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## 1AC

**1AC---Access**

Advantage 1 is Access---

**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.

**Innovation not all created equal – Only nascent firms foster transformative tech innovation across sectors, AND it can’t be predicted or directed**

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(C. Scott, and Tim, “Nascent Competitors,” 168 U. Penn. L. Rev. 1879)

Over the last century and a half, small, innovative firms have played a **particularly important role** in the process of **innovation** and competition. This is not to discount the important history of innovation at big firms with large research laboratories, such as Bell Labs, Xerox PARC, and research labs at General Electric and Merck.30 However, over the same period, a significant number of disruptive innovations—**those that transform industry**—have come out of **very small firms** with new technologies **unproven at the time**: examples include the **Bell** Telephone Company, RCA, **MCI**, Genentech, **Apple**, **Netscape**, and dozens of others.31

There is a **particular competitive significance** of the **big innovations** at the **smaller firms,** for they also represent competitive entry, and sometimes **completely transform** the industry.32 New, unproven innovators are a key source of disruptive innovation.33 Consider that Bell’s telephone did not improve the telegraph, **but replaced it**, or the impact of Apple’s personal computer on the computing industry. As this suggests, **nascent competitors** can hold the promise of offering **fresh competition for the market**, not just **in** the market. They have the capacity to displace an incumbent through a **paradigm shift**—for example, a new platform for developing software or decoding a genome. **Nascent competition** tends to be **important** in industries marked by **rapid innovation** and **technological change**. **Software**, **pharmaceuticals**, mobile telephony, **e-commerce**, **search**, and social network services **are leading examples**.

Future potency. Second, a nascent competitor is relevant due to its **promise of future innovation**. Its potency is not yet fully developed and hence unproven. Whether that innovation will make a difference in the marketplace is subject to significant uncertainty. That is due to the unpredictable rate and direction of technological change. This uncertainty stems from the same forces of technological progress that make innovation so valuable. The nascent competitor may fail in various ways: the unproven cure, despite highest hopes, may flunk its clinical trials; the technologies thought to be the future might, in fact, be overrated. This uncertainty may not be a quantifiable risk, like the odds in a casino, but closer to Knightian true uncertainty—in other words, not readily susceptible to measurement.34 The unpredictable path of innovation **often results in product plasticity**, in which products evolve and are used for purposes **different than the original**. For example, in the 1990s, mobile telephones gained popularity as a complement to a wired telephone, as a means for making calls on the go.35 Today, they compete with land lines, cameras, computers, televisions, and credit cards. General purpose technologies such as computing and Internet connectivity act as powerful fuel for unpredictable change.36 Uncertainty about what products the incumbent and the nascent competitor will actually offer in the future has a further consequence—uncertainty about the degree to which those products will actually compete.

**Only a tech ecosystem that supplements Big Tech with many small disruptive innovators which are independent BUT able to access platforms’ data will allow us to beat China in AI. Centralization guarantees defeat, because China’s better at it and has way more people! Try or die for competitive innovation.**

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(Tom, “Digital Competition With China Starts With Competition At Home,” <https://www.brookings.edu/wp-content/uploads/2020/04/FP_20200427_digital_competition_china_wheeler_v3.pdf>)

The United States and China are engaged in a **technology-based conflict** to **determine** **21st-century** international economic **leadership**. China’s approach is to identify and support the research and development efforts of a handful of “**national champion**” companies. The **dominant tech companies** of the U.S. **are de facto embracing this** Chinese policy in their effort to maintain domestic marketplace control. Rather than embracing a China-like consecration of a select few companies, America’s digital competition with China **should begin with meaningful competition** at home and the allAmerican reality that competition drives innovation.

America’s dominant tech companies have seized upon the competition with China as a rationale for why their behavior should not be subject to regulatory oversight that would, among other things, promote competition. “China doesn’t regulate its companies” has become a go-to policy response. When coupled with “of course, we support regulation, but it must be responsible regulation,” it throws up a smokescreen that allows the dominant tech companies to make the rules governing their marketplace behavior.

At the heart of digital competition — both at home and abroad — is the capital asset of the 21st century: **data**. Initiatives such as **machine learning** and **artificial intelligence** are data-dependent, requiring a large data input to enable algorithms to reach a conclusion. China’s immense population of almost 1.5 billion gives it an advantage in this regard. By definition, a population that approaches five times the size of the U.S. population produces more data. The previously “backward” nature of the Chinese economy has resulted in another Chinese data advantage: New smartphone-based apps, created in place of the digital integration that China previously lacked, produce a richer collection of data. This bulk and richness of Chinese data creates **an inherent digital advantage** when compared to the United States.

If the United States **will never out-bulk China** in the quantity and quality of data**, it must out-innovate China**. Here, the United States **has an advantage**, **should it choose to take it**. **The centralized control** of the Chinese digital economy **is an anti-entrepreneurial force**. In contrast, **innovation** is the hallmark of a free and open market. But the domestic market must, indeed, be free, open, and **competitive**.

Currently, the American digital marketplace **is not competitive**. A handful of companies **command** the marketplace by hoarding the data asset others need to compete. As innovative as America’s tech giants may be, they represent a **bottleneck** **that starves independent innovators** **of the mother’s milk of digital competition**. **If America is to out-innovate China**, then American **innovators** **need access** to the **essential data asset** **required for that innovation**.

**The nation’s response to Chinese competition must not be the adoption of China-like national champions**, nor the “China doesn’t regulate its companies that way” smokescreen. American public policy should embrace the all-American concept of **competition-driven innovation**. This begins with **breaking the bottleneck** that withholds data from its **competitive application**. This **does not necessarily mean** **breaking up** the dominant companies, but it does mean breaking open **their mercenary lock** on the **assets essential for competition-driven innovation**.

#### Scale and novelty of innovation crater after mergers---empirics.

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Amit, “Firm boundaries matter: Evidence from conglomerates and R&D activity,” Journal of Financial Economics, 2014, 381-405, Elsevier

This paper examines the impact of the conglomerate form on the scale and novelty of corporate Research and Development (R&D) activity. I exploit a quasi-experiment involving failed mergers to generate exogenous variation in acquisition outcomes of target firms. A difference-in-differences estimation reveals that, relative to failed targets, firms acquired in diversifying mergers produce both a smaller number of innovations and also less-novel innovations, where innovations are measured using patent-based metrics. The treatment effect is amplified if the acquiring conglomerate operates a more active internal capital market and is largely driven by inventors becoming less productive after the merger rather than inventor exits. Concurrently, acquirers move R&D activity outside the boundary of the firm via the use of strategic alliances and joint ventures. There is complementary evidence that conglomerates with more novel R&D tend to operate with decentralized R&D budgets. These findings suggest that conglomerate organizational form affects the allocation and productivity of resources.

1. Introduction

Do firm boundaries affect the allocation of resources? This question had spawned significant research in economics since it was raised in Coase (1937). A large body of work has focused on comparing the resource allocation in conglomerates relative to stand-alone firms to shed light on this issue. Theoretically, there are completing views on this aspect. On the one hand, Alchian (1969), Wiliamson (1985), and Stein (1997), among others, have put forth the view that conglomerates, by virtue of exerting centralized control over the capital allocation process, may do a better job in directing investments than the external capital markets. On the other hand, the “dark side” view of internal capital markets argues that problems of corporate socialism are more prevalent in conglomerates making them less efficient in resource allocation (Rajan, Servaes, and Zingales, 2000; Scharfstein and Stein, 2000).

Estimating the effects predicted by these theories has proven challenging. On the one hand, there is a broad brush approach that argues that efficiency of conglomerates can be compared to stand-alone firms by examining their relative market values. This approach has, however, been criticized as being indirect and tainted by endogeneity bias which is hard to account for.1 The other, more direct approach, has been to examine the productivity differences across organizational forms to make assessment about resource allocation (Maksimovic and Philips, 2002; Sc hoar, 2002). In this paper, 1 extend the latter by focusing on one activity and demonstrating that a causal link exists between R&D productivity differences and organizational form. By doing so, I hope to provide evidence that firm boundaries can matter for allocation of resources.

I choose to focus on innovative activity following the argument made in Wiliamson (1985) that “... in the presence of asset specificity, uncertainty, and opportunistic behavior—differences in internal organization may impact innovative behavior ..." The intuition behind this idea is simple. Novel research projects are especially characterized by significant informational asymmetries between researchers and outside evaluators. This may provide researchers in divisions leeway to manipulate the information they transmit to corporate bosses, especially if they are faced with the possible threat of reallocation of resources by corporate headquarters. Recognizing this problem, high-level managers may be reluctant to embark on novel projects in the first place. Thus, it is precisely those organizations that attempt to exploit the efficiencies of a centralized resource allocation process that may end up fostering mediocrity in their divisional R&D activities.2

I use information in the Compustat files and from the 423,640 patents granted by the United States Patent and Trademark Office (USPTO) during the sample period to shed light on this question. I measure the scale of a company’s R&D output by the number of patents its research generates. In addition, I measure the novelty of its research program by the average number of citations its patents receive in subsequent patent applications. I start by providing some suggestive evidence by evaluating these measures for Compustat firms over 1980-1998. In particular, an average patenting single-segment firm produces patents that generate more citations than those obtained by the multi-segment firms. In addition, conglomerates with more active internal capital markets and higher implied competition for R&D resources do, on average, conduct less-novel research.

These results, however, only show an association between internal capital markets and research output. There may be a concern that these effects are driven by endogenous selection rather than the impact of organizational form on R&D activity. For instance, many conglomerates may have grown by acquiring firms that have the potential to come up with novel ideas in the future. Alternatively, they may acquire firms with one big idea which has already been developed. Both these arguments would lead to different biases in estimates that compare the average R&D productivity of conglomerate firms relative to stand-alone firms. The main identification strategy of the paper accounts for these selection concerns by exploiting a quasi-experiment.

The experiment constructs two groups of firms: a “treatment group” comprised of firms taken over in a friendly merger and a “control group” that is assembled from a sample of targets whose mergers failed to go through. The important consideration for empirical design is that the reasons for failure of the friendly merger of the control group be unrelated to R&D policy of the target. I read news articles for each of the failed mergers in my sample and select only those to be a part of the control group where one can argue this to be the case (e.g., deals around 1987 crash). The two groups then comprise a sample where 1 claim that the assignment of a firm into an acquirer is random. Under this assumption, I can difference out any selection concerns by comparing the R&D productivity of the firms in the treatment group pre-and post-merger with those of the control group.

This research design allows for two tests. The identification of the main estimate comes from the unsuccessful targets that were going to conglomerate acting as a counterfactual for how the successful targets would have performed R&D after the merger, had they not been acquired by conglomerates. In addition, the research design allows me to conduct a placebo test that involves targets in non-conglomerating mergers.

I employ a difference-in-differences specification which exploits within-firm variation and find that, relative to the control group, firms in the treatment group suffer a significant decline (about 60%) in novelty of their research output after the merger. This drop is driven by diversifying mergers with targets involved in non-conglomerating mergers not exhibiting any change in their R&D output What is more, I find that the drop in novelty is significantly more in treatment firms that were acquired by diversified firms which already had an active capital market in operation. These results suggest that the very internal workings of a conglomerate bring about a reduction in the novelty of research conducted there and confirm the ‘new-toy’ effect in diversified firms documented in Schoar (2002).

These findings also alleviate concerns that my results are driven by firms in the control group being more productive after the event, due to elevated market pressure after the unsuccessful merger. If it was the case, I would have also found similar effects for firms that were involved in unrelated mergers. As well, it would not immediately follow that market pressure would intensify for firms where I find the strongest results—i.e., in firms that are involved in mergers where acquirers operated a conglomerate with an active 1CM.

I further investigate the drivers of the treatment effect by examining the R&D productivity of inventors around the merger event There are two margins which could be responsible for a decline in the R&D productivity of the treatment group: on the extensive margin, individuals with ‘entrepreneurial spirit’ may leave the diversified firm; on the intensive margin, individuals may chose to stay in the firm but become less productive on the R&D dimension—both because the combined firm might be reluctant to fund their entrepreneurial ideas (Bhide, 2000; Gompers, Lemer and Scharfstein, 2005).3 I hand-collect information on all the inventors responsible for patents in the sample and exploit within-inventor variation in the data. The results suggest that the treatment effect is largely driven on the intensive margin. In particular, the impact of invention of an average inventor in the treatment group falls more than 50% post-merger. While there is an exodus of inventors after the merger event, the rate of exit is similar for both the control and treatment groups.

#### Foreign linkages render large firms vulnerable to Chinese influence.

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Dakota Foster, Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” CSET Issue Brief, Center for Security and Emerging Technology, May 2020, https://www.geopolitic.ro/wp-content/uploads/2020/05/CSET-Antitrust-and-Artificial-Intelligence.pdf

A post-breakup AI sector composed of smaller firms might have fewer foreign governments and technology linkages, reducing the risks of U.S. government contracting for both the Pentagon and companies themselves. International expansion and domestic government contracting sometimes stand at odds. Yet the leading U.S. tech firms all have an international presence and prioritize foreign expansion.143 [FOOTNOTE 143 STARTS] For example, Google opened an AI research lab in Beijing in 2017 and has repeatedly explored growth in Chinese markets. See Douglas MacMillan, Shan Li, and Liza Lin, “Google Woos Partners for Potential China Expansion,” The Wall Street Journal, August 12, 2018, https://www.wsj.com/articles/google-woos-partners-for-potential-chinaexpansion-1534071600; Bowdeya Tweh, “Treasury Secretary Finds No Security Concerns With Google Work in China,” The Wall Street Journal, July 24, 2019, <https://www.wsj.com/articles/treasury-secretary-finds-no-security-concerns-with-googlework-in-china-11563976459>. [FOOTNOTE 143 ENDS]

As companies become more intertwined with and subject to pressure from foreign customers and governments, the Pentagon and other national security customers may view those companies and their products as too risky for defense purposes. The Pentagon has previously ended contracts on the basis of contractors’ foreign entanglements. In 2017, it terminated its relationship with Kaspersky Lab, a Russian software and cyber firm, following concerns about Russian intelligence bugs in Kaspersky products.144 In 2019, it cut ties with Huawei, the Chinese telecommunications giant,145 going so far as to ban the sale of Huawei phones on U.S. military bases.146 Huawei joined a growing list of Chinese companies the DOD monitors in an effort to protect American supply chains.147

At the same time, as U.S. firms become more entangled globally, they may choose foreign markets over U.S. government contracts. Foreign markets, particularly in China, have high sales volumes and potential for large profits. The allure of these markets could outweigh a few, large contracts with the U.S. government. Larger companies will more likely encounter this choice given their international opportunities of significant scale. Companies choosing to expand abroad would more probably accumulate foreign creditors, regulatory requirements, supply chain relationships, and other exposures reducing their appeal for the U.S. government. Smaller firms are less likely to face this tradeoff, and less inclined to choose foreign markets; for these firms, the value of international expansion often does not exceed that offered by domestic growth.

Moreover, just as the U.S. government has warned private and public entities from partnering with foreign companies like Huawei and Kaspersky, foreign governments may cut off American firms’ access to their citizens if seen as too close to Washington.

**Maintaining our innovative lead solves nuclear war**

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

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

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

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

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

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

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

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

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

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

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

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

#### Chinese security rhetoric doesn’t lead to self-fulfilling prophecies.

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Securitization theory has rightly garnered much attention among European scholars of international relations. Its basic claims are powerful: that security threats are not given, but require active construction; that the boundaries of “security” are malleable; that the declaration that a certain problem lies within the realm of security is itself a productive political act; and that “security” issues hold a trump card, demanding disproportionate resources and silencing alternative perspectives. Securitization thus highlights a familiar, even ubiquitous, political process that had received little attention in the international relations or comparative foreign policy literatures. It gave scholars a theoretical language, if not quite a set of coherent theoretical tools, with which to make sense of how a diverse set of issues, from migration to narcotics flows to global climate change, sometimes came to be treated as matters of national and global security and thereby—and this is where securitization’s critical edge came to the fore—impeded reasoned political debate. No surprise that, as Jarrod and Eric observe, securitization has been the focus of so many articles in the EJIR—and even more in such journals as the Review of International Studies and Security Dialogue. But there are (good) substantive and (not so good) sociological reasons that securitization has failed to gain traction in North America. First, and most important, securitization describes a process but leaves us well short of (a) a fully specified causal theory that (b) takes proper account of the politics of rhetorical contestation. According to the foundational theorists of the Copenhagen School, actors, usually elites, transform the social order from one of normal, everyday politics into a Schmittian world of crisis by identifying a dire threat to the political community. They conceive of this “securitizing move” in linguistic terms, as a speech act. As Ole Waever (1995: 55) argues, “By saying it [security], something is done (as in betting, a promise, naming a ship). . . . [T]he word ‘security’ is the act . . .” [emphasis added]. Securitization is a powerful discursive process that constitutes social reality. Countless articles and books have traced this process, and its consequences, in particular policy domains. Securitization presents itself as a causal account. But its mechanisms remain obscure, as do the conditions under which it operates. Why is speaking security so powerful? How do mere words twist and transform the social order? Does the invocation of security prompt a visceral emotional response? Are speech acts persuasive, by using well-known tropes to convince audiences that they must seek protection? Or does securitization operate through the politics of rhetorical coercion, silencing potential opponents? In securitization accounts, speech acts often seem to be magical incantations that upend normal politics through pathways shrouded in mystery. Equally unclear is why some securitizing moves resonate, while others [are ignored] ~~fall on deaf ears~~. Certainly not all attempts to construct threats succeed, and this is true of both traditional military concerns as well as “new” security issues. Both neoconservatives and structural realists in the United States have long insisted that conflict with China is inevitable, yet China has over the last 25 years been more opportunity than threat in US political discourse—despite these vigorous and persistent securitizing moves. In very recent years, the balance has shifted, and the China threat has started to catch on: linguistic processes alone cannot account for this change. The US military has repeatedly declared that global climate change has profound implications for national security—but that has hardly cast aside climate change deniers, many of whom are ironically foreign policy hawks supposedly deferential to the uniformed military. Authoritative speakers have varied in the efficacy of their securitizing moves. While George W. Bush powerfully framed the events of 9/11 as a global war against American values, Franklin Delano Roosevelt, a more gifted orator, struggled to convince a skeptical public that Germany presented an imminent threat to the United States. After thirty years as an active research program, securitization theory has hardly begun to offer acceptable answers to these questions. Brief references to “facilitating conditions” won’t cut it. You don’t have to subscribe to a covering-law conception of theory to find these questions important or to find securitization’s answers unsatisfying. A large part of the problem, we believe, lies in securitization’s silence on the politics of security. Its foundations in speech act theory have yielded an oddly apolitical theoretical framework. In its seminal formulation, the Copenhagen school emphasized the internal linguistic rules that must be followed for a speech act to be recognized as competent. Yet as Thierry Balzacq argues, by treating securitization as a purely rule-driven process, the Copenhagen school ignores the politics of securitization, reducing “security to a conventional procedure such as marriage or betting in which the ‘felicity circumstances’ (conditions of success) must fully prevail for the act to go through” (2005:172). Absent from this picture are fierce rhetorical battles, where coalitions counter securitizing moves with their own appeals that strike more or less deeply at underlying narratives. Absent as well are the public intellectuals and media, who question and critique securitizing moves sometimes (and not others), sometimes to good effect (and sometimes with little impact). The audience itself—whether the mass public or a narrower elite stratum—is stripped of all agency. Speaking security, even when the performance is competent, does not sweep this politics away. Only by delving into this politics can we shed light on the mysteries of securitization. We see rhetorical politics as constituted less by singular “securitizing moves” than by “contentious conversation”—to use Charles Tilly’s phrase. To this end, we would urge securitization theorists, as we recently have elsewhere, to move towards a “pragmatic” model that rests on four analytical wagers: that actors are both strategic and social; that legitimation works by imparting meaning to political action; that legitimation is laced through with contestation; and that the power of language emerges through contentious dialogue. We are heartened that our ambivalence about securitization—the ways in which we find it by turns appealing and dissatisfying—and our vision for how to move forward have in the last decade been echoed by (mostly) European colleagues. These critics have laid out a research agenda that would, if taken up, produce more satisfying, and more deeply political, theoretical accounts. In our own work, both individual and collective, we have tried to advance that research agenda. So long as securitization theorists resist defining the theory’s scope and mechanisms, and so long as it remains wedded to apolitical underpinnings, we think it unlikely to gain a broad following on this side of the pond. Second, securitization has been held back by another way in which it is apolitical—this time thanks to its Schmittian commitments and political vision. Successful securitization, in seminal accounts, replaces normal patterns of politics with the world of the exception, in which contest has no place. They imagine security as the ultimate trump card. But, in reality, the divide is not nearly so stark. Security does not crowd out all other spending priorities—or states would spend on nothing but defense and “securitized” issues. Nor does simply declaring something a matter of national security guarantee its funding—or global climate change counter-measures, including research on renewable energies, would be well-funded. Nor are security issues somehow aloof from politics: politics has never truly stopped “at the water’s edge.” Securitization considers only the politics of security. Its strangely dichotomous optic cannot see or make sense of the politics within security. In ignoring the politics within security, securitization is of course in good company. Realists of all stripes have paid little attention to domestic political contest, except as a distraction from structural imperatives. But while realism is unquestionably a powerful first-cut, this inattention to the politics within security is also among the reasons so many have found it wanting. As Arnold Wolfers long ago observed, some degree of insecurity is the normal state of affairs. But “some may find the danger to which they are exposed entirely normal and in line with their modest security expectations while others consider it unbearable to live with these same dangers.” And states, he further argues, do not actually maximize security—almost ever. “Even when there has been no question that armaments would mean more security, the cost in taxes, the reduction in social benefits, or the sheer discomfort involved have militated effectively against further effort” (1962:151, 153). A securitization perspective renders all this politics within security inexplicable. And yet, as Wolfers saw half a century ago, it is crucial.

#### That’s because the risk of escalation during a crisis is real and balancing is key

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You’ve probably heard that China’s military has developed a “carrier-killer” ballistic missile to threaten one of America’s premier power-projection tools, its unmatched fleet of aircraft carriers. Or perhaps you’ve read about China’s deployment of its own aircraft carrier to the Taiwan Strait and South China Sea. But heavily defended moving targets like aircraft carriers would be a challenge to hit in open ocean, and were China’s own aircraft carrier (or even two or three like it) to venture into open water in anger, the U.S. submarine force would make short work of it. In reality, the greatest military threat to U.S. vital interests in Asia may be one that has received somewhat less attention: the growing capability of China’s missile forces to strike U.S. bases. This is a time of increasing tension, with China’s news organizations openly threatening war. U.S. leaders and policymakers should understand that a preemptive Chinese missile strike against the forward bases that underpin U.S. military power in the Western Pacific is a very real possibility, particularly if China believes its claimed core strategic interests are threatened in the course of a crisis and perceives that its attempts at deterrence have failed. Such a preemptive strike appears consistent with available information about China’s missile force doctrine, and the satellite imagery shown below points to what may be real-world efforts to practice its execution. The People’s Liberation Army Rocket Force: Precision Strike with Chinese Characteristics The PLA Rocket Force originally focused on nuclear deterrence. Since the Cold War, the force has increasingly focused on the employment of precision-guided conventional ballistic and land attack cruise missiles. The command now consists of about 100,000 personnel and was elevated in December 2015 to a status co-equal to that of China’s other military services. In terms of specific missions, Michael S. Chase of the U.S. Naval War College wrote in 2014 that PLA Rocket Force doctrine calls for a range of deterrence, compellence, and coercive operations. In the event that deterrence fails, the missions of a conventional missile strike campaign could include “launching firepower strikes against important targets in the enemy’s campaign and strategic deep areas.” Potential targets of such strikes could include command centers, communications hubs, radar stations, guided missile positions, air force and naval facilities, transport and logistical facilities, fuel depots, electrical power centers, and aircraft carrier strike groups. Chase also stated that, “In all, Chinese military writings on conventional missile campaigns stress the importance of surprise and suggest a preference for preemptive strikes.” And while most Sinologists discount the idea of a true bolt-from-the-blue attack in a crisis without first giving an adversary a chance to back down, preemptive missile strikes to initiate active hostilities could be consistent with China’s claimed overall military strategy of “active defense.” As a 2007 RAND study of China’s anti-access strategies explained, “This paradox is explained by defining the enemy’s first strike as ‘any military activities conducted by the enemy aimed at breaking up China territorially and violating its sovereignty’…and thereby rendered the equivalent of a ‘strategic first shot.’” China analyst Dean Cheng stated similarly in 2015, “From Mao to now, the concept of the active defense has emphasized assuming the strategic defensive, while securing the operational and tactical initiative, including preemptive actions at those levels if necessary.” Thus, China could consider a preemptive missile strike as a defensive “counter-attack” to a threat against China’s sovereignty (e.g., over Taiwan or the South China Sea) solely in the political or strategic realm. If such a strike still seems unlikely, consider that U.S. military and civilian leaders may have a blind spot regarding the capabilities of the PLA Rocket Force. The bulk of the PLA Rocket Force — the conventionally armed precision-strike units — have no real counterpart in the U.S. military. American long-range ballistic missiles are all nuclear-tipped and therefore focused on nuclear deterrence, and the Army’s short-range tactical ballistic missiles are designed for battlefield use. Also, per the Intermediate Nuclear Forces Treaty with Russia, the United States fields no medium- or intermediate-range ballistic missiles of any kind, nor any ground-launched land-attack cruise missiles (LACMs). When Americans think of preemptive strike, they likely think of weapons launched by air or sea-based platforms, discounting the viability of a different paradigm: ground-based precision-strike missiles used for the same mission. Coming of Age A 2015 RAND study said that by 2017 (i.e., now) China could field about 1,200 conventionally armed short-range ballistic missiles (600-800 km range), 108 to 274 medium-range ballistic missiles (1000 to 1500+ km), an unknown number of conventional intermediate-range ballistic missiles (5,000 km), and 450-1,250 land attack cruise missiles (1500+ km). RAND also estimated that improvements in the accuracy of China’s ballistic missiles may allow them to strike fixed targets in a matter of minutes with an accuracy of a few meters. RAND assesses that key U.S. facilities throughout Japan could already be within range of thousands of difficult-to-defeat advanced ballistic and cruise missiles. Even U.S. bases on the island of Guam could be within range of a smaller number of missiles (See Figure 1). [ FIGURE 1 OMITTED ] Fig. 1: PLA Rocket Force Missile ranges vs. U.S. bases in Asia. In recent years, the PLA Rocket Force appears to have been making real the specific capabilities necessary to support execution of the preemptive strike discussed above. As examples, a 2009 RAND study of open-source literature suggested that flechette sub-munitions would likely be used against missile launchers, parked aircraft, fuel tanks, vehicles, air defense weapons, and ships in port. Penetrating munitions would be used against airfield runways, aircraft shelters, and semi-underground fuel tanks. In terms of sequencing, the study suggested that an initial wave of ballistic missiles would neutralize air defenses and command centers and crater the runways of military air bases, trapping aircraft on the ground. These initial paralyzing ballistic missile salvos could then be followed by waves of cruise missiles and Chinese aircraft targeting hardened aircraft shelters, aircraft parked in the open, and fuel handling and maintenance facilities. These capabilities may already have been tested at a ballistic missile impact test site (see Figure 2) located on the edge of the Gobi Desert in western China. Commercial satellite images seem to show a range of test targets representing just the sort of objectives discussed in the doctrine above, including groups of vehicles (perhaps representing mobile air and missile defense batteries — see Figure 3), aircraft targets parked in the open (Figure 4), fuel depots (Figure 5), runway cratering submunition tests (Figure 6), electrical power facilities (Figure 7), and the delivery of penetrating munitions to hardened shelters and bunkers (Figure 8). Of note, the 2007 RAND study mentioned above stated that submunitions are generally not capable of penetrating the hardened shelters use to house fighter aircraft at many air bases, that China’s ballistic missiles lack the accuracy to ensure a high percentage of direct hits using unitary warheads, and thus, “fighter aircraft in hardened shelters would be relatively safe from Chinese ballistic missile attack.” This clearly appears to no longer be the case, and the demonstrated ability to precisely deliver penetrating warheads to facilities such as command centers in a matter of minutes could also provide a key capability to destroy them, with their command staffs, in the initial waves of an attack. [ FIGURE 2 OMITTED ] Fig. 2: Possible PLA Rocket Force ballistic missile impact range in Western China. [ FIGURE 3 OMITTED ] Fig. 3: Left side – Possible vehicle targets with sub-munition impact pattern, imagery dated Dec. 2013. Right side – U.S. Patriot air and missile defense battery, Kadena Air Base, Okinawa, Japan. Scale of sub-munition pattern overlaid for comparison. [ FIGURE 4 OMITTED ] Fig. 4: Possible parked aircraft target, imagery dated August 2013. Upper left aircraft shaped target, imagery dated May 2012. Lower right – F-22 Fighter Parking Area, Kadena Air Base, Okinawa, Japan. [ FIGURE 5 OMITTED ] Fig. 5: Possible test targets simulating above-ground fuel tanks, imagery dated September 2012. Compared to actual fuel tanks in Japan, similar scale. [ FIGURE 6 OMITTED ] Fig. 6: Possible runway cratering munition testing, imagery dated Sept. 2012. [ FIGURE 7 OMITTED ] Fig. 7: Possible mock electronic substation target, imagery dated July 2013. Note no electrical lines running to or from the target in its very remote location. While no craters are visible, disablement may be planned using other methods, such as dispersal of conductive graphite filaments. [ FIGURE 8 OMITTED ] Fig. 8: Possible hardened aircraft shelter or bunker test targets, imagery dated Oct. 2016. Penetrator sub-munition impacts visible. Lower right: Misawa Air Base, Japan, similar scale. China has not been shy about displaying the advancing capabilities of the PLA Rocket Force. Beijing openly displayed some of its latest missiles (such as DF-26 “Guam-killer” missile) in its 70th anniversary parade in 2015 and painted the missiles’ identification on their sides in western characters, in case anyone missed the point. The PLA Rocket Force also put out a recruiting music video and other TV footage showing the employment of multiple coordinated missile launches, as well as the use of submunitions. Pearl Harbor 2.0? In 2010, Toshi Yoshihara of the U.S. Naval War College wrote that authoritative PLA publications indicated that China’s missile forces might attempt a preemptive strike to knock out the U.S. Navy in Asia by specifically targeting vulnerable carriers and warships in port. Yoshihara noted in particular that, “Perhaps no other place captures the Chinese imagination as much as Yokosuka,” the major U.S. naval base near Tokyo home to the U.S. Navy’s sole permanently forward-deployed aircraft carrier, USS Ronald Reagan (CVN 76), as well as other ships and vital support facilities (see Figure 9). In 2012, Dr. Yoshihara again stated that: [T]he Imperial Japanese Navy’s surprise attack on Pearl Harbor remains a popular, if somewhat tired, metaphor for the dangers of unpreparedness and overexposure to risk…But the real possibility that U.S. bases in the Western Pacific could once again be vulnerable…has occasioned little publicity or debate. [ FIGURE 9 OMITTED ] Fig. 9: Home of U.S. 7th Fleet, Yokosuka, Japan. Evidence that China may have been practicing to strike ships in port with ballistic missiles would lend credence to Yoshihara’s concerns. And such evidence exists: images taken in 2013 (see Figure 10) seem to show China testing its ability to do so. [ FIGURE 10 OMITTED ] Fig. 10: Possible moored ship and naval facility targets, imagery dated August 2013. Compared for scale with actual U.S. destroyer. Specifically, the PLA Rocket Force appears to have been practicing on several ship targets of a similar size to U.S. Arleigh Burke-class destroyers moored in a mock port that is a near-mirror image of the actual inner harbor at the U.S. naval base in Yokosuka (see Figure 11). Note what looks like an impact crater located near the center of the three ship targets, close enough to have potentially damaged all three ships with submunitions. The display of these targets may itself constitute signaling to the United States and its allies as a long-term deterrent effort. All the same, it bears considering that the only way that China could realistically expect to catch multiple U.S. ships in port as shown above would be through a surprise attack. Otherwise, with clear signs of imminent hostilities, the United States would likely have already sent its fleet to sea. Some skeptics might say that catching the U.S. flat-footed would be unlikely, but history teaches us not to discount the possibility of successful surprise attacks. [ FIGURE 11 OMITTED ] Fig. 11: Possible naval ship and harbor targets, compared to inner harbor at U.S. naval base at Yokosuka, Japan. The Need for Enhanced Deterrent Measures U.S. and allied efforts are underway to improve defensive areas such as base hardening and force dispersal, as well as to conduct advanced research into ballistic missile defenses such as high-velocity projectiles, rail guns, and lasers. My colleague Elbridge Colby has written with Jonathan Solomon extensively about conventional deterrence and the specific capabilities that the United States can develop in the next few years that will be critical to fielding a force “that can prevail in regional wars while still performing peacetime missions at a reasonable level.” The possibility that a threat of preemptive attack from the PLA Rocket Force already exists underscores an urgent need to take further action now.

#### China rise ushers in extreme ethno-nationalism

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Gray, May/June. “China's Race Problem: How Beijing Represses Minorities.” Foreign Affairs , MAY/JUNE 2015, Vol. 94, No. 3, pp. 39-46, EBSCO.

For all the tremendous change China has experienced in recent decades-phenomenal economic growth, improved living standards, and an ascent to great-power status-the country has made little progress when it comes to the treatment of its ethnic minorities, most of whom live in China's sparsely populated frontier regions. This is by no means a new problem. Indeed, one of those regions, Tibet, represents one of the "three Ts"-taboo topics that the Chinese government has long forbidden its citizens to discuss openly. (The other two are Taiwan and the Tiananmen Square uprising of 1989.)

But analyses of China's troubles in Tibet and other areas that are home to large numbers of ethnic minorities often miss a crucial factor. Many observers, especially those outside China, see Beijing's repressive policies toward such places primarily as an example of the central government's authoritarian response to dissent. Framing the situation that way, however, misses the fact that Beijing's hard-line policies are not merely a reflection of the central state's desire to cement its authority over distant territories but also an expression of deep-seated ethnic prejudices and racism at the core of contemporary Chinese society. In that sense, China's difficulties in Tibet and other regions are symptoms of a deeper disease, a social pathology that is hardly ever discussed in China and rarely mentioned even in the West.

When placed next to the challenge of maintaining strong economic growth, fighting endemic corruption, and managing tensions in the South China Sea, China's struggle with the legacy and present-day reality of ethnic and racial prejudice might seem unimportant, a minor concern in the context of the country's rise. In fact, Beijing's inability (or unwillingness) to confront this problem poses a long-term threat to the central state. The existence of deep and broad hostility and discrimination toward Tibetans and other non-Han Chinese citizens will prevent China from easing the intense unrest that roils many areas of the country. And as China grows more prosperous and powerful, the enforced exclusion of the country's ethnic minorities will undermine Beijing's efforts to foster a "harmonious society" and present China as a model to the rest of the world.

IT TAKES A NATION OF BILLIONS TO HOLD US BACK

Estimates vary, but close to 120 million Chinese citizens do not belong to the majority Han ethnic group. Ethnic minorities such as Kazakhs, Koreans, Mongols, Tibetans, Uighurs, and other groups represent only eight percent of China's population. But their existence belies a commonplace notion of China as a homogeneous society. It's also worth noting that, taken together, the regions of China that are dominated by non-Han people constitute roughly half of China's territory and that if non-Han Chinese citizens formed their own country, it would be the 11th largest in the world, just behind Mexico and just ahead of the Philippines.

Although Tibetans represent only about five percent of China's non-Han citizens, their struggle attracts significant international attention and is in many ways an effective stand-in for the experience of the other minority groups. Tibetans have long been treated as second-class citizens, deprived of basic opportunities, rights, and legal protections that Han Chinese enjoy (albeit in a country where the rule of law is inconsistent at best). The central government consistently denies Tibetans the high degree of autonomy promised to them by the Chinese constitution and by Chinese law. The state is supposed to protect minority groups' cultural traditions and encourage forms of affirmative action to give minorities a leg up in university admissions and the job market. But such protections and benefits are rarely honored. The state's approach toward the Tibetan language well illustrates this pattern: although the government putatively seeks to preserve and respect the Tibetan language, in practice Beijing has sought to marginalize it by insisting that all postprimary education take place in Chinese and by discouraging the use of Tibetan in business and government.

More overt forms of discrimination exist as well, including ethnic profiling. Security and law enforcement personnel frequently single out traveling Tibetans for extra attention and questioning, especially since a wave of protests against Beijing's policies-some of which turned violent-swept Tibet in 2008. Hotels in Chinese cities routinely deny Tibetans accommodations-even those who can "pass" as Han, since their identity cards designate them as Tibetan. Worse, since 2008, the state has placed new restrictions on Tibetans' civil rights, forbidding them to establish associations devoted to issues such as the environment and education-something Han Chinese are allowed to do.

Deprivations of that kind are part of a broader, more systemic inequality that characterizes life for Tibetans in China. Andrew Fischer, an expert on Tibet's economy, has used official Chinese government statistics to demonstrate that Tibetans are much less likely to get good jobs than their Han counterparts due to the lack of educational opportunities available to them. Even in Tibetan-majority areas, where Tibetans should enjoy some advantage, Tibetans earn lower incomes relative to Han Chinese.

It is hard to know exactly what role racism or ethnic prejudice plays in fostering these inequalities. In part, that is because it is difficult to generalize about the views of Han Chinese toward Tibetans and other minorities; just like in the West, public opinion on identity in China is shaped by the ambiguity and imprecision of concepts such as ethnicity and race. Still, it is fair to say that most Han Chinese see Tibetans and other minorities as ethnically different from themselves and perhaps even racially distinct as well.

That was not always the case. In the early twentieth century, Chinese intellectuals and officials talked about Tibetans and Chinese as all belonging to "the yellow race." By the 1950s, however, such ideas had gone out of fashion, and Mao Zedong's government launched a project to categorize the country's myriad self-identifying ethnic groups with the aim of reducing the number of officially recognized minorities- the fewer groups there were, the easier they would be to manage, the government hoped. This had the effect of creating clearer lines between the various groups and also encouraged a paternalistic prejudice toward minorities. Han elites came to see Tibetans and other non-Han people as at best junior partners in the project of Chinese nation building. In the future, most Han elites assumed, such groups would be subsumed by the dominant culture and would cease to exist in any meaningful way; this view was partly the result of Maoist tenets that saw class consciousness as a more powerful force than ethnic solidarity.

#### The key to stability is convincing them that the US is willing to run the risk of escalation. Otherwise, they will be provocative to extract concessions. Accommodation only empowers hardliners because it convinces them the strategy is working

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Oriana Skylar Mastro, assistant professor at the Edmund A. Walsh School of Foreign Service, Georgetown University, Why Chinese Assertiveness is Here to Stay, The Washington Quarterly 37:4, pp. 151–170, <http://dx.doi.org/10.1080/0163660X.2014.1002161>

The U.S. mindset needs to shift to accept greater risk without being reckless. Military power alone does not guarantee a credible deterrent. U.S. efforts to bolster its military presence in the Asia–Pacific—a central pillar of the rebalancing strategy—counter the geographic, kinetic and political pillars of China’s A2/AD strategy. For example, the United States is forward-deploying more assets in the region, such as the Marine Air Ground Task Force Detachment already deployed to Australia as well as the stated goal of positioning 60 percent of all U.S. warships to the Asia–Pacific by 2020. This addresses the geographic pillar. Attempts to address the kinetic pillar include new operational concepts such as Air-Sea Battle, which “relies on highly integrated and tightly coordinated operations across war-fighting domains” in order “to disrupt and destroy enemy A2-AD networks and their defensive and offensive guided weapons systems in order to enable US freedom of action to conduct concurrent and follow-on operations.”73 Bolstering U.S. alliances with Japan, South Korea, Australia, the Philippines, and Thailand, as well as partnerships with Indonesia, Malaysia, India, Singapore, Vietnam, and New Zealand are critical components to U.S. efforts to ensure political access and support in the region. These efforts are commendable—the United States rightly works to preserve its military superiority and retain its ability to project power in the region. During the Cold War, when the greatest pacing threats were land conflicts, forward deploying U.S. forces in Europe and Asia were sufficient to demonstrate the credibility of the U.S. commitment to peace in those regions. But China is currently testing the waters not because its leaders are uncertain about the balance of power, but because they are probing the balance of resolve. This means that staying ahead in terms of military might is insufficient in contemporary East Asia. China’s strategists are betting that the side with the strongest military does not necessarily win the war—the foundation of the deterrent pillar of its A2/AD strategy. Indeed, China’s experience in fighting the Korean War proves that a country willing to sacrifice blood and treasure can overcome a technologically superior opponent. The belief that balance of resolve drives outcomes more so than the balance of power is the foundation of China’s new, more assertive strategy; but U.S. responses to date have failed to account for it. Canned demonstrations of U.S. power fail to address the fundamental uncertainty concerning U.S. willingness, not ability, to fight. The U.S. focus on de-escalation in all situations only exacerbates this issue. The Cold War experience solidified the Western narrative stemming from World War I that inadvertent escalation causes major war, and therefore crisis management is the key to maintaining peace.74 This has created a situation in which the main U.S. goal has been de-escalation in each crisis or incident with Beijing. But Chinese leaders do not share this mindset—they believe leaders deliberately control the escalation process and therefore wars happen because leaders decide at a given juncture that the best option is to fight.75 China is masterful at chipping away at U.S. credibility through advancing militarization and coercive diplomacy. It often uses limited military action to credibly signal its willingness to escalate if its demands are not met. Strategist Thomas Schelling theoretically captured this approach when he wrote it is “the sheer inability to predict the consequences of our actions and to keep things under control … that can intimidate the enemy.”76 Because China introduces risk for exactly this reason, the U.S. focus on deescalation through crisis management is unlikely to produce any change in Chinese behavior—if anything it will only encourage greater provocations. Beijing has identified the U.S. fear of inadvertent escalation, and is exploiting it to compel the United States to give in to its demands and preferences. In this way, the U.S. focus on de-escalation may actually be the source of instability by rewarding and encouraging further Chinese provocations. To signal to China that the United States will not opt out of a conflict, Washington must signal willingness to escalate to higher levels of conflict when China is directly and purposely testing U.S. resolve. This may include reducing channels of communication during a conflict, or involving additional regional actors, to credibly demonstrate that China will not be able to use asymmetry of resolve to its advantage. The current mindset—that crisis management is the answer in all scenarios— will be difficult to dislodge, given the tendency among U.S. military ranks to focus on worst-case “great battle” scenarios. While realistic in Cold War operational planning, decision makers should consider instead the less violent and prolonged engagements that characterize Chinese coercive diplomacy when evaluating risk and reward, such as the 1962 Sino–Indian War or the 1974 Battle of the Paracel Islands. The idea that any conflict with China would escalate to a major war, destroy the global economy, and perhaps even escalate to a nuclear exchange has no foundation in Chinese thinking, and causes the United States to concede in even the smallest encounters. While the Chinese leadership has proven to be more risk-acceptant than the United States (or perhaps more accurately, to assess the risks to be less than those perceived by U.S. strategists), Xi still wants to avoid an armed conflict at this stage. In his November 2014 keynote address at the Central Foreign Affairs Work Conference, he noted that China remains in a period of strategic opportunity in which efforts should be made to maintain the benign strategic environment so as to focus on internal development.77 Ultimately, the U.S. regional objective must be peace and stability at an acceptable cost. Given this, it is critical to understand the four components of China’s A2/AD strategy, the strategic foundation for China’s recent assertiveness, and how best to maintain the U.S. position as a Pacific power. In addition to regularly attending meetings in the region and developing new technology, new platforms, and new operational concepts designed to defeat China’s A2/AD strategy, the United States needs to break free of its Cold Warbased paradigm paralysis and rethink conceptions of limited war, escalation, and risk. Scolding China and imposing symbolic costs for each maritime incident is unlikely to inspire the corrective change U.S. thinkers are hoping for. The United States needs to fundamentally change its approach by accepting higher risk and allowing for the possibility of escalation—both vertically in force as well as horizontally to include other countries. This admittedly is a difficult balance, especially given the need to avoid emboldening U.S. allies to take actions that run contrary to U.S. interests. But only by mastering these two balancing acts—focusing on balancing resolve, rather than forces, and prioritizing stability over crisis management—will the United States be able to maintain peace and stability in East Asia without sacrificing U.S. or allied interests

**Empirical evidence shows competition policy is preferable.**

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Ruben Maximiano and Cristina Volpin, December 2 2020, “The Role of Competition Policy in Promoting Economic Recovery,” OECD, https://one.oecd.org/document/DAF/COMP(2020)6/en/pdf

A significant array of empirical evidence shows that competition delivers many benefits at both macro and micro-economic levels. At the macro-economic level **competition promotes the optimal use of scarce economic resources, drives economic growth, boosts firms’ productivity and production levels, multiplies business opportunities and can help reduce inequality and create more and better jobs** (OECD, 2014[34]). At the micro level, **competition leads to better prices, greater choice and higher quality of goods and services**. Competition also accelerates the adoption of new technologies and encourages innovation. This works as a virtuous circle, since a competitive and innovative firms will spur its competitors to compete and innovate. It is this mechanism that then leads to the macro economic benefits boost of growth, benefits that accumulate over time, increasing prosperity in the long run. When the variety of innovation is not protected, consumers are more exposed and more severely affected by demand or supply shocks. This is particularly relevant in a pandemic and post-pandemic world. Using the example of the US market for medical ventilators during the Covid-19 pandemic, Scott Morton (2020[35]) underlines the importance of competition as a key driver of quality, choice and innovation and, in particular, in preserving the variety of innovation. **Competition can help ensure more stable distribution of essential goods**. Even when disruption occurs, in competitive supply chains, these may be corrected by competitors’ entry. Moss and Alexander (2020[36]) have argued that competition can help ensure that food systems (including agricultural inputs, processing, manufacturing, and distribution) are more resilient. The authors state that, while shocks such as extreme weather conditions, diseases and conflict regularly affect food supply chains, those economies where competition is vigorous are less likely to suffer disruptions.

**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**

Plan---

#### The United States federal government should increase prohibitions on platform practices that fail under rule of reason without imposing heightened burdens on plaintiffs.

**1AC---Conduct**

Advantage 2 is Conduct---

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

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

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

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

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

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

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

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

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

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

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

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

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

***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.**

**Exclusionary practices suppress innovation---sole big tech innovation has reached its ceiling**

**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.

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

**Stucke** is a co-founder of The Konkurrenz Group and a law professor at the University of Tennessee, **‘18**

(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.**

#### Monopolization leads to monoculture, which increases the risk of massive systemic failure---competition solves.

Duan 20 – Director of Technology and Innovation Policy, R Street Institute, Washington, D.C.

Charles Duan, “Of Monopolies and Monocultures: The Intersection of Patents and National Security,” Santa Clara High Technology Law Journal, Vol. 36, Issue 4, Article 5, May 2020, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1655&context=chtlj

B. Vulnerabilities of “Monocultures”

A second reason why monopoly undermines cybersecurity is that monopoly leads to a “monoculture” of single-vendor products, opening the door to massive systemic failure in the case of a cyberattack. Computer researchers developed the theory of software monocultures in the early 2000s, in response to the regular phenomenon of computer viruses and other attacks spreading rapidly by exploiting flaws in the dominant operating system at the time, Microsoft Windows.165 Where a computer system such as Windows has a commanding share of users, a virus that exploits a flaw in that system can quickly spread to infect a whole interconnected ecosystem. An operating system monopoly thus enables fast and easy spread of cyberattacks, and better cybersecurity would be achieved through greater diversity in online systems.166 As one research group posited, “a network architecture that supports a collection of heterogeneous network elements for the same functional capability offers a greater possibility of surviving security attacks as compared to homogeneous networks.”167

There has been considerable study of the theory that computer monocultures are naturally more vulnerable to attacks.168 In one study, computer science researchers reviewed a catalog of 6,340 software vulnerabilities recorded in 2007, to compare whether comparable software would share the same flaws.169 Of the 2,627 vulnerabilities applicable to application software (as opposed to operating systems, web scripts, and other software components), only 29 (1.1%) applied to substitute products from different vendors but providing the same functionality.170 By contrast, different versions of a single software product were found to share vulnerabilities 84.7% of the time.171 Thus, software monocultures share exploitable flaws even when there is some variation in versions across the monoculture; by contrast, diversity in software is almost guaranteed to prevent a single flaw from affecting all users.

In the case of 5G and wireless mobile communications, a monoculture is an especially concerning possibility. To the extent that systems such as smart city sensors or communication networks are widely deployed in a monoculture fashion, a widespread attack could have devastating consequences, potentially blacking out a region and affecting essential services such as 911.172 A monoculture that is vulnerable to so-called “rootkits” or “backdoors”—maliciously installed software that enable bad actors to commandeer systems—could also enable mass surveillance or spying by private hackers or foreign governments.173 The presence of systems from multiple vendors would mitigate these possibilities.

The monoculture theory is not without critics, but a review of those criticisms shows them to be inapplicable to contemporary communication technologies. Some critics suggest that software diversity imposes unwarranted costs on firms who must forego economies of scale and devise seemingly duplicative yet different setups of computer systems.174 But those concerns largely focus on the situation where a single firm produces and manages heterogeneous systems, concerns that are avoided where heterogeneity arises naturally through competition between two unrelated firms. Critics also argue that technological measures can create “artificial diversity” through automated randomization of software code, so software engineers can purportedly solve monoculture issues and device users need not worry about the issue.175 But even these critics acknowledge that artificial diversity techniques are often insufficient because they must make assumptions about what aspects of the technology are most vulnerable to attack, and they concede that artificial diversity cannot stop attacks involving operation of legitimate software functions in undesirable ways (sending spam emails or deleting document files, for example).176

It is widely recognized that a monoculture is unavoidable in at least one respect: Most connected devices will need to conform to technical standards.177 5G, for example, is a technical standard developed by a private industry consortium called 3GPP.178 A flaw in any such standard would render all mobile devices implementing the standard vulnerable to an identical attack.179 Avoiding these sorts of systemic flaws in standards requires rigorous development, analysis, and testing of the standard in the development process, which in turn requires ensuring that as many firms as possible, especially firms that share basic American values, are involved in the development of those standards.180 Thus, the necessary standardization of information and communication technologies is perhaps the most important reason why a competitive communication technology market is essential to cybersecurity and national security.

#### Concentration creates uniqueness.

Mike Elgan, Security Intelligence, Why Security Pros Can’t Ignore Big Data Monopolies, April 15, 2021, <https://securityintelligence.com/articles/security-pros-cant-ignore-big-data-monopolies/>

The rise of the cloud didn’t free us from concerns over who stores our data. Where matters, and major cloud providers and big data monopolies host a huge percentage of the world’s data. Thousands of organizations that store and manage personal, business and government data use big-name cloud providers. Smartphone platform companies house and process terabytes of the data that flows through mobile networks. Social networks house and control the data on billions of people worldwide — certainly the personal data of effectively all employees in your company.

And, that creates challenges, too. For example, cyber criminals and state-sponsored threat actors find data held in a central hub a tempting target. It’s time for a wider conversation among security specialists and industry leaders about how to better protect this data. Let’s take a look at the risks and challenges of a big data monopoly.

What’s the Problem With a Big Data Monopoly?

There are many problems with a big tech monopoly from a security perspective. The companies that hold data monopolies are ripe targets for attackers. Many holders of this big data do have thorough security, since they know they’re targets, too. It’s tempting to relax about data on these platforms.

But it’s also true that cyber criminals, state-sponsored threat actors, blackmailers and others all have a giant incentive to go after the monopolies, because that’s where the most data is.

**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 econom**y (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.**

#### Critical infrastructure attacks go nuclear.

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

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

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

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

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

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

**Removing AmEx’s heightened burdens is best for efficiency**

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

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

The rule of reason is **very flexible**. It permits a defendant to **rebut a prima facie case** by relying on context-specific considerations-which might relate to a separate but interrelated strand of transactions 177 -suggesting that the restraint is likely to be **procompetitive on the whole**. For example, in NCAA the Supreme Court held that, because sports fans benefit from competitive balance, this could justify a restraint designed to maintain parity among teams, notwithstanding an analogous restraint would be illegal in most other settings. Such cases provide a useful reminder antitrust is already capable of **accounting for special considerations** that **distinguish a particular commercial environment** from more conventional ones.

The Supreme Court was therefore mistaken to conclude that the new economics of platforms demands a **wholesale restructuring of the rule of reason**. 179 First, when a transaction platform imposes a restraint, this must have the same output effect on both sides of the market. As such, by properly accounting for platform economics, **we can look to the platform's dealings** with users on one side and still inquire into the restraint's **overall impact,** given that a procompetitive output increase would have to show up in both user groups. Second, the rule of reason's burden shifting framework always contemplates that a plaintiff's prima facie case **does not necessarily prove an overall anticompetitive effect**. But, where there are countervailing efficiencies suggesting the restraint is procompetitive on balance, **the defendant is in a much better position to cast light on them**. Third, even under the approach advocated here, **the plaintiff ultimately retains the burden** of persuasion as to the balance of pro and anticompetitive effects; the difference is merely that balancing is set aside until after the defendant has established a legitimate efficiency that might warrant such balancing. And, finally, the Supreme Court's decision will force courts to devise a standard for whether a market exhibits a "qualifying" degree of two-sidedness, and disputes over this will needlessly waste time and resources.

**Aff solves—the aff returns to evaluating conduct on a case-by-case basis and creates clear, enforceable guidelines**

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

(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 w**hich 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

## Case

### AT: Collapse

#### The LIO is sustainable---internal mechanisms maintain global stability and raise global standards of living---the alternative risks global catastrophe

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

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

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

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

THE RESILIENT ORDER

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

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

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

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

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

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

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

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

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

### 2AC---T - CWS

#### “Expand the scope of its core antitrust laws” requires modifying applicability.

Kovacic et al. 03 – Professor at George Washington University Law School

William E. Kovacic, Theodore B. Olson, R. Hewitt Pate, Paul D. Clement, Jeffrey A. Lamken, Catherine G. O’Sullivan, Nancy C. Garrison, David Seidman, Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, Verizon Communs. Inc. v. Law Offices of Curtis v. Trinko, 2003 U.S. S. Ct. Briefs LEXIS 513, Supreme Court of the United States, May 2003, LexisNexis

Conversely, the 1996 Act does not expand the scope of the antitrust laws to outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws. Such an expansion of Sherman Act duties would "modify \* \* \* the applicability of \* \* \* the antitrust laws" in contravention of 47 U.S.C. 152 note. Violations of the duties imposed by the 1996 Act are just that--violations of the 1996 Act, subject to the sanctions and penalties imposed by that Act. They do not automatically amount to treble-damages antitrust claims. The courts of appeals are again in accord. Pet. App. 29a; Covad, 299 F.3d at 1283 ("We agree with Goldwasser that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations."); Goldwasser, 222 F.3d at 400 (It is "both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws."); Cavalier Tel. Co., 2003 WL 21153305, at \*11-\*12 (similar).

#### Overlimiting—their interp arbitrarily excludes every core aff on the topic – undermines AFF innovation and causes unbeatable pics.

#### Precision—their evidence defines scope of “competition policy” that’s NOT a word in the resolution.

#### Functional limits: Congress CP, non-antitrust CPs, states, and topic DAs and Ks check lit explosion.

#### Reasonability---competing interps crowds out substance and leads to a race to the bottom.

### 2AC---T - Prohibitions

**Prohibitions are the means imposed on individuals**

**Battjes 9** – Assistant professor of constitutional and administrative law at the law faculty of VU University, Amsterdam,

Hemme Battjes, "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed," Leiden Journal of International Law, 22 , pp. 583-621, 9-1-2009, accessed via Nexis Uni

Does this 'relativity' of the minimum level of severity detract from the 'absolute' nature of Article 3, and hence imply a limitation or balancing as meant by the UK government? There is, arguably, no reason to suppose so. As the prohibition is defined by means of the effect a certain treatment has on the individual, its qualification as ill-treatment depends on the circumstances of the case and the features of the person concerned. Thus in Mayeka and Mitunga the Court ruled that detention of an unaccompanied five year-old child constitutes inhuman treatment, [116](https://advance.lexis.com/document/?pdmfid=1516831&crid=e2fb5ec5-8b4a-4989-a11c-3967e3c72dcb&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A605P-2S71-JS0R-23GP-00000-00&pdcontentcomponentid=400004&pdteaserkey=sr3&pditab=allpods&ecomp=qzvnk&earg=sr3&prid=f6e3a168-60b9-46d1-b026-fe8960301bc2) whereas detention under the same conditions would not (or not necessarily)do so for an adult, or the same child if accompanied by its parents. In the latter case the underlying reasoning is not that detention of the child is as such inhuman but justified by the presence of its parents. Rather, the detention of the accompanied minor would not cause fear and anguish. The minimum level of severity is, however, subject to another form of relativity:  
In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. [117](https://advance.lexis.com/document/?pdmfid=1516831&crid=e2fb5ec5-8b4a-4989-a11c-3967e3c72dcb&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A605P-2S71-JS0R-23GP-00000-00&pdcontentcomponentid=400004&pdteaserkey=sr3&pditab=allpods&ecomp=qzvnk&earg=sr3&prid=f6e3a168-60b9-46d1-b026-fe8960301bc2)

#### Specifically, implemented via legal tests.

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.

#### 1---Overlimiting--- ther interp destroys AFF strategic angles---undermines the process of AFF innovation, makes us lose to unbeatable PICs.

#### 2---Predictability---“ROR” function as prohibitions, semantic legal distinctions are arbitrary and NOT grounded in predictable evidence.

#### 3---Functional limits---states, non-antitrust and enforcement CPs, topic Ks.

#### 4---Reasonability---alternative visions encourage a race to the bottom in lieu of substantive debate.

### 2AC---Regulation CP

#### Perm do both---shields link.

Kobayashi & Wright 20 – Paige V. and Henry N. Butler Chair in Law and Economics at the Antonin Scalia Law School at George Mason; University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University, holds a courtesy appointment in the Department of Economics, former Commissioner at the Federal Trade Commission

Bruce H. Kobayashi, Joshua D. Wright, “Antitrust and Ex-Ante Sector Regulation,” Report on the Digital Economy, Section III, Global Antitrust Institute, 2020, https://gaidigitalreport.com/2020/10/04/ex-ante-regulation-versus-ex-post-antitrust-enforcement/#\_ftn29

Conclusion

Using ex-ante regulation to replace inefficient and ineffective ex-post litigation based antitrust is a familiar refrain for those interested in regulating large technology firms. But the narrative that antitrust is either solely or predominantly based on ex-post litigation is a false narrative, as both the current antitrust laws and its institutions incorporate many of the features that reformers put forth as ex-ante regulation. As a matter of optimal regulatory design, this is not surprising, as a true ex-ante approach will incorporate both approaches.

In the U.S., the Supreme Court has expanded its implied immunity and related common law limits on the use of the antitrust laws in response to the potential costs of inconsistent and overlapping regulation. This forces an ex-ante choice between antitrust and sector specific regulation when addressing specific problems associated with regulated industries. We suggest the ex-ante choice between antitrust and sector regulation be made based on the comparative institutional advantage of each approach, and that such an approach will result in the allocation of duties to deal and price setting to sector specific regulators. Because both approaches are imperfect vehicles for controlling competition, both the initial allocation between antitrust and regulation and the choice to regulate in the first place should be undertaken with caution, and expected to involve a long, slow, and costly evolution towards a more efficient system of antitrust and regulation.

#### Perm do CP---AFF’s a type of regulation.

Salinger 05 – Associate professor of criminology and sociology at Arkansas State University. PhD.

Lawrence M. Salinger, “Antitrust,” *Encyclopedia of White Collar and Corporate Crime*, 2005, https://sk.sagepub.com/reference/corporatecrime/n22.xml.

IN GENERAL, antitrust refers to the regulation of business practices that significantly reduce or deny competition and/or severely limit consumer access to goods or services at reasonable and competitive prices. In this respect, the purpose of antitrust laws is to criminalize and breakup monopolies, protect against unfair competition, and control mergers. The development of antitrust legislation began shortly after the Civil War as political legislators became increasingly skeptical of the growing power and size of business organizations.

#### Doesn’t solve adv 1—only DOJ and FTC have authority over mergers—that’s key to nacent acquisitions and fintech.

James Lowe, Sidley Austin LLP, Relevant Authorities and Legislation, 2020, <https://iclg.com/practice-areas/merger-control-laws-and-regulations/usa>

The principal merger authorities in the United States are the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The agencies share jurisdiction; and for transactions subject to premerger reporting obligations, the notification must be submitted to both agencies, and both agencies may conduct a preliminary review. Under an interagency clearance agreement, only one of the agencies will open a formal investigation into any particular merger.

#### Non-antitrust agency is bad—massive uncertainty and results in actions that undermine finely-tailored efficiency of antitrust

Huddleston, JD, Former Director of Tech and Innovation Policy at AAF, ‘20

(Jennifer, “Why Technology Should Not Be Regulated Like Finance,” September 30, <https://www.americanactionforum.org/insight/why-technology-should-not-be-regulated-like-finance/>)

Not only have there been calls to mirror regulations from the financial sector in order to change competition policy, a recent paper has proposed creating a new specialized regulatory agency to protect consumers and regulate data. As with calls for a Glass-Steagall for tech, this proposal also finds its inspiration in the financial sector, and specifically in the Consumer Financial Protection Bureau (CFPB) created in the wake of the 2008 financial crisis. This paper by former Federal Communications Commission Chairman Tom Wheeler, Phil Verveer, and Gene Kimmelman suggests the creation of a Digital Platform Agency to regulate a number of aspects of current technology platforms to promote consumer protection. The authors recognize that antitrust is a limited tool that should not be used to address policy concerns beyond its intended competition purposes. The lessons of the CFPB show, however, that creating a new agency to focus on a perceived crisis or focus on a sole industry may create new problems and result in over-regulation that deters beneficial uses of data.

The authors argue that while consumers have benefited from technologies, the current behaviors of Big Tech do not benefit consumers and “there are inadequate public policy tools available to protect consumers and promote competition.” Other advocates for creating such an agency have also pointed to data privacy incidents such as the 2018 Cambridge Analytica scandal as a reason to establish such an agency and take a more interventionalist approach.

Creating a new agency is an approach to data regulation taken by European regulators. This approach has tended to create regulatory burdens that are greater for smaller players and also to raise the cost of doing business more generally. More specific regulation on these issues also presumes that consumers’ prefer the tradeoffs of heightened privacy and limited data usage and does not allow consumers to select products that fit their preferences. For example, as the Center for Data Innovation’s Eline Chivot and Daniel Castro point out, this more regulatory approach and the differences in interpretations among European data protection authorities could increase costs and deter certain applications of algorithms and artificial intelligence. The more aggressive regulatory posture that could come from a new agency may dissuade innovators from considering new data practices by signaling the need to seek regulatory approval and increasing the compliance costs associated with pursuing new ideas.

To be sure, American consumers are not without protection when harm does occur. The Federal Trade Commission (FTC) has been an engaged enforcer when needed for consumer harms caused by digital platforms such as data breaches or unfair and deceptive practices. While there are reforms that could provide greater certainty for consumers, innovators, and regulators (as previously discussed), the current FTC approach of mostly responsive actions balances the tradeoffs involved in many data issues while still protecting consumers when harm occurs. A new agency would likely shift this approach.

#### Fails to address all platform conduct – too disparate.

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

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

If action is needed, the alternative to antitrust is some form of regulation. But broad regulation is ill-suited for digital platforms because they are so disparate. By contrast, regulation in industries such as air travel, electric power, and telecommunications targets firms with common technologies and similar market relationships. This is not the case, however, with the four major digital platforms that have drawn so much media and political attention—namely, Amazon, Apple, Facebook, and Google. These platforms have different inputs. They sell different products, albeit with some overlap, and only some of these products are digital. They deal with customers and diverse sets of third parties in different ways. What they have in common is that they are very large and that a sizeable portion of their operating technology is digital. To be sure, increased regulatory oversight of individual aspects of their business—such as advertising, acquisitions, or control of information—is possible and likely even desirable. But the core of their business models should be governed by the antitrust laws.

This Article argues that sustainable competition in platform markets is possible for most aspects of their business. As a result, the less intrusive and more individualized approach of the antitrust laws is better for consumers, input suppliers, and most other affected interest groups than broad-brush regulation. It will be less likely to reduce product or service quality, limit innovation, or reduce output. Where antitrust law applies, federal judges should be given a chance to apply the law.

#### Links to net benefit.

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

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

Few platforms are natural monopolies. If the market contains room for competition among multiple incumbent firms, regulation is usually a poor alternative. 70 It rarely comes close to mimicking competitive behavior. Regulation necessarily generalizes and applies the same rules to several firms in an area, while antitrust requires a fact-specific inquiry for each firm. This is particularly important if the firms in question are quite diverse.

Regulation also entrenches existing technologies and, in doing so, bolsters existing incumbents. For example, the Federal Communications Commission’s (FCC) longstanding willingness to protect AT&T’s dominant position from all rivals very likely held back innovation in telecommunications for decades.71 Of course, proper regulatory design might mitigate this. But if viable and robust competitive alternatives are available, regulation usually is not the best answer.

CP solvency deficits:

Counterplan text is ridiculous---

A---Goes too far---the first plank determines that harm to a single side of the market is sufficient ground for prohibition---that gets rid of the balancing with the procompetitive effects on the other side of the platform that is necessary for effective balancing--that's Hovenkamp and RozgaB---It legalizes all anticompetitive practices by platforms under antitrust law---that's wild---much more dramatic shift than the affLinks to the Bedoya DA---the first plank uses unfair or deceptive practices, which is direct language in the FTCA, which means the FTC does it and faces backlash

### 2AC---States CP

#### Perm do both---shield the link.

#### Perm do the CP---replicates the function of the federal government.

#### Perm AFF and all combos of the plank.

#### Perm AFF and increase prohibitions on interstate and foreign platform practices

#### Perm AFF and have states determine every other antitrust law besides the AFF violates Commerce Clause.

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

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

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

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

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

State Levels of Adherence

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

#### If they fiat past that, it’s an independent link—Obliterates business certainty

--A.) it’s an unprecedented shock, and makes them wonder what it’ll happen with next; and B.) it nukes uniformity of other antitrust rules throughout the country which produces massive, localized compliance burdens and conflicting rules, wrecks both small and large companies—AND, independently, it overloads state court dockets!

Baskin 6 – Of Counsel, U.S. Chamber of Commerce

Maurice Baskin, Robin S. Conrad Venable LLP, Court of Appeals of Maryland, Haas v. Lockheed Martin, September Term, 2006, Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Respondent, <https://www.chamberlitigation.com/sites/default/files/cases/files/2006/Haas%20v.%20Lockheed%20Martin%20Corp.%20%28NCLC%20Brief%29.pdf>

The present case highlights issues of great importance to the business community. In particular, the question presented poses a direct challenge to the principle, well established in Maryland, of maintaining uniformity between federal and state interpretation and enforcement of federal, state and local anti-discrimination laws. The Petitioner and her supporting amici are asking this Court to depart without justification from the U.S. Supreme Court's settled ruling that discrimination law statutes of limitations begin to run from the date on which plaintiffs are given written notice of a challenged employment decision, not the date that happens to be their last day worked. See Delaware State College v. Ricks, 449 U.S. 250 (1980), and Chardon v. Fernandez, 454 U.S. 6 (1981). Maryland courts have repeatedly held that this state's discrimination laws were modeled on the federal Civil Rights Act and that they should therefore be interpreted in a manner consistent with the federal anti-discrimination statute. The Chamber has requested leave to file this amicus brief in support of the Respondent because of concern that any reversal of the Court of Special Appeals decision will have serious adverse consequences for the business community, both in Maryland and nationally. Departure from the Ricks/Chardon limitations rule will create needless uncertainty for businesses in Maryland, and those considering doing business here, as to when discrimination claims may be brought against them. Perhaps more importantly, departure from the Ricks/Chardon rule of the U.S. Supreme Court in this case will leave the business community uncertain as to whether 3 or when else the state courts will diverge from federal interpretations of the civil rights laws. Given the large number of state and local antidiscrimination ordinances that overlap with the federal anti-discrimination laws, both within Maryland and in nearby jurisdictions, adoption of the Petitioner's arguments will place an unnecessary burden on employers that will hinder their ability to do business in this State. SUMMARY OF ARGUMENT Public policy strongly supports Maryland's longstanding practice of maintaining uniformity in the interpretation of the parallel federal and state discrimination laws. Such uniformity best effectuates the intent of the legislature, which deliberately modeled Article 49B on Title VII of the federal Civil Rights Act. Numerous courts have also recognized the importance of uniformity in federal and state decisionmaking in order to prevent widespread confusion and forum shopping. Businesses large and small who strive to comply with multiple overlapping discrimination laws - federal, state, and local – will face enormous burdens in attempting to comply with divergent definitions and limitations standards applied to substantially identical statutory language. 4 Such policy concerns are particularly strong in support of affirmance of the Ricks/Chardon standard, which has withstood the test of time and is now well established in the legal and business community. The Supreme Court's test for accrual of a cause of action in the discrimination law context properly balances the need for protection of legitimate employee claims against the equally important need to give repose to stale claims. The test has been followed for decades in all the federal courts, in the vast majority of states, and at the Maryland Commission on Human Relations ("MCHR"). It would be extremely disruptive for this Court to depart from the Ricks/Chardon standard, particularly in the circumstances of the present Petition. Such a departure from precedent would also create great and unnecessary uncertainty regarding the future of Maryland discrimination law, as employers and enforcement officials would have no way of knowing which of the previously controlling federal standards will apply to future interpretations of Maryland's parallel discrimination law. For each of these reasons, and for the reasons expressed in greater detail in Respondent's brief (which the Chamber fully supports), the Court of Special Appeals decision should be affirmed. 5 ARGUMENT I. As A Matter Of Policy, This Court Should Adhere To Its Settled Practice Of Maintaining Consistency With Federal Interpretations Of Discrimination Law. The Court of Special Appeals based its decision in this case on the longstanding principle in Maryland that decisions interpreting the language of Title VII of the federal Civil Rights Act should be relied on when faced with the task of interpreting a similar provision of Article 49B of the Maryland Code. Haas v. Lockheed Martin Corp., 166 Md. App. 163, 887 A. 2d 673, at 680 (Md. App. 2005), citing this Court's decision in State of Maryland Commission on Human Relations v. Mayor and City Council of Baltimore, 280 Md. 35, 40-43, 371 A. 2d 645 (1977), and University of Maryland at Baltimore v. Boyd, 93 Md. App. 303, 311, 612 A. 2d 305 (1992), and Pope-Payton v. Realty Management Services, Inc., 149 Md. App. 393, 402, n.6, 815 A. 2d 919 (2003). Presumably because this judicial deference is so well established, the Court of Special Appeals opinion did not elaborate on it at great length. The Chamber as amicus wishes to fill that gap and to explain the importance to the business community of this Court's continued deference to settled federal interpretation of discrimination law. As further discussed below, the Petitioner's and Amici's briefs fail to give 6 proper attention to the very significant policy considerations supporting continued reliance on the settled federal interpretation of discrimination law. At the outset, it is indisputable that this Court has long expressly relied on federal interpretation of the language of Title VII in order to interpret those provisions of Article 49B that track Title VII's language.2 Thus, in Maryland Commission on Human Relations v. Mayor and City Council of Baltimore, supra, 280 Md. at 40, 371 A. 2d at 647, this Court observed that certain provisions of Article 49B tracked verbatim the language of Title VII, and that the General Assembly amended Article 49B expressly in order "to conform the Maryland law to [Title VII]." The Court further recognized the close parallels between Article 49B and Title VII in Chappell v. Southern Maryland Hosp., Inc., 320 Md. 483, 494-496, 578 A. 2d 766, 722-23 (Md. 1990) (applying the same standard under both statutes to determining the existence of a prima facie case of retaliation), and Makovi v. Sherwin-Williams Co., 316 Md. 603, 621-26, 561 A. 2d 179, 188-90 (Md. 1989) (same as to state and federal remedial provisions). 2 Petitioner's own amici appear to concede this point, though they refuse to acknowledge its impact on the outcome of this case. See Petitioner Amici Brief at 7-8 ("Since the language and purposes of both Maryland AntiDiscrimination Laws and Title VII are congruent, this Court may look to Title VII as persuasive authority…."). 7 The Court of Special Appeals has followed suit, repeatedly looking to federal case law interpreting Title VII to analyze claims arising under Article 49B. See University of Maryland at Baltimore v. Boyd, supra, 93 Md. App. at 311; Pope-Payton v. Realty Management Services, Inc., supra, 149 Md. App. at 402, n.6; see also Ridgely v. Montgomery County, 164 Md. App. 214, 883 A. 2d 182 (Md. App. 1992) (recognizing that Chapter 27 of the Montgomery County Code is modeled on Title VII and therefore applying federal case law); and Cohen v. Montgomery County Dept. of Health and Human Services, 149 Md. App. 578, 591, 817 A. 2d 915 (Md. App. 2003) (same). Consistent with this uniform judicial authority, the Maryland Commission on Human Relations ("MCHR") adopted the same policy decades ago, i.e., applying federal case law to its own interpretations of Article 49B. See, e.g., among many other examples, Wake v. Montgomery College, Case No. DE114-1152 (MCHR Aug. 3, 1984), routinely applying numerous federal court Title VII precedents relating to every aspect of analyzing issues of discrimination and retaliation under the Maryland law. Accord, Haughton v. Mayor & City Council of Baltimore, Case No. E69- 1494 (Nov. 3, 1983) (applying the entire mode of analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 798 (1973)) (See attachments hereto). 8 In this regard, the MCHR has applied the Ricks/Chardon limitations standard since its inception in the Commission's enforcement of Article 49B. Indeed, as reflected in a closure letter issued by the Commission's Deputy Director in 1981, the MCHR expressed total adherence to the Supreme Court's ruling immediately after the issuance of Ricks, even to the point of applying it retroactively to a previously filed case that was deemed untimely under the then-new Supreme Court limitations standard. See July 7, 1981 Closure Letter of MCHR Deputy Director in Freeman v. Harford County Public Schools, MCHR Case No. E1280-104 (also attached to this Brief). Finally, Maryland is hardly alone in its reliance on federal interpretations of Title VII. The vast majority of state courts around the country have construed their discrimination laws in conformity with federal interpretations of the civil rights laws. Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W. 3d 790, 801 (Ky. 2004) (discussing reasons for state court to construe law consistently with federal law); see also, among many others, Eastin v. Entergy Corp., 865 So. 2d 49, 54 (La. 2004); Stephenson v. American Dental Association, 789 A. 2d 1248, 1250-1251 (D.C. 2002); W. Va. Univ. v. Decker, 447 S.E.2d 259, 265 (W. Va. 1994); Turner v. IDS Fin. Servs.,. 471 N.W.2d 105, 108 (Minn. 1991). 9 These decisions confirm and explain the many sound public policy reasons for maintaining uniformity between state and federal interpretations of parallel discrimination laws. First, as noted above, Maryland's courts and many others have found that uniformity of interpretation of the state and federal discrimination laws best effectuates the intent of the state legislature. Where the Maryland General Assembly saw fit to borrow language from Title VII for use in its own employment discrimination statute, the presumption plainly arises that the state legislature intended to adopt the construction afforded Title VII by the U.S. Supreme Court. Maryland Commission on Human Relations v. Mayor and City Council of Baltimore, supra, 280 Md. at 40, 371 A. 2d at 647; University of Maryland at Baltimore v. Boyd, supra, 93 Md. App. at 311 3 Second, numerous courts have recognized that uniformity of interpretation is, in and of itself, an important objective. See, e.g., Peper v. Princeton Univ. Bd. Of Trs., 389 A. 2d 465, 478 (N.J. 1978) ("[W]here federal antidiscrimination standards are useful and fair, it is in the best 3 Significantly, it was not until Title VII became law that a majority of states adopted their own antidiscrimination statutes. Article 49B itself was first amended to include prohibitions against discriminatory employment practices in 1965, i.e., after passage of Title VII. State of Maryland Commission on Human Relations v. Mayor and City Council of Baltimore, supra, 280 Md. at 37. Thus, federal law has traditionally set the standard for individual rights in the employment context. 10 interests of everyone concerned to have some uniformity in the law."); Winn v. Trans World Airlines, Inc., 484 A. 2d 392, 404 (Pa. 1984) ("[T]his Court has, in the interest of uniformity and predictability in enforcement of equal employment legislation, construed the Human Relations Act in light of principles of fair employment law which have emerged relative to [Title VII]."); W. Va. Univ. v. Decker, 447 S.E.2d 259, 265 (W. Va. 1994) (noting that court had previously adopted U.S. Supreme Court's formulation of disparate impact defense "simply because uniformity in these matters is valuable per se."). These and other cases have recognized that uniform interpretation of parallel state and federal statutes affords both employers and employees with clearer understanding of their rights and duties under similar laws and reduces forum shopping. Even small employers in Maryland are covered by the laws of numerous overlapping jurisdictions, with additional coverage often imposed on business locations only a few miles away in neighboring jurisdictions. Thus, in addition to Title VII itself and the several other federal antidiscrimination laws, employers must be concerned about the obligations imposed by Article 49B and by the human rights ordinances of multiple Maryland counties, to say nothing of the antidiscrimination laws of each of Maryland's adjacent states and the District of Columbia. Larger 11 employers like Lockheed are subject to antidiscrimination law coverage in dozens of other states, counties, cities, and territories all over the country. Absent some level of judicial uniformity among all of these different jurisdictions, particularly where they have adopted similar language in their antidiscrimination statutes or ordinances, the compliance burdens imposed on both small and large businesses can be enormous. Failure to promote uniformity of judicial interpretation of antidiscrimination laws also threatens to impose significant burdens on the courts themselves. The number of state discrimination cases has grown in recent years, as plaintiffs have attempted to exploit isolated divergences between state and federal interpretations of the discrimination laws. Parry, Executive Summary and Analysis, 18 Mental & Physical Disability L. Rep. 614, 618 (1994).4 Failure to preserve uniformity of decisionmaking in this area will likely result in excessive forum shopping and increased filing of claims in those states that depart from otherwise uniform standards of interpretation. 4 It is estimated that employment discrimination cases currently make up almost ten percent of federal courts' dockets. Sternlight, In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis, 78 Tul. L. Rev. 1401, 1424 (2004). The percentage of employment discrimination cases in state court dockets is significantly lower, but growing. Cohen & Smith, Bureau of Justice Statistics, Civil Trial Cases and Verdicts in Large Counties, 2001, at 1 (2004). 12 Adding to the potential for confusion, the current and longstanding enforcement scheme in Maryland and elsewhere contemplates coordination and cross-filing between state and federal antidiscrimination enforcement agencies. See 42 U.S.C. § 2000e-5(c) (2000). Such coordinated enforcement efforts are obviously made more difficult if each agency is governed by different sets of judicial interpretations of identical statutory/regulatory language. For these and related reasons, a recent analysis of state court deference to federal interpretations of discrimination laws concluded as follows: [U]nless state courts can identify some meaningful difference between state and federal law, some fundamental change in approach at the federal level, or some outright error on the part of the federal courts, divergent interpretation of parallel statutes will generally produce more harm than good in terms of further legislative preferences, legislative efficiency, and judicial integrity. Accordingly, state courts should presume uniform construction of parallel employment discrimination statutes. Long, "If The Train Should Jump The Track…": Divergent Interpretations of State and Federal Employment Discrimination Statutes, 40 Ga. L. Rev. 469 (Winter 2006). In the present case, no exceptional reason exists for this Court to diverge from the longstanding federal standard for interpreting the statute of limitations under both federal and state antidiscrimination laws. As further 13 discussed below, there is no meaningful difference between state and federal law on the point at issue, there has been no fundamental change in approach at the federal level for more than two decades, and there has certainly been no "outright error" on the part of the federal courts. Therefore, any decision not to follow the settled federal interpretation of the discrimination laws' statute of limitations here will create great uncertainty regarding the future enforcement of Maryland's discrimination laws, to the detriment of the business community, the workforce, and the courts.

#### 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.

#### Thousand cuts DA—too many state suits overwhelm companies—harms marginal small firms that can’t pay up

Peterson Director of Technology and Innovation, Pelican Institute, and Bolema Executive Director, Institute for the Study of Economic Growth, W. Frank Barton School of Business, Wichita State University, ‘21

(Eric and Ted, “The Proper Role for States in Antitrust Lawsuits,” https://www.sugarsync.com/pf/D7911054\_09969505\_9958002)

For novel cases of national import, states should limit their involvement to supplementing federal resources. This approach seems to have worked well in the Microsoft lawsuit and other matters, such as the merger of T-Mobile and Sprint, where five states partnered successfully with the Justice Department to find a pro-consumer settlement with the firms. States have not fared well when they bring these types of novel lawsuits on their own.

Moreover, the current wave of tech cases suggests another reason to worry about overly active state antitrust enforcement. Specifically, due to the high number of states that can bring lawsuits, the states could overwhelm a company, even with little or no evidence of harm to consumers. Google is one of the largest companies in the world and can afford the compliance and legal expense of defending its business practices. This is not true of every company facing the threat of antitrust suits, however. Twitter, for example, has often been thrown in as “big tech” despite its relatively meager value compared to Facebook, Amazon and Google. Could it survive the flurry of lawsuits Google is facing now?

Lawsuits can be costly beyond a profit and loss statement. Every case presents an opportunity to lose in court, potentially forcing a restructure or major change to part of the business. Facing too many lawsuits, any company might choose to settle with the government rather than fight it out in court, regardless of the merits. Such lawsuits may show displeasure with the actions of big tech companies, but run the risk of diverting attention from innovation that would have benefited consumers.

#### Politicized hyper-enforcement – even assuming national coordination!

Krakoff 22 – Furman Academic Scholar

Joseph Krakoff, JD, NYU Law, yes that Krakoff but it’s real and published by JustSecurity and is about consumer litigation which is his area of focus and also Michigan doesn’t read a big tech affirmative so “sue” us, Big Tech Is Not Big Tobacco, How Today's Toxic Politics Would Distort Attorneys General Consumer Litigation Against Facebook, *Just Security*, January 13, 2022, https://www.justsecurity.org/79836/big-tech-is-not-big-tobacco/

Former Massachusetts Attorney General Scott Harshbarger and former San Francisco Chief Assistant City Attorney Dennis Aftergut recently made a fascinating proposal on Just Security, arguing that state attorneys general (AGs) should lead litigation against Big Tech, as they did with Big Tobacco 23 years ago. While the proposal offers an attractively creative method of regulating Big Tech and holding it accountable, a few cautions are warranted – namely that, in today’s hyper-polarized political environment, empowering elected, partisan AGs to dictate the way in which information on platforms circulates likely comes with more costs and fewer benefits than the authors assume.

Big Tech and Big Tobacco May Not Be as Similar as They Seem

The Harshbarger and Aftergut proposal seeks to solve harms ranging from social media’s disastrous effects on youth mental health to disinformation by harnessing national coordination between all 50 AGs, akin to the litigation strategy that resulted in the Tobacco Master Settlement Agreement (TMSA) of 1998. Scholars have called the TMSA, which required the largest tobacco companies to pay over $200 billion and included every state, the functional equivalent of federal law. This nationally coordinated AG model, the authors argue, should now be transplanted to another Big T – Big Tech. They further argue that courts ought to recognize an “AGs enforcing state law” exception to the (in)famous Section 230 of the U.S. Communications Decency Act (47 U.S.C. § 230, or “Section 230”), which currently immunizes platforms like Facebook from harms that result from both content Facebook lets circulate and its moderation decisions.

Harshbarger and Aftergut’s proposal is timely. The Ohio AG recently became first to file a suit against Facebook modeled in part on the tobacco claims. Shortly thereafter, a coalition of AGs from 10 states launched a joint investigation into Instagram’s impact on teens. Harshbarger and Aftergut are very likely correct that AG suits against Big Tech will increase, prompting inevitable comparisons to tobacco suits.

As the authors point out, too, in consumer protection suits against both the tobacco companies then and tech companies now, private litigation utterly fails to generate compensation or corporate accountability. And in both cases, Congress failed to update the existing statute or pass new ones to address novel but obvious public policy problems. Those two factors make AG suits, as an option of last resort, enticing.

But private claims failed in the two contexts for very different reasons. The tobacco defendants attacked the victims as irresponsible addicts – and, employing a “blame the smoker” strategy – had a near-perfect record until the AGs got involved. As the architect of the AGs’ litigation strategy, former Mississippi AG Mike Moore, put it, the state had “never smoked a cigarette,” and so couldn’t be blamed.

Big Tech is different. Private lawsuits against platforms have failed (or are highly likely to fail) due to a federal statute known as Section 230. Section 230 essentially immunizes platforms from civil lawsuits based on real-world injuries that their user-generated content causes by treating the platforms as publishers, not speakers, even in the context of algorithmically “boosted” messages, and immunizes any “good faith” content moderation choices that the platforms do undertake, on the same publisher theory.

As the authors rightly acknowledge, for the AGs to sue the platforms regarding any of the regulatory issues they identify, they would need to get a court to hold that Section 230 didn’t apply to AGs ever when they litigated state law claims regarding any asserted “informational” harm. And they propose a novel “loophole” to do just that:

Liability is not barred for actions under state law that are “consistent with” Section 230. A strong argument is available that a[n AG] lawsuit against Facebook based on state consumer laws that prohibit deceiving the public is “consistent with” §230’s immunity for a “publisher” of content.

Although novel, such a reading is far from implausible. While historically the Supreme Court has read Section 230 broadly, that appears very likely to change as the balance of the Court shifts in favor of conservative justices. In 2020 alone, Justice Thomas publicly inveighed on Section 230’s breadth twice, explicitly castigating how it legitimizes Twitter’s power to “cut off speech” as against core First Amendment values. That position is echoed by conservative jurists on lower courts, most recently DC Circuit Judge Laurence Silberman, whose inflammatory dissent charged Section 230 with permitting powerful Silicon Valley firms to engage in extreme “repression of political speech” which is “fundamentally un-American.” Prominent conservative jurists are actively searching for a mechanism to cabin Section 230’s reach – and an AG exception based in principles of states’ rights and state sovereignty may be an appealing means solution. The Court has consistently afforded AG litigation with what it has called a “special solitude” based on strong deference to sovereign enforcement of state laws, permitting AG suits to bypass other limitations for antitrust enforcement, tobacco litigation, and, most recently, opioid litigation.

Still, the novelty of this argument will likely make it an uphill battle. And beyond the question of whether courts would recognize the “AG exception” to Section 230 is the equally important question of whether they should recognize it.

The objective of the Aftergut-Harshbarger proposal – utilizing tobacco-style suits to regulate Big Tech’s enabling of viral spread of misinformation, which endangers everything from public health to democracy itself – is beyond reproach. But it overlooks three related problems with translating the AG model from Big Tobacco to Big Tech. Taken together, these problems suggest that the costs of recognizing an AG exception to Section 230 outweigh the benefits.

What Benefits Would AG Litigation Actually Deliver?

Overall, the long-term benefits of the TMSA have been disappointing, which bodes poorly for the real-world impact of consumer litigation that takes tobacco as its model.

First, Aftergut and Harshbarger argue that transposing the TMSA model would produce financial compensation for Big Tech’s victims. But while AG Harshbarger’s state of Massachusetts used settlement money to compensate victims and fund public health initiatives, a large majority of other states did not. According to a recent article by leading public health litigation experts Robert Rabin and Nora Freeman Engstrom, the TMSA failed to compensate victims structurally: the settlement contained no requirements on how states would spend their recoveries, so the money was deposited in state general treasuries and used for whatever purpose the legislature saw fit. The result, according to Engstrom and Rabin, was that states “cannibalize[d]” the TMSA money for uses entirely unrelated to public health, let alone tobacco.

Criticism of the TMSA has come from all corners. Senator John McCain took the AGs to task for how they used the TMSA in 2003, as did numerous media reports in the early aughts. As of 2016, the America Lung Association, the main consumer advocacy group tracking use of the TMSA funds, gave 41 states an “F” because, even still, virtually none of their recovery had gone toward its intended purpose. The GAO and NIH’s assessments are equally dire, while TMSA architect Moore called the way funds were allocated one of the “biggest disappointments” of his career.

Second, and perhaps more importantly, the authors argue that the TMSA model provides a long-term and effective mechanism to regulate Big Tech. But the TMSA’s regulatory and deterrent effects on the tobacco industry were largely ineffective, and in some ways counter- productive. That settlement turned the 50 states into the biggest shareholders of the five largest tobacco companies, which some argue functionally immunized the tobacco industry from antitrust claims while locking in the Big 5’s market dominance. The Ninth Circuit expressly rejected antitrust suits despite evidence of a price-fixing conspiracy, holding they were preempted by the TMSA. The antitrust issue is more problematic in the Big Tech context where antitrust has emerged as the key vehicle of corporate accountability.

The upshot is that evidence from the vast majority states shows a TMSA approach would result neither in compensation for victims nor effective regulation of Big Tech.

AG Litigation Risks Further Polarizing Big Tech Regulation

The nationwide coordination that made Big Tobacco litigation successful would also be necessary for Big Tech litigation to work, as Aftergut and Harshbarger acknowledge. But, given the extreme levels of political polarization regarding Section 230 and Big Tech, it is more likely that AGs today would fracture along party lines and fail to coordinate nationally, which would balkanize internet regulation and feed bitter cycles of polarization.

As Margaret Lemos points out, one of the most important considerations about AG suits is how any such litigation would fit into the politics of the moment. This is because the AGs are not normal private lawyers or civil servants at the Department of Justice or Federal Trade Commission. Rather, they are majoritarian political actors – 43 of 50 are directly elected – who use their position as a springboard for higher office often enough to generate the tongue-in-cheek aphorism that “AG stands for almost governor.” As such, one crucial driver of their litigating, settling, and fund distribution choices isn’t altruism – it’s political self-interest. After all, the main reason most elected officials do just about anything is to win more elections.

#### Fifty state fiat is a voting issue---

#### a) Justifies no illegitimate NEG counterplans---opens the floodgates to private actors and foreign countries.

#### b) Divorces debate from core topic controversies to fringe fed key warrants---ruins pedagogical value of rez.

### 2AC---Cosmo K

#### Framework:

#### The burden of the negative should be proving that the aff is on-balance worse than a hypothetical alternative---

#### a---Fairness---any other interpretation shifts the goalposts and moots 9 minutes of the 1AC---that’s a prerequisite to having a debate at all.

#### b---Clash---their model justifies an infinite number of critiques which undermines comparison of political strategies---makes effective engagement impossible which flips their offense.

#### Focus on remedying discrete security concerns compatible with cosmopolitan ethics

Burke et al., Professor of Politics and IR, University of New South Wales, February ‘16

(Anthony, Katrina Lee-Koo, PhD, senior lecturer in International Relations, Monash University, and Matt McDonald is a Reader in International Relations in the School of Political Science and International Studies at the University of Queensland, “An Ethics of Global Security,” Journal of Global Security Studies)

Cosmopolitan Ethics for Global Security

The cosmopolitan ethics of security that this article proposes is based upon three fundamental principles. They are presented in a deontological form—as fundamental duties borne by all security actors. The first involves recognition of the responsibility that **all security actors bear “to create deep and enduring security for all human beings** in a form that harmonizes human social, economic, cultural, and political activity with the integrity of global ecosystems” (Burke, Lee-Koo, and McDonald 2014, 15). This principle represents the ethical endpoint: to create a global, **universal, interdependent, and** inclusive approach **to security.** In this sense, it builds upon Pogge’s (2002, 196) claim that “every human being has a global stature **as the ultimate** unit of moral concern” but pushes beyond such individualism to draw on a relational ethics that stresses the existential interdependence of humans with each other and with ecosystems (Burke 2015a). The second principle involves a commitment to consider the long-term **impact of present-day actions on future generations**. This principle recognizes that current insecurities (such as climate change) are the product of past ethical choices, and to avoid creating future insecurities we must consider the consequences of contemporary decisions. The final principle involves acceptance of “the global categorical imperative of security”: **security actors must behave as if the consequences of their actions will become global.** As already demonstrated, local actions such as resource plunder or intrastate conflict can quickly have global and often unanticipated security effects (see Kaldor 1999). Together, these three principles represent the foundation of the cosmopolitan ethic: every actor bears responsibility for the security of all actors (including ecosystems), now and into the future.

Consequently, the cosmopolitanism that we promote interlinks the **security of self with the** security of others**;** it is a relational ethic that recognizes that human existence occurs in fundamental and ongoing interdependence **with ecologies and other communities** (Burke 2007, chapter 3, 2013, 2015a). This brings the cosmopolitan concepts of equality, responsibility, and care to the fore in our image of security. First, equality ensures that all members of the global community have an equal right to security. Communities (and individuals within them) may have different security needs, but are equally entitled to have those needs met. Second, the notion of responsibility serves as a pillar of empowerment while also acting as a brake on the abuse of power. We argue that all actors **in the global system bear some responsibility** (albeit differentiated) **to ensure the security of themselves and others**. This is a moral obligation to others, to the web of sociality that enables a common existence, and a strategic awareness that every state and community’s security is dependent on the actions and cooperation of others.

#### Westphalian legalism is inevitable—only working within organized hierarchy solves

S.D. Krasner 10, political science professor at Stanford, “The Durability of Organized Hypocrisy”, in Sovereignty in Fragments: The Past, Present and Future of a Contested Concept, googlebooks

**Sovereignty** has come to provide the dominant logic of appropriateness **for** organizing political life, despite the fact that logics of consequences often dictate behaviour that is inconsistent with the basic principles of sovereign statehood and expectations of how it is actually practised. This decoupling of logics of appropriateness and logics of consequences, an example of organized hypocrisy**,-** is not a new development. It has always characterized the sovereign state system. Consequential actors have not had an incentive to align more closely dominant principles and actual behaviour. This calculus could, however, change if the core security interests of the most powerful states are threatened in ways that cannot be accommodated within existing sovereign norms. If such threats do become manifest, the decoupling between rules and norms could become even greater, or the rules of the international system might be rewritten. Neither of these outcomes, greater decoupling or new rules, is preferable to the status quo of organized hypocrisy. The concept of sovereignty embeds two separate and distinct principles and one fundamental assumption about actual practice. The three core elements of sovereignty are:

The concept of sovereignty embeds two separate and distinct principles and one fundamental assumption about actual practice. The three core elements of sovereignty are:

\* International legal sovereignty: international recognition which implies the right to enter into contracts or treaties with other states, juridical equality, membership in international organizations.

\* Westphalian/Vattelian sovereignty: the absence of submission to external authority structures, even structures that states have created using their international legal sovereignty.

\* Domestic sovereignty: more or less effective control over the territory of the state including the ability to regulate trans-border movements.

These three elements of sovereignty are analytically and empirically distinct; they are not an organic whole.' The Peace of Westphalia actually said little about what later came to be called Westphalian sovereignty. Emmerich de Vattel, a Swiss jurist, was the first explicitly to stipulate the rule of non-intervention. The elements of sovereignty are not logically related, nor have they always been conjoined in practice. Political entities can have international legal sovereignty, recognition, without having Westphalian/Vattelian sovereignty or effective domestic sovereignty. States can have effective and autonomous domestic governance without being recognized. They can enjoy recognition and effective domestic governance without having Westphalian/Vattelian sovereignty. In the contemporary world there are two striking deviations from the conventional sovereignty script: the European Union, whose members have used their international legal sovereignty to compromise their Westphalian/Vattelian sovereignty; and failed or weak states that enjoy international legal sovereignty and sometimes Westphalian/ Vattelian sovereignty but are unable to exercise effective domestic sovereignty. In the Breaking of Nations Robert Cooper argues that in the contemporary international environment there are three worlds: the modern world of conventionally sovereign states; the post-modern world of Europe; and the pre-modern world of failed, repressive and badly governed states.

The rules and practices of sovereignty did not begin at any particular point in time. Rather they evolved over several centuries. The Peace of Westphalia, which is often seen as the key transition to the modern state system, was, in fact, only one of many way stations. There were elements of the Peace that led later observers to identify it as the 'majestic portal which leads from the old into the new world'. The treaties did re-affirm the right of the princes of the Holy Roman Empire to enter into treaties, although this was a right given to them initially in the Golden Bull of 1356, one of the founding documents of the empire. It did treat Protestant and Catholic states equally. It did re-affirm the principle first enunciated in the Peace of Augsburg of 1555 that the prince could set the official religion of his territory, although this right was circumscribed by other provisions of the Treaties of Osnabruck and Munster, which comprise the Peace. For instance, there were a number of cities with mixed populations in which the Peace stated that authority had to be shared between Protestants and Catholics. The Peace also included manifestly medieval provisions such as rules for designating the Electors of the Holy Roman Empire and stipulations that are in conflict with what are now considered core principles of sovereignty, such as the provisions for supporting religious toleration in Germany, which violate the rule of non-intervention in the internal affairs of states. The Peace provided that religious questions had to be decided by a majority of Protestants and Catholics voting separately in the Courts and Diet of the Holy Roman Empire. A basic constitutional provision of the Empire was thus defined by an international treaty. Even the re-affirmation of the right of princes to make treaties was conditioned by a clause stating that any such 'Alliances be not against the Emperor, and the Empire, nor against the Publick Peace, and this Treaty, and without prejudice to the Oath by which every one is bound to the Emperor and the Empire'.

**That sovereignty has always been characterized by organized hypocrisy**, a disjunction between logics of appropriateness and logics of consequences, **is not surprising in an environment as complex as the international system.** There is probably no **single** set of rules **that could align interests, power and principles**; no set of rules that would create a self-enforcing equilibrium **from which actors never had an incentive to deviate.** But what is, perhaps, surprising is the durability of **this** decoupling. **Every major peace treaty** from the Peace of Westphalia to the United Nations charter **enunciated principles** that were **inconsistent with accepted sovereign norms**." Despite these inconsistencies, no **enduring** alternative **construct** has arisen **to replace or even complement sovereignty**. **Constructs that were explicitly accepted in the past**, such as colonialism (arguably consistent with sovereignty rules in that the colonial power did have full control over domestic and international affairs), protectorates, and the mandates of the League of Nations and trusteeships of the United Nations, **have disappeared**, but new developments such as the European Union and failed states have brought organized hypocrisy into the contemporary world.

Sovereignty has endured because **the** interests **of key players in the system** could be accommodated by deviations **from its rules and practices.** For the rules to change, key actors, those with an ability to change the system, would have to support some alternative **set of constructs**, something that they would only do if such alternatives could provide better outcomes. When sovereignty rules have manifestly failed to provide desirable outcomes, states have been able to cobble together alternatives. In Bosnia, for instance, governance has been provided under the auspices of the Contact Group and the European Union. **When the U**nited **S**tates **and other countries moved from recognizing** the government of **Taiwan** as the government of China **to recognizing** the government in **Beijing, they established quasi-diplomatic arrangements for** conducting business with **Taiwan**. The American Institute in Taiwan operates what is, in effect, a diplomatic mission. **This arrangement is not a perfect substitute** for conventional diplomatic ties; for instance Taiwanese officials in Washington do not meet with their counterparts in the State Department building, **but** Taiwan has flourished economically and achieved effective domestic and Westphalian/Vattelian sovereignty despite having formal diplomatic ties with only a handful of countries, most of which it has provided with significant economic subventions. Hong Kong, formally a part of China, has a separate visa regime from that of China and is a member of some international organizations of which China is also a member. When China assumed control of Hong Kong in 1997 it was anxious to reassure both the Hong Kong and international business communities that the Hong Kong economy could operate under different rules from that of the rest of China. The rest of the world was happy to accommodate China's desires even though this meant violating conventional sovereignty norms.

#### Western scholarship is useful despite gaps in understanding – the best response to their k is a more broad discussion not voting for the k

Acharya, UNESCO Chair in Transnational Challenges and Governance and Professor of International Relations at the School of International Service, American University, ‘07

(Amitav, “Theoretical Perspectives on International Relations in Asia,” Conference on International Relations in Asia: The New Regional System,” George Washington University, 27-29 September)

Moreover, theory is too “Western”. Thus, even among those writers on Asian IR that are theoretically oriented, disagreement persists as to whether IR theory is relevant to studying Asia, given its origin in, and close association with, Western historical traditions, intellectual discourses and foreign policy practices. International relations theory, like the discipline itself, has been, and remains, an “American social science” to quote Stanley Hoffman’s much quoted phrase.3 The recent advances made by the “English School” and continental European constructivism **have not made IR theory “universal**”; it might have entrenched and broadened the Western dominance. The question of how relevant is IR theory to the study of Asian security have evoked strikingly different responses. On the one hand, David Kang has seized upon the non-realization of realist warnings of post-war Asia being “ripe for rivalry” to critique not just realism, but Western IR theory in general for “getting Asia wrong”.4 In analyzing Asian regionalism, Peter Katzenstein comments: “Theories based on Western, and especially West European experience, have been of little use in making sense of Asian regionalism.”5 Although Katzenstein’s remarks specifically concern the study of Asian regionalism, they can be applied to Asian IR in general. And it is a view widely shared among Asian scholars. On the other side, John Ikenberry and Michael Mastanduno, defend the relevance of Western theoretical frameworks in studying the international relations of Asia. While intra-Asian relationships might have had some distinctive features historically, this distinctiveness had been diluted by the progressive integration of the region into the modern international system. The international relations of Asia has acquired the behavioral norms and attributes **associated with the modern inter-state system which originated from Europe and still retains much of the features of the Westphalian model.** Hence, the core concepts of international relations theory such as hegemony, the **distribution of power,** international regimes, and political identity, are as relevant in the Asian context as anywhere else.6

To this writer, **this debate is a healthy caveat**, rather than a debilitating constraint, on analyzing Asian international relations with the help an admittedly Western theoretical literature. To be sure, theoretical paradigms developed from the Western experience do not adequately capture the full range of ideas and relationships that drive international relations in Asia. But IR theories - realism, liberalism, constructivism and critical IR theories - **are relevant and** useful in analyzing Asian IR **provided they do not encourage a selection bias in favor of those phenomena** (ideas, events, trends, relationships) which fit with them and against that which does not. **IR scholars should feel free to identify and study phenomena that are either ignored or given scarce attention** by these perspectives. They should also develop concepts and insights from the Asian context and experience, not just to study Asian developments and dynamics, but also other parts of the world. In other words, Western IR theory, despite its ethnocentrism, is not to be dismissed or expunged from Asian classrooms or seminars, **but universalized with the infusion of Asian histories** (Sam Kim essay), personalities, philosophies, trajectories and practices.

To do so, one must look beyond the contributions of those who write in an overtly theoretical fashion, explicitly employing theoretical jargon and making references to the theoretical literature of IR. A good deal of empirical or policy-relevant work may be regarded as theoretical for analytical purposes because they, like the speeches and writings of policymakers, reflect mental or social constructs that side with different paradigms of international relations.7 To ignore these in any discussion of theory would be to miss out on a large and important chunk of the debate and analysis of Asian IR.

#### No link: We have not taken an indelible stance on IR---the 1AC has not said “nation-states are the ONLY relevant actors” – BUT has forwarded the claim that they are impactful in so far as states like Russia and China do exist and that their actions have consequences.

#### But even then, states ARE important actors that should be considered.

Goddard, Jane Bishop Associate Professor of Political Science @ Wellesley College, and Nexon, Associate Professor of International Security, Georgetown School of Foreign Service, ‘16

(Stacie and Daniel, “The Dynamics of Global Power Politics: A Framework for Analysis,” Journal of Global Security Studies, February)

Accusations of “state centrism” remain a touchstone for critics of realism. Indeed, contemporary realists often assume that power politics—or, at least, the power politics that really “matter”—is the province of states. **States enjoy an** unrivaled capacity **to practice realpolitik**. They represent the only political communities capable of mustering and deploying the resources necessary to survive under anarchy. And, of course, **not all states are created equal.** From a realist perspective, power politics is by definition great power politics, as it is these actors’ pursuit of security that determines the overarching dynamics of the international system.

Criticisms range from demanding reform **to a complete rejection of realist theoretical infrastructure.** The less dramatic include claims that realists unduly neglect the role of non-state actors, particularly violence-wielding ones. **Even non-violent transnational and sub-state actors may profoundly impact security:** from the security of individuals and social groups to how and when states pursue military force. These claims bleed over into more profound critiques, including that transnational movements and international institutions “shape and shove” how states pursue security in ways not captured by the states-under-anarchy framework. Some argue that we should view these kinds of actors as autonomous agents in international security. The most profound criticisms, however, hold that realists get the relevant “units” and “structures” of international security completely wrong.15 For example, some feminists argue that gender structures world politics and that state-centrists thus miss the most important dimensions of security. Likewise, many Marxists focus on class analysis, modes of production, and the like (e.g., Sjoberg 2009, Tickner 2014).

We contend that the study of the dynamics of power politics **should embrace a healthy, but not unlimited,** agnosticism **about which actors matter in global power politics**. **We have already demarcated a global power politics research program** as studying the collective mobilization of those that claim, or exercise, authority over a political community. **But these actors need not be states.** Any social group in which a limited number of actors exercise authority over relevant cross-boundary transactions—**whether sovereign states, multinational firms, transnational social movements, or militias**—qualifies as a corporate actor (Nexon 2009a, 45–46). Thus, for the study of the dynamics of global power politics:

The emergence and persistence of actors in global power politics itself depends on successful collective mobilization—and this remains true for states, social movements, terrorist groups, and the like;

The relative significance of states with respect to alternative social sites inheres in how much success they enjoy in maintaining, sustaining, and initiating collective mobilization;

The **actors relevant to global security will often prove** empirically variable—a function of relative success in achieving joint action within and around social boundaries; and

Some of the most fundamental dynamics of power politics operate in and around the constitution of actors themselves.

At some level, realists correctly argue that **states constitute some of the most** significant actors **of**, and sites for, global power politics. States number among those actors largely responsible for expanding control, **as well as undercutting the influence of others**, in the context of struggles among political communities. At the same time, the realist argument rests on under-examined assumptions about the modern state’s capacity for collective mobilization. From at least the nineteenth century onward, **states have enjoyed** unrivaled abilities when it comes to mobilizing effective military instruments, such as training and equipping large standing armies. **States dominate economic mobilization,** providing the infrastructure necessary for economic growth in the industrial and post-industrial age, the power to protect property, and the ability to extract economic resources from their population to engage in power politics. **States dominate the symbolic universe of power politics as well.** States claim political legitimacy: the right to act in the name of a people in the pursuit of security. Whether they claim that right in the name of dynastic ties, **a nation, or democracy, they exert** tremendous gravitational pull over the symbolic levers of power politics. It is this potent mix of military, economic, and symbolic mobilization that gives states the pride of place in global power politics (Nexon 2009b, chaps. 2 and 9; Buzan and Lawson 2013).

### 2AC---Bedoya DA

#### Confirmations basically always succeed

Niedzwiadek and Mueller 3/30 – Nick Niedzwiadek is a healthcare reporter for POLITICO. Eleanor Mueller is a labor reporter for POLITICO.

Nick Niedzwiadek and Eleanor Mueller, “Moderate Dems hand Biden his first nomination vote defeat,” *POLITICO*, 30 March 2022, https://www.politico.com/news/2022/03/30/david-weil-wage-hour-nom-senate-00021860.

It’s exceedingly rare for congressional leadership to bring agenda items to the floor that lawmakers wind up voting down. Indeed, of the 204 cloture motions to clear the way for a final roll call that Congress has voted on to date, just 10 have failed — and those were on pieces of legislation with 60-vote thresholds.

#### FTC is unconstrained now – hyperpartisan agenda that guarantees backlash and removal of FTC authority

Vasant and Swift 21 – Khushita Visant is a senior antitrust correspondent for MLex. Mike Swift is a chief global digital risk correspondent for MLex.

Khushita Visant and Mike Swift, “FTC’s Wilson expands on scathing critique of Khan, calling agency’s direction ‘appalling and gut-wrenching,” *MLex*, 12 November 2021, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/ftcs-wilson-expands-on-scathing-critique-of-khan-calling-agencys-direction-appalling-and-gut-wrenching.

Wilson said she was “speaking from the heart” in a speech at an American Bar Association conference\* in which she warned that the neo-Brandeisian leaders of the FTC are on a path that will damage the agency and lead to a failure of their antitrust and merger policy agenda.

The Republican commissioner said in her public speech that she fears damage to the economy as the FTC implements antitrust policies based on an expansive view of the agency's remit.

“An earlier draft of the speech said, ‘And, God help me, I speak for Democrats who are very troubled by what they see at the Federal Trade Commission, but who are too loyal to the party to speak out.’ So, heaven help me, I am speaking for the Democrats,” Wilson told MLex, speaking with evident emotion. “But that underscores the message that antitrust enforcement traditionally has been bipartisan, and what is happening now is appalling and gut-wrenching. I feel like I'm watching a slow-motion car wreck. And it's very disturbing to me.”

Democratic critics

Democrats with a long association with the FTC, from the commissioner level on down, are privately expressing concerns about sudden shifts in how the agency operates, including its initiation of fundamental policy shifts on party-line votes.

For the first time since the tumultuous tenures of FTC Chairs Michael Pertschuk and James Miller in the 1970s and 1980s, an incoming president has installed new leadership at the FTC with a mandate for significant change in the agency’s priorities and regulatory philosophy.

In the early 1980s, Miller applied President Ronald Reagan’s conservative philosophy, slashing the FTC’s staff, closing offices and aggressively dialing back the activist philosophy Pertschuk applied under President Jimmy Carter.

The FTC's transformation under Khan, who took office in June after her appointment by President Joe Biden, has created unease among some agency veterans. Wilson herself is in her third stint at the agency, having first served as a law clerk and later as chief of staff to Chair Timothy Muris under President George W. Bush.

Notable departures

Khan’s short tenure as chair has been marked by notable departures of long-tenured and highly respected staffers such as Daniel Kaufman and Maneesha Mithal. Such staffers are seen by many within the agency as being not only the FTC's institutional memory, but as — in the words of one former FTC staffer who posted on Kaufman’s LinkedIn page after his departure — “the heart and soul" of the Bureau of Consumer Protection.

Wilson said she believes more departures are coming. “It's going to take a generation to replace the talent that we have lost and that we are losing now,” she told MLex.

Wilson and fellow Republican Commissioner Noah Phillips contend that if Republicans retake control of Congress, the FTC's overreach under Khan could lead to the removal of the agency’s authority to regulate antitrust, leaving the Department of Justice as the sole US antitrust enforcer.

#### No uniqueness---they’re attacking tech NOW.

**Carpenter 12/3** – journalist

Jacob Carpenter, "Lina Khan targets low-hanging fruit for first big antitrust move," Fortune, 12-3-2021, https://fortune.com/2021/12/03/nvidia-arm-lina-khan-antitrust/

Like any smart newbie looking to make a good first impression, Federal Trade Commission Chair Lina Khan is beginning her antitrust campaign with an easy case.

The FTC moved Thursday to block semiconductor maker Nvidia’s planned $40 billion acquisition of chip designer Arm, jumping ahead of counterparts in Europe who have all-but-guaranteed they would try to scuttle the largest-ever semiconductor deal. FTC officials argue that California-based Nvidia could undermine its competitors if it takes over Arm’s technology, which it licenses to Apple, Samsung, Intel, and dozens more of the industry’s largest manufacturers.

“This proposed deal would distort Arm’s incentives in chip markets and allow the combined firm to unfairly undermine Nvidia’s rivals,” FTC Bureau of Competition Director Holly Vedova said in a statement. “The FTC’s lawsuit should send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations.”

In a statement, a Nvidia spokesperson told Fortune that the company “will continue to work to demonstrate that this transaction will benefit the industry and promote competition.”

The FTC filing has, understandably, been cast as Khan’s opening salvo in her promised crusade to increase enforcement of antitrust law, which she and many Democrats argue has been ignored amid rapid Big Tech consolidation.

But Khan, perhaps smartly, isn’t exactly taking a big swing here.

From the moment that Nvidia announced its planned acquisition in September 2020, analysts and competitors have been skeptical the deal would go through. In subsequent months, some of the U.S.’ most prominent tech companies cried foul about the merger, including Google parent Alphabet, Microsoft, and Qualcomm, Bloomberg reported early this year.

Khan also has momentum at her back, with European Union and United Kingdom regulators already lining up an antitrust case. A top UK official teed up Thursday’s announcement by telling Bloomberg last month that “there is a lot of collaboration” on each side of the Atlantic with regard to Nvidia and Arm.

In addition, the FTC’s case has bipartisan support, with the organization’s two Republican commissioners joining their two Democratic counterparts in support of the case.

The true test of Kahn’s mettle lies farther down the road, as the FTC ponders whether to throw its weight behind challenges to acquisitions with more divided support and more complicated facts.

Among those cases: Amazon’s proposed $8.5-billion deal to buy Hollywood’s MGM Studios; defense giant Lockheed Martin’s looming $4.4 billion acquisition of Aerojet Rocketdyne; and the $43 billion merger of AT&T’s WarnerMedia division with Discovery.

#### No public perception---we are a niche court ruling tweaking Amex, NOT Roe v. Wade 2.

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

#### Public announcement delayed.

**SCOTUS 17**, 7-13-2017, "The Court and Its Procedures," SCOTUS.gov, https://www.supremecourt.gov/about/procedures.aspxTop of Form

The Court maintains this schedule each Term until all cases ready for submission have been heard and decided. In May and June the Court sits only to announce orders and opinions. The Court recesses at the end of June, but the work of the Justices is unceasing. During the summer they continue to analyze new petitions for review, consider motions and applications, and must make preparations for cases scheduled for fall argument.

#### Anti-monopoly action is bipartisan

Christopher Cadelago and Meridith Mcgraw, Politico, ‘It’s ceding a lot of terrain to us’: Biden goes populist with little pushback, 7/19/21, <https://www.politico.com/news/2021/07/19/biden-populist-antimonopoly-500100>

“If you're against competition, then what are you for?” said Bharat Ramamurti, deputy director of the National Economic Council. “Big business charging people whatever they want. You’re for businesses being able to offer workers low wages because there's no other competitor in town to offer something better. I mean, it's very hard to be against competition.”

The right’s muted response to Biden’s orders underscores the remarkable ideological shift that’s occurring in Washington, D.C. A Republican Party once closely allied with corporate America finds itself increasingly less so in the Donald Trump era. Indeed, in the aftermath of Biden’s orders, even officials in Trump’s orbit were saying the politics were smart.

“Both [Biden and Trump] have elements in their constituencies that want this, and, by the way, they’re on solid ground with the rest of America,” said a Trump adviser. “America has a love-hate relationship with these companies.”

But, so far, much of the GOP’s newfound economic populism has been delivered in words rather than action. And that’s given Democrats space to pursue an agenda that, even just five years ago, likely would have sparked massive blowback.

“People will understand who's on their side and who's not,” said Cedric Richmond, a senior White House adviser and director of the Office of Public Engagement. “There will be Democrats who are on the side of working families, and not Republicans. For them, I think it's a terrible mistake.”

The executive order Biden issued earlier this month included 72 initiatives in all. Among the most consequential were his moves calling for greater scrutiny of tech acquisitions, bolstering competition for generic drug makers and importers from Canada, allowing hearing aids to be sold over the counter, standardizing plans for health care shoppers trying to compare insurance options, and protecting certain meat-packing workers from what are seen as artificially low wages.

It was another prong in what economic observers view as an increasingly populist White House agenda. Earlier, Biden had stated his commitment to waiving intellectual property rights for Covid-19 vaccines and nominated Amazon critic and anti-monopoly advocate Lina Khan to chair the Federal Trade Commission.

Some of Biden’s actions came on issues that already had Republican support, including the effort to bring down the price of hearing aids, discouraging agricultural consolidation and limiting so-called noncompete agreements that harm U.S. workers, among others. Twenty-one Republicans backed Khan’s nomination.

The cross-partisan appeal around anti-monopoly policies traces back even further. During the 2016 election, Trump ran on promises to combat big mergers and take on massive corporations that he said posed a “huge antitrust problem.” Following Trump’s loss, Sen. Josh Hawley (R-Mo.) and Rep. Ken Buck (R-Colo.) have called for sweeping antitrust reform in Congress that at times echoes Democratic efforts. Fox News’ Tucker Carlson, one of the most influential voices to the right, cheered the choice of Khan to lead the FTC.

#### Their evidence is about FRT internationally---no reason why US bans are key – China obviously won’t listen NOR gives a shit.

#### There’s no way its key to all democracy – too many alt causes

# 1AR

## T

#### That means our AFF prohibits all of the type of conduct

**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”.

#### Rule of Reason prohibits.

Sarah E. Light 19, Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania, “The Law of the Corporation as Environmental Law,” 71 Stan. L. Rev. 137, Lexis

C. A Heterogeneous Regulatory Toolkit

Layering the traditional narrative with the contributions of those scholars who have sought to expand beyond it yields the conclusion that environmental law is a heterogeneous field. In an influential article, Larry Lessig identified four different types, or "modalities," of influence on behavior: law, social norms, markets, and architecture. 75 Law "directs behavior" under threat of government sanction; social norms constrain behavior through "the enforcement of a community"; markets "regulate through the device of price"; and "architecture" or "features of the world - whether made, or found - restrict [\*156] and enable in a way that directs or affects behavior." 76 The law may constrain behavior directly, such as by prohibiting a bad act. But the law can also regulate behavior indirectly by shaping or regulating one of the other modalities (social norms, markets, or architecture), which then constrains behavior through its own means of influence. 77 Environmental law employs each of these means of influence both alone and in combination.

Regulators have a diverse set of tools at their disposal to promote environmental values and goals like conservation of common pool resources and the reduction or prevention of pollution. 78 They can use prescriptive rules like technology requirements, or performance standards that require firms to meet certain environmental goals. They can create property rights over common pool resources, impose market-leveraging approaches like taxes and subsidies, or adopt tradable permits for emissions. Regulators can employ informational regulation, requiring the disclosure of environmental information to the public with an eye toward providing incentives for better environmental performance. They can impose environmental standards through procurement rules or supply-chain management, or can mandate or encourage the purchase of insurance for environmentally risky activities.

To take one example, there are many ways to increase recycling and limit the use of virgin materials, 79 a concern that implicates the problem of cumulative harms. A regulator could simply legally mandate the recycling of certain products, or it could ban the use of virgin materials in production. The law could require that products procured for government use contain a minimum percentage of recycled materials in order to encourage the growth of [\*157] a market for recycled goods. 80 The law could encourage recycling behavior by creating exceptions to onerous reporting and handling requirements for solid, hazardous waste if the product is recycled in a closed-loop process. 81 The law could operate through price mechanisms, either by taxing the use of virgin materials or subsidizing the use of recycled ones. Deposit refund schemes can provide incentives for consumers to return objects like plastic or glass bottles to stores for recycling. 82 The law could establish a tradable permit scheme, requiring an allowance to use a certain amount of virgin materials, but permitting firms to trade these allowances. The law could influence the physical convenience or architecture of recycling. Local governments could set schedules for curbside recycling that are more frequent than trash pickups. 83

As alternatives to public law rules, social norms could develop (or be consciously shaped) within a community to identify recycling as "patriotic," or to shame those who discard, rather than recycle, valuable virgin materials. 84 Or a private environmental governance solution could arise in which firms, NGOs, or industry associations employ parallel versions of these public law tools or innovate with new solutions. 85 For example, private firms or NGOs could develop take-back programs that encourage consumers to return old products when they purchase new ones, or firms could impose limits on their suppliers' use of virgin materials. 86

[\*158]

D. What Is Missing

Despite the widespread understanding that environmental law is a heterogeneous field, still missing, even from these discussions that look beyond traditional federal environmental statutes, is an in-depth, holistic account of the impact of corporate, securities, antitrust, and bankruptcy law on firms' environmental decisionmaking. As noted above, to the extent that environmental law scholars have examined these fields of corporate and business law, their approach has tended to focus on a single field, a single doctrine, or a single case. 87

Environmental law casebooks used in law school, which arguably represent what is considered central to the field, likewise do not generally offer any in-depth discussion of whether firm managers have a fiduciary duty only to maximize profit for the benefit of shareholders, or whether they have broader discretion to take into account the long-term interests of a wider class of stakeholders, including customers, employees, the local community, and possibly the environment itself. 88 Nor do they include any discussion of the business judgment rule - a principle of state corporate law that affords firm managers the discretion to act in the best interests of the firm, even taking into account environmental values, without second-guessing by the courts. 89 In discussions of the management of common pool resources, even those casebooks that discuss Ostrom's insider solutions concept do not mention the potentially limiting implications of antitrust law for private industry cooperation. 90 Nor do they discuss the implications of the Bankruptcy Code for a firm that files for bankruptcy and seeks to discharge its environmental liabilities. 91 Perhaps because securities regulations now impose affirmative obligations on publicly traded firms to disclose certain environmental risks, several casebooks do mention these obligations. 92

[\*159] One could argue that it is unfair to criticize environmental law casebooks for failing to discuss multiple fields of law; casebooks are intentionally focused pedagogically on teaching the core of a field in depth. The alternative, one might say, would lead to a kind of hodgepodge approach of combining materials from different fields that existed before environmental law coalesced into a single field. 93 If, however, one takes seriously the arguments that environmental law is a heterogeneous field with numerous tools at its disposal to promote environmental values and goals, and that business firms play a significant role in promoting or hindering progress toward environmental goals, then environmental law casebooks should at least acknowledge the significance of corporate law, securities regulation, antitrust law, and bankruptcy law to the core of environmental law's enterprise.

This Article's analysis thus builds upon the work of those who have raised the profile of the business firm in environmental law, and of those who seek to expand our understanding of environmental law, by offering what is missing in prior environmental law scholarship - a holistic analysis of the role that positive corporate law, securities regulation, antitrust law, and bankruptcy law can and should play in shaping firms' environmental behavior. Each of these fields interacts with environmental decisionmaking - meaning the decisions that firm managers make to comply with public environmental law, or to go beyond compliance by adopting private environmental governance - in different, but sometimes overlapping, ways. They either increase or decrease the likelihood that firm managers will take environmental goals into account. In other words, unlike private environmental governance, these fields themselves constitute positive law. But in their "law"-ness, they operate more indirectly than canonical environmental statutes like the Clean Water Act, which directly prohibit or regulate what can come out of a pipe. These fields of corporate and business law shape norms, markets, and architecture in ways that profoundly affect firms' environmental decisionmaking.

[\*160]

II. The Forms of Interaction

This Part offers the Article's main analytical contribution - a taxonomy of five primary ways in which the fields of law governing the corporation and markets interact with firms' environmental decisionmaking. This analysis demonstrates that viewing each field separately may miss the bigger-picture story about how these fields operate in harmony or conflict not only with traditional environmental law and values, but also with one another. In other words, changing one doctrine may be necessary but not sufficient to change firm behavior with respect to the environment. A unified approach is required.

To build on the example of recycling presented above, 94 if securities regulations mandated disclosure of information on firms' recycling practices, that disclosure mandate would likely provide secondary incentives for improved recycling behavior. 95 Corporate law's business judgment rule would be neutral toward this change: While the rule alone would do nothing to encourage recycling behavior, it would provide a safe harbor for managers to increase such behavior, even if doing so carried short-term costs, against claims by shareholders that the managers' decisions are not in the best interests of the firm. 96 However, if private firms in an industry wanted to collaborate to set industry-wide standards or mandates for recycling, in which firms that did not meet the standard were penalized with a boycott or refusals to deal, this could raise problems under antitrust law, which might either prohibit - or at the very least, discourage - such collaboration. 97 And if bankruptcy law allowed a firm facing financial trouble to discharge its pre-petition liability for failure to comply with legal recycling mandates, this would create disincentives for [\*161] environmental performance by firms anticipating a bankruptcy filing. 98 It is essential to view these fields of law in a larger context.

There are five primary forms of interaction between these fields and firm managers' decisions to promote environmental values and goals: mandates, incentives, safe harbors, disincentives, and prohibitions. 99

Mandates: Corporate and business law can impose mandatory environmental obligations on firms, with the effect that firm managers must take environmental considerations into account in some fashion. Examples in this category include securities regulations that require publicly traded firms to disclose financially material environmental and climate risks to investors. A second example lies in the Department of Justice's use of antitrust law to break up collusion by the major automakers and their industry association which prevented pollution control technology from reaching the market in the 1960s. 100

Prohibitions: On the flip side, corporate and business law can also prohibit firm managers from taking environmental values into account - at least under some circumstances. One example of such a prohibition can be found in the way that antitrust law generally precludes firms from entering into agreements with their competitors to conserve environmental resources [\*162] through industry standards that incorporate price fixing or sanctions on noncomplying firms. 101 And while courts generally do not intrude on firm managers' discretion to take values other than the maximization of short-term shareholder value into account in the day-to-day operations of the firm, 102 in the limited context of firm takeovers, courts have interpreted Delaware corporate law more narrowly to require a connection between managers' decisions and increased short-term shareholder value. 103

Safe harbors: Safe harbors create protected spheres for firm managers, who, in their discretion, wish to take environmental values into account in their decisionmaking. For example, in the ordinary course of business, firm managers may take the interests of multiple stakeholders into account and, under the business judgment rule, courts will not second-guess management decisions even if they fail to maximize short-term shareholder value. 104 Safe harbors do not prohibit such actions. Nor, however, do they mandate or provide incentives for such actions. 105 The mere fact that a manager can exercise her discretion without fear of liability is distinct from an incentive, because nothing in the safe harbor provides a benefit to a firm manager who chooses to take environmental values into account in her decisions. Arguably, the choice is based on the manager's preexisting preferences, and managers may just as easily decline to use the safe harbor.

Incentives and disincentives: The final two categories of interaction occur when a corporate or business law field creates either incentives or disincentives for firm managers to undertake environmentally protective action. Markets affect behavior by making it more or less costly as a function of price, while norms affect behavior by making it more or less costly as a result of social sanction or approbation. When corporate and business law fields operate indirectly in this way, they create either costs or subsidies for firm managers to take the environment into account in their decisions. As an example, the fact that some pre-petition environmental obligations can be discharged in bankruptcy creates disincentives for firms to meet those obligations fully. 106 Similarly, antitrust law does not categorically prohibit under a per se rule all kinds of industry standard setting aimed at promoting the conservation of environmental resources; some are evaluated under the more fact-intensive rule of reason inquiry. To the extent there is uncertainty [\*163] about whether antitrust law prohibits such collective action, this uncertainty may create disincentives for certain forms of private environmental governance. 107

On the flip side, corporate and business law can create incentives for positive behavior with respect to the environment. For example, more than thirty states have created the "benefit corporation" as a new corporate form. While a firm must opt into this form of incorporation, once the firm has selected the benefit corporation form, its directors and officers are obligated to take environmental (or social) values into account alongside corporate profit for shareholders, and must publish reports that evidence their progress toward these commitments. 108 The benefit corporation goes beyond the safe harbor provided by the ordinary business judgment rule: It provides incentives for firm managers to take environmental values into account in their decisionmaking. They gain the reputational benefit of presenting themselves to the public as benefit corporations, and are protected by a bright-line bar to certain shareholder lawsuits. There is, however, some question as to how enforceable such commitments are, leaving them in the category of incentives, rather than mandates. 109 Finally, while Securities and Exchange Commission (SEC) environmental disclosure rules are primarily mandates because they require the disclosure of certain information, they have secondary effects that operate as incentives for better environmental behavior. 110

Laying out these categories according to whether they operate in confluence or conflict with environmental values, combined with the degree of influence they exert, yields the following taxonomy.

[\*164]

Table 1

Five Primary Forms of Interaction

[TABLE 1 OMITTED]

To be sure, any taxonomy of this sort necessarily involves some oversimplification. But these categories are analytically useful nonetheless. The taxonomy supports this Article's holistic account by demonstrating commonalities across fields of law. It also exposes a more nuanced set of influences than mere conflict-versus-confluence or mandates-versus-incentives. Part III will give more content to the categories by highlighting examples of each primary form of interaction. Part IV will then demonstrate that this account of the forms of interaction reveals a more complete set of options available for integrating environmental values into these areas of corporate and business law. These doctrines can evolve not only from conflict to confluence, but also from prohibition or disincentive to safe harbor, from safe harbor to incentive, and from incentive to mandate.

Corporate law, securities law, antitrust law, and bankruptcy law are not just a fourth generation of environmental law. 111 Rather, they have their own environmental narratives to tell. Instead of telling them as discrete stories, the next Part highlights common themes across these fields.

[\*165]

III. Corporate and Business Law as Environmental Law

Having developed the taxonomy, this Part offers detailed examples of each type of interaction. Given the vast nature of each field and the scholarship within it, this Part does not purport to offer a complete account of every such interaction, but rather aims to highlight examples within each category to draw common lessons.

A. Mandates

1. Securities disclosures

Securities regulation offers one of the strongest examples of how business law can affect the environmental decisions of publicly traded firms. 112 After briefly summarizing firms' current disclosure obligations, this Subpart situates securities disclosure requirements in the context of environmental informational regulation more broadly, in order to highlight their primary nature as a mandate while recognizing their secondary nature as an incentive. This Subpart then examines the debate over how broadly to interpret the concept of materiality, which will have significant consequences for the impact of such disclosure requirements on firms' environmental performance going forward. 113

A major purpose of the securities laws in the United States is to provide information to investors concerning securities offered for sale to the public, in order to "protect investors against manipulation of stock prices." 114 Securities law achieves this goal of market integrity largely through informational regulation. Under the Securities Act of 1933 115 and the Securities Exchange Act of 1934, 116 the SEC adopted Regulation S-K to harmonize corporate disclosures of material information to investors when securities are initially offered to the [\*166] public; in connection with the annual shareholders' meeting; in both annual and quarterly reports; and when certain specified events occur, such as a merger or acquisition. 117

Regulation S-K specifies how its general provisions apply to environmental issues and risks. It requires publicly traded firms to disclose the costs of complying with environmental laws, including material capital expenditures; material pending legal proceedings, including environmental legal proceedings; material impacts of risk events, including material "risk factors"; and a general management discussion and analysis of financial condition, including known future trends as well as "uncertainties that are reasonably likely to have a material effect on financial condition or operating performance." 118 In 2010, in response to several investor petitions, the SEC issued an interpretive release to clarify that these existing disclosure requirements apply to climate change, and to provide guidance to public companies on such disclosures. 119 The SEC's release explained that firms must disclose the impact of actual or potential legislation and regulations regarding climate change, including international accords; indirect consequences of regulations or business trends, such as changes in demand for goods or services resulting from climate change; and the physical impacts of climate change, including risks to performance and operations as a result of extreme weather events. 120

Mandatory information disclosure is an important tool of environmental governance. 121 Indeed, NEPA - the first major environmental statute adopted by Congress - contains no substantive performance standards; it requires only the assessment and public disclosure of information about potentially significant environmental impacts of major federal actions. 122 While informational regulation mandates the disclosure of information, it has the secondary benefit of providing incentives to those disclosing that information to [\*167] change their behavior. 123 For example, the EPA's Toxics Release Inventory (TRI) program, which requires certain firms to file public annual reports regarding their use and release of listed toxic chemicals, has coincided with a dramatic reduction in the use of those chemicals and their release into the environment. 124 These reductions have occurred through a combination of self-monitoring by firms and external monitoring of firm actions by the public, regulators, investors, and peers. 125 Publicly traded firms have faced secondary implications of TRI reporting, including drops in stock prices and increases in borrowing and insurance costs. 126

A similar dynamic is at work in the securities regulation context. In some circumstances, environmental and climate-related risks can have a legally material impact on a firm's financial position. 127 A recent high-profile example involved ExxonMobil's failure to disclose environmental and climate-related risks. In 2016, the SEC initiated an investigation into whether the firm's securities disclosures adequately addressed the material risks of climate change to its business, in particular with respect to how the firm valued its oil reserve assets. 128 The SEC's investigation mirrored an earlier, separate inquiry by the [\*168] New York Attorney General into whether ExxonMobil misled its investors about the possibility that its assets - oil resources that remained in the ground to be extracted at some point in the future - could become "stranded" if future environmental regulations precluded the firm from extracting them, or if regulations made extraction unprofitably expensive. 129 ExxonMobil ultimately chose to reduce its estimate of recoverable reserves in a subsequent 10-K filing by more than three billion barrels of oil equivalent, including "de-booking" all the reserves it held in a Canadian oil sands project. 130 Separately, in response to a shareholder proposal requesting a public report regarding the impact of climate change on the firm, ExxonMobil indicated in December 2017 that it would discuss "energy demand sensitivities, implications of two degree Celsius scenarios, and positioning for a lower-carbon future" in subsequent disclosures. 131 In addition to refocusing management attention, mandated securities disclosures can spur more effective public monitoring of firms' environmental behavior when such disclosures are compared to the firms' statements to other stakeholder groups, including regulators, the public, and customers. 132

The key doctrinal debate is how the concept of materiality, the touchstone of what firms must disclose, interacts with both environmental risks to the firm (such as the physical effects of climate change) and environmental externalities caused by the firm, which might be the subjects of regulation or litigation. The U.S. Supreme Court has held that a fact is material to investors if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix' of information made available." 133 Silence on a matter is not [\*169] actionable unless there is a specific duty to disclose information, or if the failure to disclose creates a misleading impression. 134 Thus, what the "reasonable investor" cares about is paramount.

The relevant question here is whether materiality encompasses environmental disclosure only when environmental issues are connected to a firm's financial performance, or if it applies more broadly, covering environmental issues for their own sake, even if unrelated to financial performance. 135 While SEC regulations repeat the Supreme Court's broad language defining materiality, 136 the agency has generally interpreted this language to encompass those environmental disclosures that are material to a firm's financial performance. 137 For example, in its 2010 interpretive release providing guidance on climate disclosures, the SEC explained why regulatory and ecological developments in the climate arena are worthy of disclosure, noting that such developments "could have a significant effect on operating and financial decisions," such as by "changing prices for goods or services" and creating "new opportunities for investment." 138 Empirical data bear out a positive relationship between financial and environmental performance. A 2015 meta-analysis of more than 2,000 empirical studies exploring the relationship between environmental, social, and governance (ESG) performance and corporate financial performance concluded that the two are "positively correlated." 139

Several legal scholars have argued that materiality should be understood more broadly to require disclosures about environmental and social risks even if they do not rise to the level of financial materiality, because these risks, too, are of legal significance to investors. 140 Empirical studies have demonstrated that private investor interest in firms' social and environmental risks and their [\*170] environmental decisionmaking has increased in recent years. 141 In 2016, the SEC issued a concept release "to seek public comment on modernizing certain business and financial disclosure requirements in Regulation S-K," including social and environmental disclosures. 142 More than 80% of the non-form comments received by the SEC relating to sustainability called for improved disclosure and standardization of such disclosure. 143 One recent high-profile example demonstrates investor concern for social and environmental governance. In January 2018, Laurence Fink, CEO of the investment firm BlackRock - the largest institutional investor in the world - wrote a letter to the CEOs of publicly traded companies in which the firm invests, admonishing that "to prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society." 144

There is a statutory basis for a broader understanding of materiality as encompassing nonfinancial environmental and social risks. Beyond information explicitly required to be disclosed, the SEC has broad authority to require disclosure of "such other information … as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors," regardless of whether such information is financially material. 145 Indeed, the SEC has made certain disclosures mandatory, such as those relating to board members' attendance at meetings; board committee structure; executive compensation; and, since Watergate, illegal actions by management, even in the absence of any link to financial materiality. 146

[\*171] Although at present it appears unlikely that the SEC will take further action to require social and environmental reporting in response to its 2016 concept release, 147 the possibility remains for another administration to take such action in the future. The broader interpretation of materiality would be consistent with the environmental priority principle put forth below, arguably offering stronger incentives for firm managers to take environmental values into account in their decisionmaking. 148

2. Antitrust law

Antitrust law offers a second example of how business law can mandate or prohibit environmentally positive behavior by firms. While several scholars have identified a conflict between antitrust law's goal of promoting competition and the environmental norms of promoting conservation, 149 the relationship between the two is more complex. Before this Article turns to how antitrust law prohibits and creates disincentives for certain forms of industry environmental cooperation, 150 this Subpart first offers a narrative of confluence, describing how antitrust law can advance the goals of environmental protection by prohibiting anti-environmental collusion.

Antitrust law has long been said to serve many purposes, including promotion of "efficiency" in markets; 151 promotion of justice; 152 protection of consumers from monopoly firms' ability to increase prices; 153 and protection [\*172] of competitors, especially small businesses, from "larger, more efficient firms." 154 But antitrust statutes adopted after the Sherman Act, 155 including the Clayton Act 156 and the Federal Trade Commission Act, 157 focused more squarely on the notion of promoting market competition and targeting anticompetitive behavior. 158

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 159 There are certain kinds of actions that are per se illegal under the antitrust laws, rendering antitrust law an absolute bar. 160 Such actions include price fixing, horizontal boycotts, and output limitations. 161 Courts apply the per se rule when firms aim to "disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" 162 In the per se unreasonableness context, the plaintiff need not show anticompetitive effect, as harm to competition is presumed. 163

Before the enactment of the Clean Air Act, the federal government invoked antitrust law to end a collusive agreement among major automakers and their industry association to keep pollution control technology from reaching the California market. By 1952, authorities addressing air pollution in Los Angeles County had accepted scientific findings that motor vehicle emissions were the major source of the smog that blanketed the Los Angeles basin. 164 Local officials began to reach out to the major automobile [\*173] manufacturers about research on emissions-control technology. 165 In 1953, the Automobile Manufacturers' Association (AMA), an industry trade group, began a campaign to study the issue and committed to funding research. 166 In 1955, several automobile manufacturers, including the four major manufacturers - General Motors, Ford, Chrysler, and American Motors - entered into a formal cross-licensing agreement to share technological information and data on the development of emission-control technology, 167 an action that later became the subject of antitrust litigation. 168 They announced their decision publicly, garnering some praise for addressing the smog problem. 169

In 1960, California passed the California Motor Vehicle Pollution Control Act. 170 The Act mandated that manufacturers of new cars install emissions-control devices; however, the mandate was only triggered once such devices had been certified by the newly created Motor Vehicle Pollution Control Board. 171 By 1964, the Board had certified four emissions-control devices as meeting the state's standards, triggering the mandate under the Act. 172 Independent firms, rather than the major automakers, had developed these devices. 173 Shortly after the state certified these devices, the major automakers announced that they, too, had developed their own emissions-control technology, 174 arguably so that they would not be required to license technology from other firms. This sequence of events led some officials in California to conclude that the major automakers had conspired to delay making their own technologies publicly available. 175 After Los Angeles County officials asked the U.S. Attorney General to investigate possible collusion, a grand jury was convened. 176

Although the Department of Justice did not file criminal charges, in January 1969 it filed a civil antitrust suit against the AMA and the four major [\*174] automakers, alleging that the defendants had conspired among themselves and with smaller motor vehicle manufacturers "to eliminate competition in the research, development, manufacture and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights, covering such equipment," in violation of section 1 of the Sherman Act. 177 In response to the complaint, the defendants argued that their cooperation had actually accelerated the development of emissions-control devices and noted that collaboration was required to ensure that all manufacturers would be able to comply with the increasingly stringent standards. 178 After the lawsuit was filed, a partner in the law firm representing the AMA penned an article 179 explaining that individual consumers had been "unwilling to spend the additional small amount" necessary to purchase vehicles equipped with emissions-reducing devices. 180 Thus:

So far as the installation of devices was concerned, therefore, the manufacturers had a substantial and legitimate interest in cooperating. No company wanted to incur a cost disadvantage, either in terms of an increase in sales price or an adverse effect on vehicle driveability, without some assurance that all manufacturers were incurring similar disadvantages in the marketplace. 181

Arguably, this was as much a problem of the interaction between corporate law and antitrust law in competitive markets as it was one of antitrust law alone. If firms had a broader mandate beyond profit maximization, including to contribute to the public interest, perhaps they would have been more willing to incur a short-term cost disadvantage, even in a competitive market, rather than enter into an agreement to limit competition.

The parties resolved the suit by entering into a consent decree, which required the defendants not to conspire to delay the development of emissions-control devices and to make available without royalties both patent licenses and data on the emissions-control devices they had developed. 182 However, the decree did not require the defendants to admit liability or pay monetary penalties or damages for environmental harm; nor did it require the [\*175] retrofitting of vehicles. 183 Despite the lack of damages or penalties, in this case antitrust law served as a mandate to promote environmental goals, preventing collusion in the market when firms feared that developing an environmental product would put them at a competitive disadvantage.

A second, more recent example of antitrust law serving as an environmental mandate comes from the European Union, not the United States, but the example offers a similar lesson about the potential confluence, rather than conflict, between antitrust principles and environmental goals. In 2011, the European Commission fined two consumer products firms, Unilever and Procter & Gamble, more than 300 million euros combined for entering into an agreement to maintain prices for laundry detergent while the firms switched to selling a more concentrated, environmentally preferable formulation. 184 The firms switched to the more environmentally friendly formulation as a result of their participation in a voluntary industry initiative called the "Code of Good Environmental Practice for Household Laundry Detergents," 185 a classic example of private environmental governance. The voluntary initiative included reducing the amount of detergent needed for each load of laundry, as well as overall product weight and packaging. 186 The industry initiative appropriately did not include any commitments regarding price fixing. 187

However, the firms privately "agreed to keep the price unchanged" when the "products were "compacted'" in a way that might appear to a consumer that he would be able to wash fewer loads of laundry than the compacted product was capable of cleaning. 188 In addition, they engaged in other forms of price collusion, including "restricting their promotional activity" and "deciding not to pass the benefit of cost savings (reduced raw materials, packaging and transport costs) on to consumers." 189 The firms further agreed on direct price [\*176] increases and "exchanged sensitive information on prices and trading conditions, thereby facilitating the various forms of price collusion." 190

In this case, just as in the case of the automakers, antitrust law enforcement served as an environmentally positive mandate. Relying on antitrust law, the European Commission fined these firms for seeking to avoid passing cost savings from an environmentally beneficial product onto consumers. The motivations of the consumer products firms mirrored those of the automakers: In both cases, the firms feared that being the first to market an environmentally preferable product would reduce profits or create a competitive disadvantage vis-a-vis other firms in the marketplace. This example likewise suggests the importance of viewing antitrust law in connection with other fields, such as corporate law. Firms driven by a profit motive experience that motive in the context of a competitive environment. 191

B. Prohibitions and Disincentives: The Antitrust Per Se Rule and the Rule of Reason

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive.

As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition.

The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199

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

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

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

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

### Overlimiting DA

#### It’s THE antitrust case of the century – including it is vital to reflect core, contemporary controversies.

**Newman 18** --- Professor of Law, University of Miami.

John, 2-26-2018, "Ohio v. American Express Is the Antitrust Case of the Century – So Why Isn’t Anyone Talking About It?," Concurrentialiste Review, https://leconcurrentialiste.com/ohio-v-american-express/

Cases like Ohio v. American Express might come around only once in a lifetime. It’s a hot-bed of contemporary issues: platform market analysis, Silicon Valley implications, durable oligopoly, and a restraint of trade that forces the least wealthy to fund lavish perks for the most affluent. This may well be *the antitrust case of the century*. It deserves to become a vital part of the current debates about the future of antitrust.

### AT: Practices

#### “Business practices” include tactics or activities.

Free Dictionary ND, “Business Practice,” No Date, https://financial-dictionary.thefreedictionary.com/Business+Practice

Business Practice

Any tactic or activity a business conducts to reach its objectives. Ultimately, a business's objective is to make money. Business practices are the ways it attempts to do so in the most cost effective way. A company may have rules for business practices to ensure that its employees are efficient in their work and abide by applicable laws. See also: Business ethics.

#### Specifically, individual acts.

G. Dolph Corradino 3, Judge, New Jersey Municipal Court, Passaic, “TMK Assocs. v. Landmark Dev.,” 2003 Conn. Super. LEXIS 2464, Lexis

They argue that "in order to successfully allege a violation of CUTPA, the plaintiff must allege more than a singular occurrence"; "there must be a pattern of unfair or deceptive trade practices"; "the plaintiff failed to plead more than a single act (of) unfair [\*14] or deceptive business practices." This argument was laid to rest in Johnson Electric Co. v. Salce Contracting Assocs., 72 Conn. App. 342, 805 A.2d 735 (2002). There, "the trial court held that, because the plaintiff did not prove that the defendant had engaged in a repeated course of misconduct, the plaintiff did not establish that the defendant violated CUTPA." Id. page 349. The court disagreed, ruling that, 'The trial court improperly declined relief to the plaintiff on the ground that it had alleged and proven only a single act of misconduct." Id. page 353.

## K

**They cannot wish away Xi and CCP control of China---elites are entrenched, and will fight like hell to keep the status quo**

**Wainer and Bienenfeld 19** – Kit Wainer is a member of the United Federation of Teachers and is active in the opposition caucus, the Movement of Rank and File Educators. Mel Bienenfeld is a longtime socialist activist and recently retired president of a higher-education teachers local union.

(Kate Griffiths, 7-21-2019, "Problems with an Electoral Road to Socialism in the United States," New Politics, https://newpol.org/issue\_post/problems-with-an-electoral-road-to-socialism-in-the-united-states/)

Governors control the National Guard and state police. Local governments control local police forces, although the Constitution allows states full discretion to limit the autonomy of localities. While the president may federalize the guard for a period of time, **it is easy to imagine guard generals refusing to obey presidential authority when asked to enforce decisions the courts have ruled unconstitutional**. Of course a president can send the army into states, thus violating the Posse Comitatus Act of 1878, but it is similarly easy to envision generals refusing to execute orders on solid constitutional grounds, or the officer corps dividing amongst itself, in that scenario. In short **there would be no way** of overcoming state recalcitrance **to implement socialist legislation without destroying the legitimacy of the constitutional order.**

In fact, not only can **state authorities** resist**, they can also repress**. Partial socialist victories in the electoral arena would inevitably yield a **fractured state,** with critical parts still in the hands of pro-capitalist officials. The latter would be constitutionally authorized to arrest and terrorize mass movement activists who threaten their rule. They have, after all, done so numerous times in U.S. history. Even today, federal and state authorities are far more likely to arrest someone for the crime of being an immigrant or person of color than for marching with an armed fascist gang threatening the annihilation of the Jews. **Mass movements that are not prepared to physically confront and defeat armed authorities would stand little chance.**