm done could be orders of magnitude greater than with a normal company. While consumers may be outraged, a dominant firm has less reason to worry of consumers’ switching to rivals.

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

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

#### Goes nuclear.

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

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

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

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

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

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

#### Aff solves—the squo prior to *Amex* evaluated conduct on a case-by-case basis and created clear, enforceable guidelines

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

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

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

Fine-tuning the proper aims of a nonpredictive antitrust

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

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

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

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

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

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

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

Nonpredictive antitrust enforcement in practice

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

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

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

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

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

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

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

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

## 2AC

### 2AC---T-Prohibitions

#### Changing plaintiff’s burden increases “scope”

Orbach, Professor of Law and the Director of the Business Law Program, the University of Arizona College of Law, ‘15

(Barak, “The Durability of Formalism in Antitrust,” 100 Iowa L. Rev. 2197)

In other dimensions, the Supreme Court has developed formalistic rules and categories. For example, in the late 1970s, when the Court started blurring the distinction between per se and rule of reason, it also introduced the “direct purchaser” doctrine as a standing requirement. This rule bars indirect purchasers from bringing antitrust lawsuits, regardless of the circumstances. Also in the late 1970s, the Court began drawing a categorical distinction between horizontal and vertical restraints. The distinction is exceptionally important for the understanding of economic relationships but it does not necessarily define competitive effects as some suggested. Likewise, since the late 1970s, the Supreme Court has been using procedure—namely by applying formalism—to narrow the scope of antitrust through rules that disfavor plaintiffs.

#### CI—prohibitions are implemented via legal tests—the threshold of the test determines how much or how little conduct is prohibited

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

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

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

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

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

### 2AC---T-Courts

#### Expand” means to enlarge.

White 07 – United States District Court, California Northern

Jeffrey S. White, Medtronic, Inc. v. W.L. Gore & Assocs., 2007 U.S. Dist. LEXIS 80038, United States District Court for the Northern District of California, October 2007, LexisNexis

8. "Expand" and variations.

Medtronic contends that the Court should construe this term, and its variations, to mean "enlarge from a first to a second larger dimension." Medtronic's proposed construction is in accord with the plain meaning of the term "expand." See, e.g., Webster's Ninth New Collegiate Dictionary at 436 ("to open up; to increase the extent, number, volume or scope of'). Gore, in contrast, argues that the Court should construe this term, and its variations, to require that the device expanded is a "low memory metal stent," which is expanded by a balloon rather than by its own resilience. For the reasons previously stated, the Court rejects Gore's proposed construction.

The Court finds further support for its conclusion from the claims of the '062 Patent, which do not contain the "balloon-expandable" limitation proposed by Gore. In contrast, dependent claim 2 of the '219 Patent does contain such a limitation, whereas independent claim 1 of that patent, does not. (See Bianrosa Decl., Ex. 6 ("219 Patent, 8:2-I 1.) Similarly, dependent claim 15 of the '828 Patent requires the use of a balloon, whereas claim 14 of the '828 Patent, from which claim 15 depends, contains no such limitation. ('828 Patent, 8:29-59.) Moreover, the use of the balloon in the dependent claims is the only meaningful distinction from the independent claims. Thus, the presumption of claim differentiation weighs against Gore's proposed construction. See SunRace Roots, 336 F.3d at 1303.

Accordingly, the Court construes the term "expand" (and its variations) to mean: "to enlarge from a first to a second larger dimension."

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

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

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

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

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

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

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

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

### 2AC---Core PIC

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

Sleet 99 – Judge, United States District Court, Delaware

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

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

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

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

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

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

### 2AC---CIL CP

#### Perm: do the CP---‘should’ isn’t mandatory.

Duarte 19. Development Code of the City of Duarte, California, Municipal Code, “ARTICLE 1 - ENACTMENT, APPLICABILITY, AND ENFORCEMENT”, 1/10/2019, https://library.municode.com/ca/duarte/codes/development\_code?nodeId=ART1ENAPEN\_CH19.02PUAPDECO

B. *Terminology*. When used in this title, the following rules apply to all provisions of this Development Code: 1. *Language*. When used in this Development Code, the words "shall," "must," "will," "is to," and "are to" are always mandatory. "Should" is not mandatory but is strongly recommended; and "may" is permissive.

#### 7. Structural uncertainty makes ilaw ineffective

Goldsmith 09

Jack Goldsmith, Henry L. Shattuck Professor of Law, Harvard Law School, Daryl Levinson, Fessenden Professor of Law, Harvard Law School, Harvard Law Review, May 2009, vol. 122, no. 7, "LAW FOR STATES: INTERNATIONAL LAW, CONSTITUTIONAL LAW, PUBLIC LAW", 1792-1868

A. International Law

International law lacks a centralized and hierarchical lawmaker akin to the legislature inside a state to specify authoritative sources of law and the mechanisms of legal change and reconciliation. It also lacks centralized and hierarchical judicial institutions to resolve the resulting legal uncertainty. As a result, its norms are imprecise, contested, internally contradictory, overlapping, and subject to multiple interpretations and claims. International law’s inability to resolve this uncertainty has fueled skepticism about its status as law; law that is unclear or unknowable, many believe, cannot be described as a real legal system, and in any case cannot be effective.32

States coordinate public understandings of what counts as law largely through the institutional mechanism of an authoritative legislature. But of course there exists no global legislature. International legal rules are created through two decentralized mechanisms: treaties and customary international law (CIL). A treaty results from the consent of two or more nations, and binds only those nations that ratify it.33 A small handful of treaties — the U.N. Charter and the Geneva Conventions, for example — have been ratified by practically every nation in the world. But even these universal laws are laboriously constructed through the same decentralized process of negotiation and consent. CIL also originates through a decentralized process; its content is derived from those customary state practices that states follow out of a sense of legal obligation (opinio juris).34

These decentralized lawmaking processes give rise to fundamental uncertainty about the content of international legal norms. The problem of uncertainty is most severe with respect to CIL, which lacks any clear rule of recognition. Little agreement exists as to what types of state action count as state practice.35 Official pronouncements, certain types of legislation, and diplomatic correspondence are relatively (but not entirely) uncontroversial sources of CIL, but international law has no settled method for weighing or ordering these sources or for determining when they count as evidence of opinio juris. Bilateral and multilateral treaties are sometimes invoked as evidence of CIL, though rarely consistently or coherently.36 The writings of jurists are a secondary source of CIL, but jurists rarely agree even on supposedly settled rules.37 Nonbinding statements and resolutions of multilateral bodies, most notably the resolutions of the U.N. General Assembly, are also invoked as a basis for CIL, as are moral and ethical claims. Needless to say, each potentially relevant source of CIL may point in a different direction, and there is no formula or agreed-upon set of principles for reconciling them. Nor is there any authoritative institutional mechanism — the equivalent of a legislature or supreme court — for definitively resolving CIL’s content. The unsurprising result is frequent and persistent contestation over the content of CIL.

By comparison, the secondary rules for treatymaking are relatively well-settled, and there is much less disagreement over what counts as a treaty.38 But there is still a great deal of disagreement about the content of treaty-based international law because the relationships between different treaties, and between treaties and CIL, are subject to no settled rules. The U.N. Charter is among the most fundamental of international laws, and its Article 103 provides that Charter obligations trump other international law obligations.39 But when NATO countries bombed Kosovo in violation of the U.N. Charter’s prohibition on the use of force, many scholars contended that there was a developing CIL exception for humanitarian intervention, and there has been much disagreement — among both scholars and nations — about this point ever since.40 There are also many unsettled questions about the validity of important treaty obligations that conflict with the Charter. 41 Similarly, different human rights treaties (for example the European Convention on Human Rights42 and the International Covenant on Civil and Political Rights43) contain different and in some respects contradictory rights, and there is disagreement among courts, legal institutions, and scholars about which prevails.44 The same is true of obligations imposed by the World Trade Organization that conflict with obligations imposed by other treaty regimes.45

Thus, even when the relevant rules of international law can be clearly identified, it often remains unclear how overlapping and inconsistent rules are to be reconciled and systematized. In theory, the international legal system has a set of meta-rules — rules of nonretroactivity, last-in-time, the priority of lex specialis, and normative hierarchy (prioritizing the U.N. Charter or jus cogens norms) — that are supposed to help sort out these conflicts.46 But in practice these rules are often contested and indeterminate.47 Lacking a centralized legislative process, the international legal system commonly allows for the unbridled proliferation of contradictory norms.

### 2AC---States CP

#### CP is a de facto patchwork—majority of states bound by federal precedent

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

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

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

State Levels of Adherence

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

#### Rogue state DA—CP creates mass uncertainty that chills all business

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

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

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

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

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

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

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

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

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

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

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

State Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

Workarounds

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

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

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

State-to-State Conflicts

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

A Case Study

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

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

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

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

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

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

#### AFF reinvigorates EU-US digital democratic alliance—big tech antitrust key

Muscolo, Commissioner, Italian Competition Authority, Rome, and Massolo, Economic advisor of Commissioner Gabriella Muscolo, Italian Competition Authority, Rome, ‘21

(Gabriella and Alessandro, “Will the Biden Presidency Forge a Digital Transatlantic Alliance on Antitrust?” Concurrences, Issue 1, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>)

5. Finally, the deterrence principle will catalyse the third pillar. Democracy will in fact be the main criterion for choosing US partners in order to consolidate the West against the expansion of the East.

6. Within this context, the digital economy represents an extremely important battlefield for the US to regain world leadership. The USA is well placed when it comes to digital competition—indeed, almost all the prominent Western online platforms are American.

7. However, over the last decade, Google, Amazon, Facebook, Apple and Microsoft (hereinafter “GAFAM”) have come under severe antitrust and regulatory scrutiny, starting in the European Union and ending in the United States. A “break-up” sentiment is spreading on both sides of the Atlantic and this will certainly represent one of the main issues on Biden’s agenda. Indeed, GAFAM’s huge market power is perceived as a threat to Western democracies and has been accused of hampering competition and innovation. Both the USA and the EU know that it is fundamental to shape global standards in order to face security and privacy concerns posed by the rise of Eastern tech giants. [247] Moreover, there is a growing feeling that the growth of big tech, combined with non-democratic governments, could lead to “techno-authoritarianism.” [248]

8. Therefore, will there be a transatlantic unity when clamping down on online giants in the name of protecting and strengthening Western “techno-democracies?” A digital transatlantic alliance shall not be taken for granted.

9. Indeed, over the last decade, the EU has markedly shaped its own way of building a European data market and of facilitating the emergence of European tech companies.

#### That’s key to various geopolitical threats—hybrid war, cyber estalation

Schaake is the international policy director at Stanford University’s Cyber Policy Center and an international policy fellow, Stanford Institute for Human-Centered Artificial Intelligence, ‘20

(Marietje, “How democracies can claim back power in the digital world,” September 29, <https://www.technologyreview.com/2020/09/29/1009088/democracies-power-digital-social-media-governance-tech-companies-opinion/>

Today, technology regulation is often characterized as a three-way contest between the state-led systems in China and Russia, the market-driven one in the United States, and a values-based vision in Europe. The reality, however, is that there are only two dominant systems of technology governance: the privatized one described above, which applies in the entire democratic world, and an authoritarian one.

The laissez-faire approach of democratic governments, and their reluctance to rein in private companies at home, also plays out on the international stage. While democratic governments have largely allowed companies to govern, authoritarian governments have taken to shaping norms through international fora. This unfortunate shift coincides with a trend of democratic decline worldwide, as large democracies like India, Turkey, and Brazil have become more authoritarian. Without deliberate and immediate efforts by democratic governments to win back agency, corporate and authoritarian governance models will erode democracy everywhere.

Does that mean democratic governments should build their own social-media platforms, data centers, and mobile phones instead? No. But they do need to urgently reclaim their role in creating rules and restrictions that uphold democracy’s core principles in the technology sphere. Up to now, these governments have slowly begun to do that with laws at the national level or, in Europe’s case, at the regional level. But to bring globe-spanning technology firms to heel, we need something new: a global alliance that puts democracy first.

Teaming up

Global institutions born in the aftermath of World War II, like the United Nations, the World Trade Organization, and the North Atlantic Treaty Organization, created a rules-based international order. But they fail to take the digital world fully into account in their mandates and agendas, even if many are finally starting to focus on digital cooperation, e-commerce, and cybersecurity. And while digital trade (which requires its own regulations, such as rules for e-commerce and criteria for the exchange of data) is of growing importance, WTO members have not agreed on global rules covering services for smart manufacturing, digital supply chains, and other digitally enabled transactions.

What we need now, therefore, is a large democratic coalition that can offer a meaningful alternative to the two existing models of technology governance, the privatized and the authoritarian. It should be a global coalition, welcoming countries that meet democratic criteria.

The Community of Democracies, a coalition of states that was created in 2000 to advance democracy but never had much impact, could be revamped and upgraded to include an ambitious mandate for the governance of technology. Alternatively, a “D7” or “D20” could be established—a coalition akin to the G7 or G20 but composed of the largest democracies in the world.

Such a group would agree on regulations and standards for technology in line with core democratic principles. Then each member country would implement them in its own way, much as EU member states do today with EU directives.

What problems would such a coalition resolve? The coalition might, for instance, adopt a shared definition of freedom of expression for social-media companies to follow. Perhaps that definition would be similar to the broadly shared European approach, where expression is free but there are clear exceptions for hate speech and incitements to violence.

Or the coalition might limit the practice of microtargeting political ads on social media: it could, for example, forbid companies from allowing advertisers to tailor and target ads on the basis of someone’s religion, ethnicity, sexual orientation, or collected personal data. At the very least, the coalition could advocate for more transparency about microtargeting to create more informed debate about which data collection practices ought to be off limits.

The democratic coalition could also adopt standards and methods of oversight for the digital operations of elections and campaigns. This might mean agreeing on security requirements for voting machines, plus anonymity standards, stress tests, and verification methods such as requiring a paper backup for every vote. And the entire coalition could agree to impose sanctions on any country or non-state actor that interferes with an election or referendum in any of the member states.

Why Facebook’s political-ad ban is taking on the wrong problem

A moratorium on new political ads just before election day tackles one kind of challenge caused by social media. It’s just not the one that matters.

Another task the coalition might take on is developing trade rules for the digital economy. For example, members could agree never to demand that companies hand over the source code of software to state authorities, as China does. They could also agree to adopt common data protection rules for cross-border transactions. Such moves would allow a sort of digital free-trade zone to develop across like-minded nations.

China already has something similar to this in the form of eWTP, a trade platform that allows global tariff-free trade for transactions under a million dollars. But eWTP, which was started by e-commerce giant Alibaba, is run by private-sector companies based in China. The Chinese government is known to have access to data through private companies. Without a public, rules-based alternative, eWTP could become the de facto global platform for digital trade, with no democratic mandate or oversight.

Another matter this coalition could address would be the security of supply chains for devices like phones and laptops. Many countries have banned smartphones and telecom equipment from Huawei because of fears that the company’s technology may have built-in vulnerabilities or backdoors that the Chinese government could exploit. Proactively developing joint standards to protect the integrity of supply chains and products would create a level playing field between the coalition’s members and build trust in companies that agree to abide by them.

The next area that may be worthy of the coalition’s attention is cyberwar and hybrid conflict (where digital and physical aggression are combined). Over the past decade, a growing number of countries have identified hybrid conflict as a national security threat. Any nation with highly skilled cyber operations can wreak havoc on countries

that fail to invest in defenses against them. Meanwhile, cyberattacks by non-state actors have shifted the balance of power between states.

Right now, though, there are no international criteria that define when a cyberattack counts as an act of war. This encourages bad actors to strike with many small blows. In addition to their immediate economic or (geo)political effect, such attacks erode trust that justice will be served.

### 2AC---Antitrust DA

#### Non-unique—platform monopoly is a structural limit on high-tech innovation

Newman, Associate Professor, University of Miami School of Law, ‘19

(John, “Antitrust in Digital Markets,” 72 Vand. L. Rev. 1497)

Despite the fact that digital markets frequently exhibit high barriers to entry, skeptics of antitrust enforcement have one card left to play: they portray digital markets as nonetheless being characterized by intense innovative rivalry.135 As a result, the argument runs, antitrust would move too slowly to correct any problems and is unnecessary because the relevant markets will quickly correct themselves.136 Under this view, the lure of monopoly profits will inevitably attract disruptive upstarts seeking to replace dominant incumbents—and monopoly is actually good and desirable because it is necessary to spur technological progress.137 This unorthodox vision traces its roots to Schumpeter’s decades-old invocation of “creative destruction,”138 which became a favorite trope among those associated with the Austrian and Chicago schools.139

For empirical support, proponents of this digital creative destruction narrative commonly point to Facebook’s “disruption” of MySpace and Google’s “disruption” of Yahoo.140 Thus, for example, Robert Bork and Gregory Sidak argued that Google should not face antitrust liability because “[i]t surpassed Yahoo, just as Yahoo surpassed others before it.”141 Put another way, if Facebook and Google could supplant their predecessors, they must themselves face the constant risk of disruption—their perch at the top is a precarious one.

Let us pause to revisit these two commonly cited examples of digital disruption. It is true that Facebook supplanted MySpace as the largest social network—in April 2008.142 That was, to put it rather mildly, some time ago.143 Facebook’s reach continuously expanded during the following decade. As of 2018, Facebook, Inc. controlled the three largest mobile social networking apps in the United States144 and boasted a combined user base over five times larger than that of its nearest rival.145 With each passing year, the creative-destruction narrative becomes ever less credible.

The Google example fares even worse. Google was already the world’s second most popular search provider by 2000.146 That same year, Yahoo (previously the most popular provider) announced that Google would begin serving as the search engine for Yahoo’s web portal,147 effectively making Google the dominant global search provider.148 As with Facebook, Google’s stranglehold over search only increased with the passage of time—as o

f 2018, after nearly two decades of dominance, Google still controlled more than 90% of the global market for general search results.149

The anecdotes of MySpace and Yahoo, still commonly cited by those who argue that digital markets are epicenters of creative destruction,150 look increasingly creaky with age. The relevant markets have been characterized not by the “gale” of creative destruction described by Schumpeter, but by entrenched and unchecked dominance. It is high time to abandon the “romantic but naïve Schumpeterian [notion] that giant” monopolists and concentrated oligopolies are necessary for technological progress.151 In fact, a more sophisticated reading of Schumpeter suggests that he was not nearly so opposed to government intervention—particularly in the form of antitrust enforcement—as his modern-day adherents tend to be.152 An antitrust enterprise that somehow came to view monopoly as good and necessary has rather clearly lost its way.153

Durable market power is the precise evil antitrust laws are meant to prevent. Far from being self-correcting, digital markets often facilitate such power. This suggests that the orthodox position rests in part upon a flawed assumption about the balance of error costs in this context. The societal cost from false negatives is substantially higher than pro-defendant analysts have previously assumed. Normatively, this militates in favor of an invigorated approach to digital markets.

#### Turn—their link is backwards for platforms—defense-friendly regime incentivizes platforms NOT to innovate

Newman, Trial Attorney, U.S. Department of Justice, Antitrust Division, ‘12

(Jordan, “Anticompetitive Product Design in the New Economy,” 39 Fla. St. U. L. Rev 682)

What all these approaches have in common is that they place a thumb on the scale in favor of defendants, at least as compared to the generally used section 2 exclusionary-conduct inquiry,258 essentially a rule-of-reason analysis. The D.C. Circuit in Microsoft III set forth the general method of analysis, complete with allocations of the burden of proof. First, the burden is on the plaintiff to make a prima facie case that the defendant has engaged in monopolistic conduct (properly defined).259 If the plaintiff does so, the burden then shifts to the defendant to show a procompetitive justification for the redesign.260 If the defendant fails to do so, the conduct is exclusionary.261 If, however, the defendant shows some plausible justification, the burden shifts back to the plaintiff to rebut that justification.262 If the plaintiff fails to do so, then the plaintiff must show that the anticompetitive harm outweighs the procompetitive justification.263 The leading treatise takes issue with the last step, at least insofar as it seems to call for courts to engage in “balancing” of close cases—advocating instead a burden-shifting analysis that, while perhaps somewhat less defendant-friendly than the above approaches, calls for “resolv[ing] close cases in favor of the defendant.”264 The various approaches described above, however, end the analysis and dismiss the claim as soon as the defendant shows any plausible justification for its behavior. This favorable treatment traditionally accorded to defendants in this area is due largely to the concerns noted above—the fear that, because (1) the markets themselves act as a check on exclusionary product redesigns (making them quite rare) and (2) antitrust courts are generally not competent to second-guess design changes, condemning product redesigns will tend to unduly stifle innovation.

Yet, as shown above, these concerns largely dissipate in the types of markets under discussion. As to the first, the nature of code-based products and the widespread availability of high-speed Internet access have combined to make the now standard method of redesigning these products—software updates—a uniquely attractive method of foreclosing rivals. This is so for three primary reasons: (1) low development and distribution costs,265 (2) low risk that consumers will reject redesigns,266 and (3) low losses incurred if these product redesigns fail.267 Additionally, new-economy markets tend to be characterized by strong positive network externalities, which may further incentivize monopolistic behavior.268 Given the confluence of these factors, it is much more likely that Ci > Pm – LR in these markets.

And with regard to the second concern, as shown above, the inherent and unique nature of code-based product redesign makes it uniquely susceptible to antitrust scrutiny.269 Given that such redesigns are more easily analyzed than traditional, physical product redesigns, it should come as no surprise that firms may be able to offer no justification for their conduct (as occurred in Microsoft III). Alternatively, they may simply settle out of court or enter into consent decrees (as may have occurred in In re Intel). At any rate, the point is that antitrust courts no longer need to simply throw up their hands and find for defendants in design-related cases.

Since these concerns largely dissipate in these markets, the need to place a thumb on the scale in favor of defendants—that is, the need for the inquiry to end as soon as the defendant makes any plau sible claim of a procompetitive benefit—dissipates as well. And in the formula expressed above, a defendant-friendly approach lowers R by reducing the risk of antitrust liability for engaging in exclusionary, design-related conduct. Absent the usual check of market forces, such an approach even further incentivizes such conduct. Firms can and almost certainly do engage in anticompetitive design in these markets; wit

ness Microsoft’s commingling of code,270 the FTC’s theory in In re Intel, 271 or Apple’s allegedly exclusionary software updates.272 While courts are rightly reluctant to review antitrust challenges to physical product design changes, code-based product markets exhibit unique features that obviate the need for an overly defendant friendly analysis.

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

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

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

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

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

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

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

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

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

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

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

#### No internal link—long-term cost of intervention uncertain and offset by anticompetitive conduct

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

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

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

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

The second premise raises questions regarding the full range of long-term effects, including chilling effects on future innovation. One concern is that antitrust interventions in these settings are counterproductive, because they reduce the global ex ante incentives for innovation.258 While antitrust interventions reduce a potential monopolist’s incentive to innovate in theory, questions remain regarding the size and overall impact of the interventions in practice. Many observers, for example, believe that the effect of small antitrust policy changes has no appreciable effect on innovation incentives and, in any event, has not been empirically established.259 Fu

rthermore, anticompetitive effects also affect the innovation by their rivals, either by suppressing rivals’ actual innovation or by reducing rivals’ incentives to innovate.260 The innovation embodied in the product redesign, therefore, is not the only innovation effect at issue. Thus the link between anticompetitive conduct and rival innovation suggests that assessments regarding innovation effects that focus solely upon the defendant’s innovations may be incomplete.261

### 2AC---Court Legitimacy DA

#### No link---AFF not perceived.

Baum and Devins 10 – Lawrence Baum is a professor emeritus in the Department of Political Science at Ohio State University; his primary research focus is judges’ behavior in decision making. Neal Devins is Sandra Day O’Connor Professor of Law and Professor of Government at William and Mary Law School.

Lawrence Baum and Neal Devins, “Why the Supreme Court Cares About Elites, Not the American People,” *The Georgetown Law Journal*, vol. 98, 2010, pp. 1549-1550, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs.

It is worth underlining the point that a great deal of the Court’s work is essentially invisible to the public. Decisions in fields such as antitrust and patent law may be highly consequential, but it seems unlikely that there are strong public feelings about those decisions. Even if Justices seek to maintain the Court’s legitimacy, they have no reason to worry that public outrage in decisions in those fields will damage this legitimacy.170 More telling, the Rehnquist Court’s federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated eleven federal statutes on federalism grounds,171 thereby shifting the balance between the federal government and the states substantially. Nevertheless, these decisions (although prompting significant law review commentary) appeared to have low political salience.172 Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or any other Supreme Court invalidations of federal statutes.173

#### Court capital resilient.

Feldman 20 – Distinguished professor of law and adjunct professor of political science at the University of Wyoming.

Stephen M. Feldman, “Court-Packing Time? Supreme Court Legitimacy and Positivity Theory,” *Buffalo Law Review*, vol. 68, no. 5, December 2020, pp. 1548-1552, <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4892&context=buffalolawreview>.

In fact, political science studies suggest that the public’s diffuse support for the Court is resilient, sustained by “a reservoir of favorable attitudes or good will.”87 A “positivity bias” helps the Court maintain this good will and institutional legitimacy. According to positivity (bias) theory, “anything that causes people to pay attention to courts— even controversies— winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts.”88 Even when the Court issues a decision contrary to an individual’s personal views, that individual is unlikely to lose faith in the Court. If anything, when news of Court activities draws an individual’s attention, then that attention (to the Court) will likely reinforce the individual’s positive views of the institution. In a sense, the more one knows about the Court, the more one is likely to find its decisions legitimate (the opposite is true for Congress).89

To be sure, the Court’s legitimacy is not bulletproof: It depends on a perception that the Court is not merely another political institution. For instance, a confirmation battle in the Senate is unlikely to damage the Court’s legitimacy, but if widely viewed advertisements (related to the confirmation battle) attack the Court as purely political, then diffuse support for the Court is likely to diminish.90 Thus, while a politically salient Supreme Court decision might offend some Americans based on political ideology,91 a lack of specific support for that decision does not translate into a meaningful reduction of diffuse support. Only those Americans who already reject the Court as an institution—those individuals who have not developed a favorable attitude and good will toward the Court—are likely to denigrate it because of a small number of specific decisions. For the most part, the Court is able to maintain its institutional legitimacy despite “the ideological and partisan cross-currents that so wrack contemporary American politics.”92 Even so, sustained disappointment with the Court’s decisions over the long term, especially in politically salient cases, can weaken diffuse support for the Court. To take one example, diffuse support for the Court diminished among black Americans during the post-Warren Court years (consider the Burger, Rehnquist, and Roberts Courts’ consistent hostility toward race-based affirmative action).93

Significantly, the people’s diffuse support for and loyalty to the Court does not depend on the myth of pure law—that is, the myth of the law-politics dichotomy. To the contrary, many Americans seem to understand that Supreme Court decision making entails a combination of law and politics— the law-politics dynamic. As Gibson and Caldeira conclude: “[T]he American people seem to accept that judicial decisionmaking (sic) can be discretionary and grounded in ideologies, but also principled and sincere. Judges differ from ordinary politicians in acting sincerely . . . .”94 This insight into the Court’s institutional legitimacy has enormous implications for Democratic court-packing. Although a court-packing controversy would undoubtedly entail debates over the Court’s politically-charged decisions, the Court’s overall diffuse support would probably remain relatively stable. Most likely, in these hyper-polarized times, individuals’ political ideologies—leaning Republican or Democratic— would influence reactions to a Democratic court-packing plan. Republicans of course would oppose it, but many Democrats would likely support it, especially if Democratic politicians emphasized that they sought to return the Court to sincere and principled decision making.95 To the extent that individual views of the Court’s legitimacy might change in response to a court-packing plan, partisan shifts would likely cancel each other out. In the end, despite divergent views of the court-packing plan, the overall legitimacy of the Court itself would likely be sustained (or even grow) whether because of a positivity bias favoring the Court or a widespread Democratic (policy) opposition to the Roberts Court’s conservatism (as well as Democratic abhorrence toward recent Republican Senate maneuvers, including the rushed confirmation of Barrett, which resulted in an ironclad six-justice conservative bloc).96

#### Texas abortion decision terminally destroys legitimacy – the decision was BONKERS and totally undermined any illusion that the court cares about the rule of law

Sarat and Aftergut 9/6 – Austin Sarat is the William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College. Dennis Aftergut is a former federal prosecutor who has successfully argued before the Supreme Court.

Austin Sarat and Dennis Aftergut, “Supreme Court trashed its own authority in a rush to gut Roe v. Wade,” *The Hill*, 6 September 2021, https://thehill.com/opinion/judiciary/570958-supreme-court-trashed-its-own-authority-in-a-rush-to-gut-roe-v-wade?rl=1.

But in addition to the harms to women’s rights in this law, the court’s Sept. 1 decision in Whole Women’s Health v. Jackson reveals something dangerous to lawful society writ large: the 5-4 ultra-partisan, conservative majority has, in its haste to gut Roe, eviscerated the rule of law it is supposed to stand for and diminished the court’s own authority.

The decision adds fuel to the already strong arguments for reforming the Supreme Court and urgency to the work of President Biden’s Commission on the Supreme Court.

It concedes, perhaps even celebrates, the fact that states, and individuals, can engage in legally questionable action and evade judicial scrutiny. By allowing Texas to flout Roe’s clear meaning, the court undermines an ordered society and may be paving the way for authoritarian rule.

The decision is a radical departure from the institutional history of the Supreme Court, w

hich previously has been marked by efforts to assert and preserve the court’s exclusive prerogative to “say what the law is.” That was the crux of Chief Justice John Marshall’s famous 1803 opinion in Marbury vs. Madison, the case that established the Supreme Court as the ultimate arbiter of the Constitution’s meaning.

Over time, the court has jealously guarded its authority against those who have challenged it. It is the court’s right to have the last word on constitutional questions that has secured for it a central place in our system of government. As Supreme Court Justice Robert Jackson once explained, “We are not final because we are infallible. We are infallible only because we are final.”

And the court has time and again insisted that everyone abide by its rulings no matter how much they might disagree with them.

This was vividly demonstrated in the civil rights era during the middle of the last century when southern states refused to respect the court’s constitutional decisions and when demonstrators took to the streets to promote racial integration in defiance of court orders. The court responded by insisting to both sides: obey the laws first, and only then can you challenge our views of what the Constitution means.

When Dr. Martin Luther King and other civil rights activists ignored an Alabama state court injunction in the belief that the order to desist from a planned protest was unconstitutional, the Supreme Court upheld their arrest and conviction.

In his majority opinion in the 1967 case of Walker v. Birmingham, Supreme Court Justice Potter Stewart recognized the “substantial constitutional questions” that a challenge to that injunction would have raised. But he firmly rejected the marchers’ contention that they were free to ignore a law they believed to be unconstitutional and condemned their decision to take the law into their own hands:

“This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law…. [I]n the fair administration of justice, no man can be [the] judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.”

And the U.S. Supreme Court has not been alone in that view nor has it been alone in striking down attempts by citizens or governments to disobey existing law.

In 2004, the California Supreme Court invalidated then-San Francisco Mayor Gavin Newsom’s declaration that the city would marry same sex couples in defiance of an existing voter-approved law that declared “Marriage shall be restricted to a man and a woman.”

Justice Sotomayor’s dissent in Whole Women’s Health makes precisely the same point about courts’ exclusive role in deciding on the law’s meaning. Calling the Texas anti-abortion law a “breathtaking act of defiance,” she labelled the court’s failure to act “stunning.” In her view, it “rewards tactics designed to avoid judicial review and inflicts significant harm on the applicants and on women seeking abortions in Texas.”

Until last week, defense of the judiciary’s role in saying what the law is and insisting that others defer to its judgments has united conservative and liberal justices.

But, in Whole Women’s Health, only one conservative, Chief Justice Roberts, joined with the court’s three liberal justices in standing up for such nonpartisan jurisprudential principles. His five conservative colleagues seem so eager to gut Roe that they are willing to disembowel the judiciary’s own authority.

The risk of legal chaos from the Supreme Court’s inaction on Sept. 1 may soon be realized in a kind of Cold War between the states.

Imagine blue states reacting to Whole Women’s Health with laws permitting private lawsuits against anti-vaxxers who help someone evade a business’s COVID vaccination mandate, or against owners of banned guns whose prohibition is the subject of federal court challenges.

When the current conservative majority on the Supreme Court trashes its own authority to tilt the scales in the current culture wars, it endangers the liberty of all, no matter which side of the cultural wars they are on.

#### Future controversy thumps.

AP 19 – Associated Press

“Low-key days at Supreme Court may be ending soon” <https://www.theindianalawyer.com/articles/49087-low-key-days-at-supreme-court-may-be-ending-soon>

The Supreme Court began its term with the tumultuous confirmation of Justice Brett Kavanaugh, followed by a studied avoidance of drama on the high court bench — especially anything that would divide the five conservatives and four liberals.

The justices have been unusually solicitous of each other in the courtroom since Kavanaugh’s confirmation, and several have voiced concern that the public perceives the court as merely a political institution. Chief Justice John Roberts seems determined to lead the one Washington institution that stays above the political fray. Even Roberts’ rebuke of President Donald Trump, after the president criticized a federal judge, was in defense of an independent, apolitical judiciary.

The next few weeks will test whether the calm can last.

When they gather in private on Friday to consider new cases for arguments in April and into next term, the justices will confront a raft of high-profile appeals.

Abortion restrictions, including a controversial Indiana law, workplace discrimination against LGBT people and partisan gerrymandering are on the agenda. Close behind are appeals from the Trump administration seeking to have the court allow it to end an Obama-era program that shields young immigrants from deportation and to put in place restrictive rules for transgender troops.

There already are signs the conservative justices, apart from Roberts, are willing to take on controversial cases that are likely to produce the ideological and partisan divisions their colleagues seem eager to avoid.In recent weeks, three conservative justices accused the court of ducking its job of deciding important cases, especially when lower courts have disagreed on the outcome. Their criticism, written by Justice Clarence Thomas and joined by Justices Samuel Alito and Neil Gorsuch, came after a recent decision to avoid a case involving funding for Planned Parenthood.

Then, on the Friday before Christmas, the court divided 5-4 in refusing to allow the Trump administration to enforce new restrictions on asylum seekers. Roberts joined the four liberals. The three conservatives who were displeased by the Planned Parenthood case outcome again noted their disagreement, this time joined by Kavanaugh.

The two votes can’t be used to draw any firm conclusions about what may be happening behind closed doors at the court, as the cases arrived in different circumstances. In the Planned Parenthood case, the justices were considering whether to grant full review, a process that takes only four votes. The asylum case was an emergency appeal from the administration. At least five of the nine justices would have had to vote in the administration’s favor.

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#### Broadening standing expands the scope of the antitrust laws---prefer the literal only contextual evidence.

Morgan 76 – United States Court of Appeals, Fifth Circuit

Lewis Render Morgan, Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, United States Court of Appeals for the Fifth Circuit, July 1976, LexisNexis

Suppliers to the contractors, unlike stockholders, could not be distinguished. Allocation would be possible to provide suppliers with their lost profits without duplicating any damages paid to the contractors. Nevertheless, these damages are too attenuated and do not fit within the proximate damage theory that has been read into the antitrust laws. Such a rule would result in standing for the employees of any business injured by any violation of the antitrust laws. We are unable to agree with so dramatic an expansion in the scope of the antitrust laws. Instead, we adhere to the target area theory. We, nevertheless, do conclude that the employees in this case have standing, not because they suffered injuries as a result of their employer being victimized by violations of the antitrust laws, but because the conspiracy in this case was aimed at the employees as much as it was aimed at the employer.11 Tugboat, Inc., it is alleged, conspired with Masters, Mates, and Pilots to keep plaintiff union employees off of Tugboat, Inc., job sites, necessarily depriving the union member plaintiffs of job opportunities. Since they are in the target area, they may sue.12

#### Resolved means to express by formal vote.

**Webster’s** Revised Unabridged Dictionary, 199**8** (dictionary.com)

5. To express, as an opinion or determination, by resolution and vote; to declare or decide by a formal vote; -- followed by a clause; as, the house resolved (or, it was resolved by the house) that no money should b/’e apropriated (or, to appropriate no money).

#### USFG doesn’t have to be all three.

UIC 7 (University of Chicago Manual of Style, “Capitalization, Titles”, http://www.chicagomanualofstyle.org/CMS\_FAQ/CapitalizationTitles/CapitalizationTitles30.html)

Q. When I refer to the government of the United States in text, should it be U.S. Federal Government or U.S. federal government? A. The government of the United States is not a single official entity. Nor is it when it is referred to as the federal government or the U.S. government or the U.S. federal government. It’s just a government, which, like those in all countries, has some official bodies that act and operate in the name of government: the Congress, the Senate, the Department of State, etc.

#### AND, we’ll expressly concede their arguments that anti-trust laws have to be statutes. That’s irrelevant to our argument because courts directly interpret statutes to CHANGE THE LAW.

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

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

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

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

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

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

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

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

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

### Core Law PIC

#### CP links HARDER to innovation---first legislative change in DECADES signals SEA CHANGE---also signals to the courts that they should be more pro-plaintiff, which causes harsh court enforcement down the line.

Tracy 21– Ryan Tracy and Brent Kendall, tech and legal reporters, respectively, in WSJ’s Washington Bureau

(Ryan Tracy and Brent Kendall, 3-12-2021, "Antitrust Law: What Is It and Why Does Congress Want to Change It? ," WSJ, <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>)

U.S. antitrust laws date back more than 130 years and affect every part of the economy. Democrats and Republicans are now considering the most significant changes in decades. Here's what you need to know about what might be coming:

What is antitrust law?

Antitrust laws are designed to protect and promote competition, guided by the principle that consumers are better off when companies battle for their business by offering better services and prices.

The laws date to the 1890 Sherman Antitrust Act, when powerful monopolies (then known as "trusts") in industries such as oil and railroads exercised huge influence over American trade. These laws bar price-fixing, market-rigging, monopolistic practices and mergers that pose a substantial threat to competition.

Why does Congress want to update the laws now?

Both political parties have been galvanized by concern that the nation's giant tech companies -- including Alphabet Inc.'s Google, Amazon.com Inc., Apple Inc. and Facebook Inc. -- hold unchecked power over the economy and American society, and don't have any true rivals in the sectors they dominate.

Are Democrats and Republicans in agreement?

To a degree, but they have different perspectives.

Democrats say the tech giants are a symptom of a broader disease, pointing to studies showing many U.S. industries have grown more concentrated. With fewer competitors, they say, big companies are tilting the scales in favor of the rich and powerful by, for example, paying their workers less or shutting off a path to startups that could offer better products.

Republicans generally aren't convinced concentration is a problem in and of itself, pointing out that operating at a large scale can allow big companies to cut prices. But they do worry about it in some industries. In social media, many in the GOP say, a lack of competition for Facebook, Google's YouTube and Twitter Inc. empowers those platforms to treat conservatives unfairly. (The companies deny political bias.) Republicans also see increased antitrust enforcement as a better approach than direct government regulation of the marketplace.

What changes are they considering?

Some of the proposals are relatively modest, including bigger budgets and new civil penalty power for antitrust enforcers at the Federal Trade Commission and the Justice Department.

Lawmakers have also proposed changes to legal standards to make it easier for enforcers to halt proposed mergers and business practices that threaten competition. And some have called for moving some of the FTC's enforcement authority into the Justice Department, rather than having the agencies share power.

There is also a bipartisan proposal to allow local news outlets to join to negotiate with dominant platforms such as Google and Facebook.

What are some of the tougher proposals?

Some lawmakers are calling for measures that would force technology companies to break apart widely used digital platforms from other business lines. This could force Amazon to separate its online marketplace, or Google to split off its search engine. Both companies operate many other businesses.

Existing lawsuits by the FTC, Justice Department and states could result in similar consequences for Google, and could force Facebook to shed its Instagram and WhatsApp units, but those remedies are years away at a minimum.

I've read about something called self-preferencing. What is that?

That is a practice in which companies such as Amazon and Google use proprietary platforms to promote their own products and services over those offered by competitors.

While Republicans generally aren’t in favor of breaking up big companies, a handful of GOP lawmakers say they are so concerned about the conduct of big tech platforms that they would be open to restricting self-preferencing.

That could mean a mandatory separation of certain business lines, such as Amazon dividing its e-marketplace from Amazon-made retail products or Google splitting its search engine from maps or travel.

Are the tech companies fighting back?

Yes. The tech giants and other big businesses are poised to fight many of the measures, which they see as threats to their bottom lines. Facebook and Amazon spent more on lobbying in 2020 than any other U.S. corporations, seeking to influence legislation on antitrust and other matters. The tech giants say that they face vigorous competition forcing them to constantly innovate, and that they have acquired large market shares because consumers love their products—arguments that they are now making in court.

Supporters of existing antitrust law say the current rules are sufficiently flexible for addressing the challenges presented by evolving technologies and other developments in the modern marketplace. They also say the current approach strikes a fair balance between policing markets and giving companies significant room to maneuver in the rough-and-tumble business world.

So what might happen?

Members of both parties support larger enforcement budgets and the news-industry proposal. In concept, both sides agree there might be a need for so-called interoperability and data portability rules to create more competition in the tech sector. These would allow consumers to move more easily between competing online platforms by, for instance, posting on multiple social-media sites at once or moving their shopping histories from one marketplace to another.

Some Republicans have also said they would join Democrats in supporting changes to legal standards—especially if they are targeted at the tech sector. In addition to self-preferencing, one potential area for compromise between the parties is a proposal to raise the legal burden for mergers by companies with 50% or greater market share.

Republicans would support a consolidation of enforcement agencies, but Democrats don’t appear interested.

What would the changes mean?

Even if Congress acts on only a couple of middle-of-the-road proposals, it could mark the biggest substantive changes in decades, as courts have been reading current antitrust laws more narrowly. Very large companies could have trouble getting deals approved. Tech giants could have to divest themselves of certain business lines.

If lawmakers, for example, make slight changes to reinforce broad government authority to successfully challenge mergers that threaten consumers, “that would signal to the courts that merger enforcement is important and that doubts should not always be resolved in favor of defendants,” said Wayne State University law professor Stephen Calkins.

### Court PTIX DA

#### Congress won’t do it.

Rebecca **Crotoof**, Yale Law School, J.D., **’11**

(“Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon,” The Yale Law Journal, Vol. 120)

While discussing how the Charming Betsy canon might have been used in interpreting the September 2001 Authorization for Use of Military Force, Professor Ingrid Brunk Wuerth notes several reasons why the latter understanding is less sensible.116 First, it would effectively privilege customary international law and sole executive agreements at the expense of non-selfexecuting Article II treaties.117 This is problematic, given that Article II treaties, which require formal approval from the Senate and the President, are arguably more representative than customary international law (which is established through state practice and opinio juris) and sole executive agreements (which are created by the President and are only subsequently submitted for congressional approval). Second, in applying the Charming Betsy canon, courts only **rarely suggest** that its application depends on the self-executing nature of a treaty.118 Indeed, as demonstrated above, **courts often ignore the selfexecuting status of a treaty entirely.**119 Finally, due to the difficulty of determining a treaty’s status, distinguishing between self-executing and nonselfexecuting treaties in statutory construction would **muddy the canon** for both courts and Congress.120 Imposing this distinction now—after decades of courts’ almost entirely unquestioned application of the canon121—might frustrate congressional assumptions that all treaties will serve as interpretive devices. Additionally, insofar as Congress passes statutes in the context of the longstanding Charming Betsy canon, the possibility that ambiguous ones may be interpreted to accord with non-self-executing treaties is **built into the statute itself**.122 Because Congress may easily render this interpretative method inapplicable for individual statutes, employing the Charming Betsy canon with non-self-executing treaties **does not privilege** the interests of a Senate that approved a non-self-executing treaty over the interests of a Congress **enacting a later statute.**

#### No countermajoritarian difficulty – antitrust decisions don’t contravene the popular will

Crane 13 – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust and the Judicial Virtues,” *Columbia Business Law Review*, no. 1, 2013, pp. 4, https://core.ac.uk/download/pdf/232689875.pdf.

Antitrust law is not plagued by a substantial countermajoritarian difficulty and thus presents no reason for judges to exercise passive or avoidant virtues. Judges making antitrust law do not have to worry that their decisions will trump the popular will, except in the limited sense that they may reject suits by public enforcers like the Justice Department or Federal Trade Commission ("FTC"). To the extent that judges promulgate legal norms different from those favored by the executive branch, a small countermajoritarian difficulty is presented. But since judicial antitrust decisions are theoretically reversible by Congress, the courts do not have the final word on antitrust questions, as they do in constitutional cases. There is therefore little reason for judges to worry that their decisions in antitrust cases will compromise the legitimacy of the courts by undermining popular will.

#### Even elites don’t understand antitrust decisions

Crane 13 – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust and the Judicial Virtues,” *Columbia Business Law Review*, no. 1, 2013, pp. 22, https://core.ac.uk/download/pdf/232689875.pdf.

In Trinko and Microsoft, the judges spoke with a unified voice, politely papering over their deep differences. There is a moment for such harmony, particularly in cases like Brown v. Board of Education," where the political legitimacy, independence, and power of the Court would be instantly challenged by powerful reactionary forces. One could only wish that the Supreme Court could have spoken with an equally unified voice in Bush v. Gore," whichever way the decision came out. Thankfully, courts deciding antitrust cases have few reasons to worry that their decisions will provoke serious challenges to their legitimacy, independence, or power. Given the luxury of relative indifference to their decisions in the general population, and even among the political elite, antitrust judges may, and often should, candidly disclose their differences.

#### Issue controversy doesn’t spillover – and there’s no credible threat to court perception

James L. **Gibson**, Sidney W. Souers Professor of Government Department of Political Science Professor of African and African American Studies Director, Program on Citizenship and Democratic Values Weidenbaum Center on the Economy, Government, and Public Policy Washington University in St. Louis, **’13**

(James L. Gibson, and Michael J. Nelson, Ph.D. Candidate, Department of Political Science Graduate Student Associate, Washington University in St. Louis, “Is the U.S. Supreme Court’s Legitimacy Grounded In Performance Satisfaction and Ideology?” Prepared for delivery at the 2013 Annual Meeting of the American Political Science Association, August 29 – September 1, 2013)

The **overwhelming weight of the evidence** we present in this paper is that the legitimacy of the U.S. Supreme Court is not much dependent upon the Court making **decisions that are pleasing to the American people.** The Court’s legitimacy seems not to be grounded in policy agreement with its decisions, nor is it connected to the ideological and partisan cross-currents that so wrack contemporary American politics. Whether desirable or undesirable, it seems that the current Supreme Court has a sufficiently **deep reservoir of goodwill** that allows it to **rise above the contemporary divisions in the American polity.**

These empirical conclusions have enormous theoretical importance. It seems that the Court as currently configured is unlikely to consistently disappoint either the left or the right. As we have documented above, the current Supreme Court makes fairly conservative policy, but it clearly does not make uniformly conservative policy. Thus, even the Rehnquist and Roberts Courts have made many decisions that should be pleasing to liberals, even if conservatives should be slightly more pleased with the Court.

Perhaps a court closely divided **on ideology cannot produce the consistent decisional fuel needed to ignite a threat to the institution’s legitimacy**. Some worry that an ideologically divided Court undermines the institution’s legitimacy (e.g. Liptak 2011). Perhaps the truth is exactly the opposite: an ideologically divided Court is able to **please both liberals and conservatives** with its decisions, and therefore decisional displeasure does not build to the point of challenging the institution’s legitimacy.

This then takes us to the Court’s so-called countermajoritarian dilemma, a problem in which many legal scholars are currently interested. At least a portion of this rekindled interest has been stimulated by the Court’s decision in Citizens United. Pildes (2010) declares that “Citizens United is the most countermajoritarian decision invalidating national legislation on an issue of high public salience in the last quarter century” (157). The countermajoritarian nature of the decision is reflected in evidence that the American people, by a fairly substantial majority, disagree with the substance of the Court’s ruling.

Let us assume that people do not question the legitimacy of decisions made by courts when they agree with those decisions. Legitimacy only comes into play when there is an objection precondition. So we will assume that the 27 % of the American people (according to an interest group poll conducted in February 2010, cited by Pildes) who agree with the Court’s decision cede legitimacy to the institution.

Nearly two-thirds (64 %) of the American people oppose the ruling. But let us assume that about half of this two-thirds extends legitimacy to the Supreme Court and is therefore willing to accept decisions with which they disagree. If we add this 32 % to the 27 % supporting the decision, then a fairly sizeable 59 % is unlikely to be willing to support schemes to attack the Court or to try to overrule its decision. Thus, the constituency for curbing the Court on most decisions is the fairly small minority who oppose the decision and who do not extend legitimacy to the Court. **These calculations explain why a coalition for attacking the Court is difficult to assemble**, and, in conjunction with the evidence that the Court today is issuing both liberal and conservative opinions, may provide a clue as to why the Court’s legitimacy is currently so stable.

The Supreme Court is a majoritarian institution, not in the sense that it is typically in substantive policy agreement with its constituents, the American people, but rather in the sense that it is dependent upon a majority granting legitimacy to the institution. And, as Clark (2009; 2011) has so ably shown, the Court seems aware of this requirement and acts to protect its core legitimacy. Thus, the Supreme Court need not make decisions pleasing to the majority all or even most of the time, and in that sense it is not a majoritarian institution (unlike, for instance, a legislature). But because the Court currently attracts legitimacy from the majority, its ability to rule against the people’s preferences, even up to one-half or so of the time, is secure. Thus, this **“new math” of institutional legitimacy** goes some considerable distance toward accounting for the efficacy and the seeming **invincibility of the current Supreme Court**.

#### Texas decision eviscerates legitimacy – it’s legal nonsense

Seddiq 9/11 – Politics reporter for Business Insider.

Oma Seddiq, “‘Lawless behavior’: Legal experts say the Supreme Court acted out of ‘political motivations’ in upholding Texas’ abortion ban,” *Insider*, 11 September 2021, https://www.businessinsider.com/legal-experts-supreme-court-is-lawless-after-upholding-texas-abortion-law-2021-9.

The Supreme Court opened the door to fierce backlash when a narrow majority of justices in a ruling last week upheld a strict Texas law that bans abortions after six weeks of pregnancy.

From President Joe Biden to advocacy leaders, critics have knocked the court's decision, arguing it flouts the constitutional right to an abortion established nearly 50 years ago under Roe v. Wade. That Supreme Court decision, along with other major abortion rulings since, protect the right to an abortion until pre-viability, or the point when a fetus can survive outside of the womb, which most experts say occurs around 24 weeks of pregnancy.

The court's refusal to block the Texas law "unleashes unconstitutional chaos," Biden said last Thursday, hours after the decision was handed down. The Department of Justice filed a lawsuit this week in an attempt to block the six-week abortion ban.

"This is the loudest alarm yet that abortion rights are in grave danger, in Texas and across the country," Alexis McGill Johnson, president and CEO of Planned Parenthood Federation of America, said in response to the ruling.

Some legal experts, too, have piled on the criticism. They argue that the Supreme Court justices, who are meant to behave as interpreters and appliers of the law, instead conducted themselves as partisan lawmakers in the Texas decision.

"Our court is broken. I mean, it's more of a political institution than it is a legal institution," Barry McDonald, a law professor at Pepperdine University Caruso School of Law, told Insider, adding that the Texas law is "flagrantly unconstitutional."

The Texas decision came via a little-known process called the 'shadow docket'

At midnight on September 1, a Texas statute that bans abortions after six weeks of pregnancy, a time when many people do not yet know they are pregnant, went into effect. The law makes no exceptions for cases of rape or incest and invites private citizens, rather than state officials, to enforce the ban.

It was not until 24 hours later when the Supreme Court responded to a request from abortion providers in the state to block the law. The court declined the appeal, and handed down its 5-4 opinion via a little-known process dubbed the "shadow docket."

The shadow docket, a term coined by University of Chicago law professor William Baude in 2015, refers to the range of decisions the Supreme Court makes that fall out of line with its normal routine. Unlike the lengthy process the court uses to decide 60-70 major cases per term, these shadow docket rulings are usually short, unsigned and could come before any oral arguments take place before the court, as was the case with the Texas decision.

Traditionally, the court uses the shadow docket for procedural purposes — to accept or deny applications for emergency action — in typically small, uncontroversial cases. But in recent years, the court's use of the shadow docket has sparked outrage over what critics describe as increasingly partisan and unsubstantial rulings, including now in the Texas abortion case.

"In the abortion case, it's not only short, it's just a jumble of nonsense," Richard Pierce, a law professor at the George Washington University Law School, told Insider of the court's opinion. "It's incoherent. The reasoning makes no sense at all."

The court's majority, in an unsigned opinion, argued that its ruling was technical and not based on the substance of the Texas law, which could still be legally challenged.

"In particular, this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts," the majority wrote.

Yet experts dispute the court's decision-making. "That's lawless behavior," Pierce said.

"It just concerns me tremendously," he added. "To me, the court should never take any action without providing a full set of reasons, telling us why it acted as it did. And the court has not been doing this in these cases that are referred to as the shadow docket."

"It's stunning," McDonald said of the court's ruling. "It just adds to this perception that the court is acting out of political motivations as opposed to impartial and objective application of legal principles."

#### The Texas decision was the single largest threat to constitutional legitimacy in all of recent history – allows states to circumvent law through vigilantism

Bernstein 9/2 – Bloomberg Opinion columnist.

Jonathan Bernstein, “Supreme Court Abets Lawlessness in Texas Abortion Ruling,” *Bloomberg Opinion*, 2 September 2021, https://www.bloomberg.com/opinion/articles/2021-09-02/texas-abortion-law-supreme-court-chooses-lawlessness-kt2ujvc9.

But well beyond that: Procedure matters, and the ad hoc, unjustified procedure in this case — procedure that produced a sharp and compelling dissent from Chief Justice John Roberts, who may eventually join a majority to destroy or overturn Roe — may have done as much to undermine the rule of law as anything we’ve seen in these last years of threats to constitutional government.

It simply can’t be the case that state governments can eliminate established constitutional rights by structuring laws so that they must go into effect, thus robbing people of those rights, without the courts having any option of stopping them. That’s what Texas and a handful of judges have done in this case, and it’s wrong and it’s lawless even if Roe was incorrectly decided and the Texas law — which effectively puts abortions off limits after six weeks of pregnancy by giving citizens the power to sue anyone who “aids or abets” them — would eventually be upheld (for more detail, see Rick Hasen’s reaction).

The courts are a political branch. They always have been. They’re supposed to be. That’s not a problem.

But there are implicit but important rules about how they are political. Precedents can be overturned. They can be evaded so many times and so many ways that they no longer exist. They cannot simply be ignored. Justices can be partisan — there’s nothing new in that — but they need to cloak it in proper form, and proper procedure. They can’t simply say that they are ruling such-and-such a way because they are Republicans, or because that’s the outcome they want. Nor can they veil it so thinly that they might as well say so explicitly.

Or, that is, they can — but in doing so, they behave improperly, and threaten not only the legitimacy of the judiciary but of the entire system. A five-Justice majority that essentially says they’ll do whatever they want because they have five votes and tough luck to anyone else — and yes, that’s basically what the Court did in this case and has done or come close to doing in others — is acting lawlessly, full stop. In doing so, these five Justices are inviting everyone else in the political system to simply do whatever they have the power to do, whether it’s overturning elections, packing or stripping jurisdiction from the courts, or whatever else they can get away with.