## 1AC D7

**1AC---Platforms**

Advantage 1 is Platforms---

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

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

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

A. Against Platform Exceptionalism

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

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

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

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

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

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

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

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

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

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

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

B. Private Sector Institutional Dynamics

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

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

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

Ii. The Competition Shortcomings

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

A. Entry Barriers

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

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

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

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

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

C. International Competitiveness

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

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

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

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

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

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

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

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

Maintaining U.S. Leverage

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

**Iran’s an emerging global hub for Bitcoin mining---that obviates the effectiveness of sanctions.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Not too bad,” he said.

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

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

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

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

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

**Tracking solves Iranian evasion---US lead key**

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

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

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

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

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

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

Solutions for Sanctions Risks

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

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

**Strong sanctions prevent Iranian nuclear acquisition**

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

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

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

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

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

**Israel preempts Iran prolif---draws in all major powers**

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

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

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

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

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

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

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

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

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

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

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

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

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

**Can’t stay contained---multiple pathways to global nuclear war.**

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

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

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

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

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

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

More Creative Alternatives

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

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

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

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

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

a. Enabling Competition Within the Platform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Agreements among the active 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**.

**Regulatory approaches are systemically compromised—capture and comfort means anticompetitive conduct becomes the norm**

**Lambert**, Wall Family Chair in Corporate Law and Governance Professor of Law, University of Missouri Law School, November, **‘11/1/21**

(Thomas, “Tech Platforms and Market Power: What’s the Optimal Policy Response?” Mercatus Working Paper)

The agency oversight approach, however, **is not simply “faster antitrust** with expert adjudicators.” While standards-based and flexible, the approach differs from antitrust along three significant dimensions: **focus**, political **susceptibility**, and duration of **control**. Taken together, antitrust **courts’** more **narrowly focused objectives**, **greater insulation** from **political influences**, and **limited jurisdiction** over their subjects render them far less susceptible to **adverse public choice concerns** than agencies like the UK’s DMU.

In crafting remedies for anticompetitive harm, antitrust courts have a tremendous reservoir of authority.174 But antitrust’s focus—and the objective of any court-ordered remedy—**is narrow:** the restoration of market output **to competitive levels** for the benefit of consumers.175 This **precludes** successful claims by, and remedies in favor of, parties **seeking some private benefit** apart from the enhancement of market output. A digital markets **regulator** is unlikely to be as laser-**focused** on output effects as an antitrust court and will therefore be a more attractive target to rentseeking firms. The DMU’s “open choices” objective, for example, **invites a laggard competitor** that might otherwise be driven out of business to seek some rule **hindering its more efficient rivals**, on the ground that preserving its own offering will create a broader range of options for consumers.

A second important difference between antitrust courts and agencies relates to the decision makers’ incentives. The **federal judges** determining liability and imposing remedies in antitrust cases have **little reason to please** the parties before them. Possessing life tenure and fearing no retribution save possible reversal, they are **insulated from outside pressure** and motivated to make decisions calculated to enhance market output and thereby benefit consumers. The bureaucrats staffing agencies, by contrast, **do not enjoy this level of political insulation**. Many will have been appointed by or **have ties to a political leader**, whom they will wish to please. They may also contemplate **future employment** at one of their regulatees or at a regulatee’s rival. **Even absent** contemplation of a job change, they may have a **stake** in one regulatory outcome over another, as the budget or prestige of their agency **may be affected** by the regulatory choices they make. **Their personal interests** are therefore less aligned with the public’s interest **in maximizing overall market output.**

A third difference between antitrust and agency oversight is that antitrust courts’ involvement with parties is **limited in duration**, while overseeing agencies **remain perpetually involved** with the firms they regulate. Ongoing oversight requires **continuous contact** with the regulatee, whose perspective the regulator needs in order to make sound decisions. Eventually, however, the regulator may begin seeing things from the perspective of the regulatee.176 This is **especially likely** if the individuals with interests adverse to the regulatee’s position are widely dispersed and difficult to organize.177 The benefits to a regulatee from a decision may be outweighed by the **aggregate costs it would impose**, but if the costs are so widely spread that no individual or group has an incentive to incur the cost of arguing against the decision, the only argument the regulator will hear is that of the **regulatee-beneficiary**.178 In light of the relationships that develop from perpetual supervision and the common “concentrated benefits-diffused costs” dynamic, agencies possessing continuing oversight over their regulatees are **frequently captured by those firms,** **to the detriment of the public at large**.179

It seems, then, that the ongoing agency oversight model for addressing market power from digital platforms **may not be the panacea** its proponents have suggested. Combining broad discretion that invites interest group **manipulation**, **exposure to political pressures** that may sway regulators from pursuing the public interest, and the sort of continuous regulatee contact **that often leads to capture**, the approach raises **serious public choice concerns**. The UK’s experience with its new DMU will be informative. But US policymakers would do well to wait on the results of the UK’s experiment, and the resolution of the numerous pending antitrust actions, before abandoning antitrust in favor of a digital platforms regulator.

**1AC---Plan**

Plan---

**The United States federal government should increase prohibitions on those anticompetitive business practices which cause net-harm on one side of platforms.**

**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.**

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

Sandra **Matz** is an Assistant Professor of Business at Columbia Business School, 20**18**, Guy Rolnik is a Clinical Associate Professor for Strategic Management at the University of Chicago Booth school of Business, and an editor of ProMarket.org, Moran Cerf is a Professor of Neuroscience and Business at the Kellogg School of Management at Northwestern University, Solutions to the Threats of Digital Monopolies, <https://promarket.org/2018/04/10/solutions-threats-digital-monopolies/>

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.**

**1AC---Access**

Advantage 3 is Access---

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

**Hemphill and Wu 20**, Moses H. Grossman Professor of Law, New York University School of Law, , Julius Silver Professor of Law, Science and Technology, Columbia Law School.

(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.

**Maintaining our innovative lead solves nuclear war**

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

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

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

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

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

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

**Continued software breakthroughs vital to solution-development for every existential risk**

**Hayes 14** – Correspondent-Democrat & Chronicle

Matthew Hayes, Bill Gates sees innovation solving world problems, 2014, <http://www.democratandchronicle.com/story/money/business/2014/10/05/bill-gates-sees-innovation-solving-world-problems/16760969/>

ITHACA – Bill Gates delivered an optimistic message about the future to Cornell University students during a back-and-forth Wednesday evening with President David Skorton. Gates, who fielded questions from the audience, spoke to the packed auditorium at Bailey Hall with the message that innovations in science, medicine and computer technologies will continue to shape the world for the better. Progress in reducing health and income inequalities in developing countries gave him particular pride, he said. The Bill & Melinda Gates Foundation, which he co-chairs with his wife, has dispersed more than $30 billion in grants since its inception 14 years ago. The foundation has a mission to improve education in the United States and a global focus on improving people’s health in poor countries. “We saw that health was the greatest injustice,” he told Skorton about his foundation’s mission to improve people’s health. Feeding the poor is only one priority of the Gates Foundation. The philanthropic group has helped lower the number of childhood deaths from 10 million in 2000 to about 6 million today. His goal is to reduce that further to 2 million, he said. He expressed optimism that research into diseases that ravage the poorer parts of the world — malaria, cholera, tuberculosis and others — will continue to be funded. Economic development in poorer countries has helped reduce global inequality, which he said is at a lower level than it has ever been. “The world is A, much richer, and B, much richer in a far more equitable way,” he told the students. That has been the opposite of what has happened in the past three decades or so in the United States, he said. He called for tax policies to help level that inequality, with a progressive consumption tax and a high estate tax that limits the dynastic possession of wealth. While he expressed concern about the current political climate in the country, he felt that science innovations can overcome problems in Washington, D.C. “The things that count in society don’t depend on politicians being geniuses,” he said. At the dedication Gates had a similar optimistic message earlier in the day during the dedication ceremony of Gates Hall. Gates said it’s an exciting time to be involved in the computer sciences, even more than when he got involved 46 years ago. Despite the advances over the past few decades, he said, “the full dream of what is possible with computing has not yet been realized.” Problems like developing vaccines, energy sources without carbon dioxide emissions, and understanding issues as diverse as neurological disease and weather forecasting can all be tackled with emerging technologies. “With every one of these problems, the **digital tools combined with really amazing software are going to be the reason that we can solve these things**,” he said. He said **figuring out solutions depends on software-intensive techniques**, and that Cornell students will be poised to make gains in those fields.

**Synthetic biology advances elsewhere will inevitably result in easy global ability to engineer superbugs. ONLY the U.S. getting out ahead with new breakthroughs can solve**

**Lohr 11/23** – Quoting Endy, Professor of Bioengineering, Stanford University

Steve Lohr, Quoting Drew Endy, professor of bioengineering at Stanford University, 23 November 2021, https://www.nytimes.com/2021/11/23/business/dealbook/synthetic-biology-drew-endy.html

Synthetic biology holds great promise, but there is a dark side as well. Hacking biology and **democratizing the tools** to do so raises the specter of an **angry loner** or **terrorist group** creating a **build-your-own pandemic** **genetically targeted** at their enemies, among other potential horrors.

Mr. Endy, though synthetic biology’s champion, has been **cleareyed about the risks** since the outset. He was the lead author of a report for the Pentagon’s advanced research agency in 2003 that laid out a framework for developing synthetic biology and managing its risks. In the report, he assessed the spectrum of dangers and imagined the bad-actor threat as “Bin Laden Genetics.”

Today, **risk management**, Mr. Endy said, should **start with the assumption** that in the **not too distant future** “**anyone, anywhere can make any virus from scratch.”**

One **line of protection** is **synthetic biology itself**. For example, Mr. Endy points to the possibility of advanced technologies like **engineered chromosomes** that **would give humans a built-in defense system**, say, against the world’s **top 20 pathogens**.

**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.**

**Wheeler 20**, visiting fellow in Governance Studies at The Brookings Institution, Chairman of the Federal Communication Commission (FCC) from 2013 to 2017, ‘20

(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**.

**China tech lead spreads authoritarianism globally**

**Meserole and Sisson 21** – Chris Meserole is a fellow in foreign policy at the Brookings Institution and director of research for the Brookings Artificial Intelligence and Emerging Technology Initiative. Melanie Sisson is a fellow in the Brookings Institution’s Center for Security, Strategy, and Technology.

Chris Meserole and Melanie W. Sisson, “U.S.-China technology competition,” *Brookings Institution*, 23 December 2021, https://www.brookings.edu/essay/u-s-china-technology-competition/.

Yet **Beijing doesn’t need to bundle Huawei routers with Xi Jinping Thought to undermine liberal values**. The real fear is that **autocrats, as well as** democratically-elected **populist leaders, will increasingly build** out **the next generation of** telecommunications **infrastructure on Chinese hardware**. **The more they do so, the more U.S. and European leaders will lose a point of leverage** — **it’s much easier to insist on governing** telecommunications and **surveillance technology in line with democratic values when you are the supplier of that technology.**

Put differently, the big problem with Chinese technology exports is the downward pressure it places on democratic principles like transparency and accountability, particularly when it comes to the governance of surveillance technologies like facial recognition. If democracies fail to provide compelling alternatives, we’re going to find ourselves in a race to the moral bottom.

SISSON:

Chris is quite right that which governments states buy their technology from matters. **Purchasing technology from countries committed to open societies and human rights is an opportunity to encourage the adoption of liberal principles.** As Chris also notes, **China does not currently seem to use technology exports** and financing explicitly **as a means of** also **exporting** socialism, communism, or **authoritarianism** more generally. **It is possible**, however, that **the effect will be a spread of illiberalism all the same.**

In addition to concerns about how already-illiberal regimes might use Chinese technologies, there is a risk of catastrophic success in all recipient states. It is possible that **near-term material effects** — **felt in economic growth, rising quality of life, and popular satisfaction** — **will make deals with China appealing for** various **governments to get into and very hard for them to get out of. Over time these** political and economic **dynamics might enhance China’s influence** — in bilateral relationships and in overall global market share — **and could habituate societies into technical standards that run counter to liberalism, such as built-in restrictions on** transnational **flows of information and the denial of privacy protections**. The longer these conditions persist, the more entrenched and normalized they become, and the more readily they can be used by regimes interested in exercising social and political control.

**Collapse of democracy guarantees global war**

Larry **Diamond 19**. PhD in Sociology, professor of Sociology and Political Science at Stanford University. “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” Kindle Edition

In such a near future, my fellow experts would no longer talk of “democratic erosion.” We would be spiraling downward into a time of democratic despair, recalling Daniel Patrick Moynihan’s grim observation from the 1970s that liberal democracy “is where the world was, not where it is going.” 5 The world pulled out of that downward spiral—but it took new, more purposeful American leadership. **The planet was not so lucky in the 1930s, when the global implosion of democracy led to a catastrophic world war, between a rising axis of emboldened dictatorships and a shaken and economically depressed collection of selfdoubting democracies**. **These are the stakes**. **Expanding democracy**—with its liberal norms and constitutional commitments—**is a crucial foundation for world peace and security**. **Knock that away, and our most basic hopes and assumptions will be imperiled**. The problem is not just that the ground is slipping. It is that **we are perched on a global precipice**. That ledge has been gradually giving way for a decade. **If the erosion continues, we may** well **reach a tipping point where democracy goes bankrupt suddenly—plunging the world into depths of oppression and aggression that we have not seen since** the end of **World War II**. As a political scientist, I know that our theories and tools are not nearly good enough to tell us just how close we are getting to that point—until it happens.

**Innovation key to solve**

**Donahoe 21** – Executive director of Stanford’s Global Digital Policy Incubator. Former U.S. Ambassador to the UNHRC in Geneva.

Eileen Donahoe, “System Rivalry: How Democracies Must Compete with Digital Authoritarians,” *Just Security*, 27 September 2021, https://www.justsecurity.org/78381/system-rivalry-how-democracies-must-compete-with-digital-authoritarians/.

Last, but not least, **democracies need to recognize that normative leadership and technological leadership go together. If our goal is to spread democratic values** rather than authoritarian norms, **we must lead in technological innovation, particularly in AI and quantum computing. Dominance in those realms will translate into leverage and influence in normative realms and tech standard setting bodies**. In addition, we need to become far more proactive in exporting democratic digital infrastructure as part of our trade and economic development aid programs, rather than ceding the opportunity to China to embed values into digital infrastructure in the developing world.

**Empirical evidence shows competition policy DOES solve**

**Maximiano and Volpin 20** – Ruben Maximiano is a Senior Competition Expert at the OECD and a lecturer at Lille Catholic University, where he teaches EU competition law. Cristina is a Competition Law & Policy Expert at the OECD

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.

## 2AC

### Adv 1

#### Fintech M&As are at an all-time high.

**FTN 21**, Fintech News Switzerland, 11-17-2021, "Fintech M&A Activity Reaches New Heights," https://fintechnews.ch/funding/fintech-ma-activity-reaches-new-heights/50011/

Fintech exits through mergers and acquisitions (M&A) have reached a new all-time high this year, outpacing all of 2020 by 23% to reach 664 deals in Q3 2021 year-to-date (YTD), new data from CB Insights show.

These figures were shared in the [State of Fintech Q3’21 Report](https://www.cbinsights.com/research/report/fintech-trends-q3-2021/?utm_source=CB+Insights+Newsletter&utm_medium=email&utm_campaign=newsletter_general_tues_2021_10_26&utm_term=spiel&utm_content=research-public), which explores global investment trends to spotlight emerging trends.

According to the report, global fintech exits reached new heights this year, driven by [M&A activity](https://fintechnews.ch/fintech/10-largest-fintech-acquisition-deals-so-far-in-2021/48580/). Acquisitions in the fields of digital lending and banking, in particular, led most of the activity.

#### Those M&As eliminate disruptive innovation, directly connects to our internal link.

**Cornelli 21** --- Senior Financial Market Analyst, Monetary and Economic Department, Departmental Research Support.

Giulio, [Sebastian Doerr](https://www.bis.org/author/sebastian_doerr.htm), [Lavinia Franco](https://www.bis.org/author/lavinia_franco.htm) and [Jon Frost](https://www.bis.org/author/jon_frost.htm), Sept. 2021, “Funding for fintechs: patterns and drivers” BIS Quarterly Review, https://www.bis.org/publ/qtrpdf/r\_qt2109c.htm

While fintech funding is growing rapidly, the innovation impetus may wane because of rising market concentration, particularly due to big techs' growth (Carstens et al (2021); Katz (2021)). If big techs acquire new entrants, this could slow innovation.

Usually, M&As by large firms spur firm entry, as acquisitions raise the potential return to entrepreneurs through higher firm valuations (Phillips and Zhdanov (2013)). In the digital economy, however, network effects imply that incumbents with a large user base have a head start over new entrants. In such markets, M&A activity could even reduce innovation. By acquiring entrants before their products reach sufficient scale, big techs can discourage users from joining these entrants' network, thereby reducing startups' growth prospects. For big techs in the US, this "kill zone" effect has been shown to make it harder for innovative firms to raise capital (Kamepalli et al (2020)). Relatedly, large firms may engage in "killer acquisitions" to discontinue a target firm's innovation projects (Cunningham et al (2021)). Whether acquisitions by large banks – which may see fintechs as complementing their existing services, rather than as direct competitors – have a different effect remains an open question.

#### 3 - Squo prior to *Amex* evaluated conduct on a case-by-case basis and created 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 which are empirically known to perpetuate the structural market conditions associated with bad competitive outcomes.

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

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

#### Prefer our advocate. Most qualified anti-trust scholar of our generation.

Allensworth, Professor of Law at Vanderbilt Law School, ‘15

(Rebecca, “The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust, 100 Iowa L. Rev. 1919)

When faced with this void of authority, especially covering cutting-edge antitrust issues raised by new technology and business arrangements, lower courts often turn to a single treatise, Antitrust Law: An Analysis of Antitrust Principles and Their Application, by the late Philip E. Areeda and Herbert Hovenkamp. The treatise’s influence is such that Justice Breyer has remarked “that most practitioners would prefer to have two paragraphs of Areeda’s treatise on their side than three Courts of Appeals or four Supreme Court Justices.” Why courts are so influenced by the treatise is no secret: It is up-to-date, technologically savvy, politically middle-of-the-road, economically literate, comprehensible, and comprehensive. The monopoly that Professor Hovenkamp (as the only living editor of the treatise) has inherited and lovingly maintains is certainly the kind of which antitrust would approve: It is a monopoly “thrust upon it” by simply being the best. But its dominance in lower courts and, therefore, in firm decision-making, should raise concerns among those who believe it was Congress’s intent to put the courts, not a professor, in charge of antitrust policy.

### 2AC---T Subsets

#### We meet---Amex changed the LAW!

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

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

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

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

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

#### C/I---Antitrust is 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.

#### Precision---distinction is arbitrary – antitrust is subject to the same set of public choice concerns

Shughart 08 – J. Fish Smith Professor in Public Choice at Utah State University. PhD in economics from Texas A&M.

William F. Shughart II, “Ch. 25: Regulation And Antitrust,” *Readings in Public Choice and Constitutional Political Economy*, Springer 2008, Eds. Charles K. Rowley and Friedrich G. Schneider, pp. 473-474, https://sci-hub.se/https://link.springer.com/chapter/10.1007/978-0-387-75870-1\_25.

In sum, the empirical case for characterizing antitrust processes as a mechanism of wealth redistribution is strong. From the perspective of public choice, antitrust is simply another form of regulation, having the same causes and consequences. Although this conclusion has not yet gained wide acceptance, the mounting evidence of the politicization of antitrust law enforcement produced by recent high-profile cases brought against some of the world’s most successful business enterprises—cases instigated not in response to complaints by consumers but at the prompting of competitors and other special pleaders—promises eventually to bring antitrust within the ambit of the economic theory of regulation.

Summary

The economic theory of regulation generally, and antitrust in particular, looks behind the stated intentions of the proponents of government intervention into the private economy to uncover hidden agendas of wealth redistribution. The theory’s main thrust is that the formulation and enforcement of public policies toward business has, in fact, tended to protect politically powerful constituencies at the expense of competition and economic efficiency. That is, the theory explains many (if not all) policy decisions as rational political responses to the demands of wellorganized pressure groups. These demanders of protectionism offer political support (votes, campaign contributions, and the like) in return for favored treatment. These favors include the right to charge prices in excess of costs, the erection of barriers to the entry of new rivals, and the proscription of business practices and contractual agreements that would enhance overall economic efficiency, but harm them personally. Importantly, the strategic exploitation of regulation and antitrust by well-organized groups does not represent ‘‘abuse’’ of the policy process in any meaningful sense. The demand for protectionism—and the political response to it—is simply rational behavior under a particular set of institutional constraints.

### 2AC---Regs CP

#### Perm do both---shields the 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.

#### Only DOJ and FTC have authority over mergers—that’s key to nascent acquisitions, AI, 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.

#### Antitrust key—ex ante enforcement/regulation is extremely dangerous in platform markets—ex post litigation minimizes costs

Shelanski, JD, PhD, Professor @ the Georgetown University Law Center, Partner, Davis Polk & Wardell, former ORIA Administrator, former FCC Chief Economist, former Director of the FTC Bureau of Economics, ‘13

(Howard, “Information, Innovation, and Competition Policy For The Internet,” University of Pennsylvania Law Review, May 2013, Vol. 161, No. 6)

Competition enforcers could adopt a number of approaches to these mixed results depending on whether the changes are on balance more beneficial than harmful, or depending on whether the harms are intentional or not. Both inquiries, however, run the risk of calling into question company's best judgment about how to engineer its own products. Finding that an innovation—say a new proprietary interface or product integration is anticompetitive because the value of the innovation to consumers deemed ex post to be outweighed by the costs of competitive exclusion cause firms to hesitate to make beneficial product changes. Knowing the firm could be punished for the effects the innovation has on rivals if the innovation does not turn out well (or perhaps turns out too well for compet itors' tastes), the firm will raise the required ex ante probability of success and undertake fewer R&D efforts. Similarly, punishing a firm that has or mixed motives for undertaking innovation might harm consumers deterring product changes that benefit consumers despite the firm's partly anticompetitive motives.

Absent compelling evidence, then, caution and modesty in enforcement are warranted in this area. This prescription comes not from a glib hope that competition or innovation will somehow eradicate any harm, but from risk that intervention is as likely to make things worse as to make things better. Some have advocated for a government regulatory body to evaluate search algorithms and other intermediary behavior on the Internet.112 There are compelling reasons to be very skeptical of interposing such a government review process into the ongoing and demanding process of private innovation. Algorithms change quickly and must adapt to gaming manipulation by those seeking to profit from online search.113 Regulators are certain to know less about a new technology than those who invent work with it daily. Moreover, regulatory processes and related litigation will inevitably become part of rivals' competitive strategy, distracting resources from competition and innovation in the marketplace. A much better course is for government to give a wide berth to innovation, even where the firm's intentions may not seem benevolent and where the conduct may appear harm competition at the same time that it benefits consumers. And where there is a compelling case for harm, ex post intervention on a case-by-case basis through antitrust law is preferable to general regulation in this context.

This wide berth does not, however, mean we should abandon enforcment or place all purportedly innovative conduct beyond the reach of antitrust law. Microsoft 7/114 gave significant deference to product innovation and integration, but clearly left open the door to a finding that such activity was a ruse or pretext for anticompetitive exclusion. It allowed for antitrust liability where a product innovation was not in some way different and better than what a consumer could do for himself, thereby preserving anticompetitive tying as a possible claim against a software platform.115

Generalizing from the Microsoft II decision, where innovation was clearly a pretext for harming rivals or for deterring rival innovation, competition enforcement should be available. Two kinds of conduct which digital platforms have been accused of undertaking would appear to harm innovation without constituting legitimate innovation: raising rivals' costs and forced free riding.

#### Regulatory capture—it completely undermines solvency

Childson, former chief technologist at the FTC, ‘19

(Neil, “Creating a new federal agency to regulate Big Tech would be a disaster,” October 30, <https://www.washingtonpost.com/outlook/2019/10/30/creating-new-federal-agency-regulate-big-tech-would-be-disaster/>)

On its face, a single expert agency, laser-focused on one set of problems, sounds sensible. But history shows that such industry-specific agencies are most susceptible to “regulatory capture,” a term used to describe when an institution is dominated by the industry they are charged with overseeing — for example, when a state board that sets the rules for the practice of dentistry is dominated by practicing dentists.

The idea was popularized by the Stigler Center’s namesake, Nobel economist George Stigler, who argued that “regulation is acquired by the industry and is designed and operated primarily for its benefit.” In his foundational paper “The Theory of Economic Regulation,” Stigler warned that any regulated industry has strong incentives to form close connections with its regulators to seek favors. The inevitable result, he argues, is that industries disproportionately influence the agency’s agenda, shape its rulemaking and even supply it with personnel.

Companies find it much easier to influence narrowly focused institutions than institutions with broader law enforcement mandates. Where the latter hear from a wide range of companies with a variety of concerns, the former hear only from one type of company. Think about how much easier it is to talk your way out of a speeding ticket from the local police officer, who knows your family, than it is to deal with an effectively anonymous city cop who pulls over dozens of drivers a day. Similarly, big companies would much rather deal with a select group of bureaucrats whom they know well — and who hear only their perspective most of the time.

Captured agencies don’t hold companies accountable; instead, they act to benefit the industry’s established players, disadvantaging newer firms and the public at large. In worst-case scenarios, such agencies can block new, disruptive competitors that threaten the established, regulated industry.

The recent report from the Stigler Center holds up the Federal Communications Commission as an example of what a new Digital Authority could look like. But the FCC is a perfect example of the likely problems of an industry-specific regulator. At nearly every turn, with every new potentially disruptive communications innovation, the FCC (and its predecessor, the Federal Radio Commission) did the bidding of the best-connected incumbents. As former FCC chairman Michael Powell said, “[T]he history of the FCC is, when something happens that it doesn’t understand, kill it. We tried to kill cable. We tried to kill long-distance. When [MCI founder] Bill McGowan start[ed] stringing out microwave towers that threatened AT&T, the FCC tried to stop him. The FCC tried to kill cable because it was going to threaten broadcasting.” While it didn’t halt technological progress or competition, it often slowed it, occasionally by decades.

#### Links to NB.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Teaming up

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

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

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

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

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

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

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

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

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

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

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

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

The next area that may be worthy of the coalition’s attention is cyberwar and hybrid conflict (where digital and physical aggression are combined). Over the past decade, a growing number of countries have identified hybrid conflict as a national security threat. Any nation with highly skilled cyber operations can wreak havoc on countries that fail to invest in defenses against them. Meanwhile, cyberattacks by non-state actors have shifted the balance of power between states.

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

### 2AC---Innovation DA

#### 1. AFF outweighs – type of innovation matters – only we connect to an impact.

Kamepalli 21 – Economics Ph.D. Student at Columbia University

Sai Krishna, Raghuram Rajan, University of Chicago Distinguished Service Professor of Finance, and Luigi Zingales, finance professor at the University of Chicago Booth School of Business, “Kill Zone,” Becker Friedman Institute for Economics Working Paper No. 2020-19, https://ssrn.com/abstract=3555915

The classic analysis of the effect of antitrust enforcement on incentives to innovate is Segal and Whinston (2007). In their model, where there are no network externalities, voluntary licensing agreements (and equally mergers) raise both parties’ payoffs and thus increase innovation. In this framework, Cabral (2018) introduces the distinction between radical innovation (competition *for* the market) and incremental innovation (competition *within* the market). He shows that antitrust restrictions on acquisitions (or technology transfers) can lead to lower incremental innovation but higher radical innovation. The negative impact of mergers on radical innovation, however, comes from an “opportunity cost” effect. By increasing the payoff of incremental innovation, mergers reduce the additional payoff of radical innovation. Callander and Matouschek (2020) reach a similar result by focusing on rent seeking. With incremental innovation, the entrant's product is closer to the incumbent’s business, and is more liable to be taken over when mergers are allowed (so that the incumbent can shut down a competitive threat). In our model we only have radical innovation. Nevertheless, mergers can reduce the incentive to innovate because of the impact they have on the difficulty of attracting customers away from the incumbent.

#### A) AFF reverses to pre-Amex regime---crafts a limited exception that is consistent with current law.

**Salop 21** --- Professor, Georgetown University Law Center.

Steven C, Daniel Francis, Lauren Sillman, Michaela Spero Amadeus, “Rebuilding Platform Antitrust: Moving on from Ohio v. American Express,” Georgetown University Law Center, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3432&context=facpub

By insisting on a single market definition encompassing both sides, the Court was able to avoid making (or at least admitting) this exception, and—into the bargain—to place a burden on the plaintiff, rather than the defendant, to figure out whether the acknowledged harms were in fact offset by claimed benefits.168

Had the Court chosen the more direct road, it would have focused instead on crafting a limited exception to the general rule against multi-market balancing. Such an exception would have to be narrowly tailored and consistent with existing law, including the law of burdens of proof. But, as we shall demonstrate, such an exception could have been created.

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

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

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

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

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

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

**Specifically, against Big Ag!**

**Dorning ’22** [Mike; January 3; reporter; Fortune, “Biden’s new plan to fight inflation: take on Big Meat,” <https://fortune.com/2022/01/03/biden-inflation-food-prices-meat-packing/>]

President Joe Biden will **announce plans** Monday to combat the market power of the giant conglomerates that **dominate** meat and poultry processing, ratcheting up a months-long campaign that has blamed anti-competitive practices in the industry for contributing to surging food inflation.

Biden will join Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland to meet virtually with ranchers and farmers to hear complaints about consolidation in the industry, while a newly launched portal will allow them to report unfair trade practices by meatpackers. The White House will also highlight initiatives it is taking to counter meatpackers’ economic power, including $1 billion in federal aid to assist expansion of independent processors and new competition regulations under consideration.

The **latest announcement** focuses **fresh attention** on Biden’s fight with the meat industry and helps cast him as a president willing to take on **powerful business interests** over consumer prices. Many Democrats are concerned that months of negotiations over Biden’s economic plan have distanced him too much from the most pressing kitchen-table concerns facing Americans.

Inflation has swiftly moved to the top of public concerns as the annual rise in consumer prices hit its highest level in 40 years. Meat prices, which in November were up 16% from a year earlier, have been the biggest contributor to grocery inflation. Meatpacking industry representatives have blamed soaring prices on labor shortages, rising fuel prices and supply-chain constraints.

Biden **singled out** the meat and poultry processing industries for scrutiny in a July e**x**ecutive **o**rder on promoting competition across the economy. His top economic adviser later criticized meatpackers for “pandemic profiteering.” The U.S. Agriculture Department also announced plans in June to consider three new sets of regulations on unfair trade practices in livestock and poultry markets, with officials anticipating the proposal of new rules early this year.

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

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

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

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

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

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

The Google example fares even worse. Google was already the world’s second most popular search provider by 2000.146 That same year, Yahoo (previously the most popular provider) announced that Google would begin serving as the search engine for Yahoo’s web portal,147 effectively making Google the dominant global search provider.148 As with Facebook, Google’s stranglehold over search only increased with the passage of time—as of 2018, after nearly two decades of dominance, Google still controlled more than 90% of the global market for general search results.149

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

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

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

Seru 14 --- University of Chicago Business Professor.

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.

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

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

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

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

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

The second premise raises questions regarding the full range of long-term effects, including chilling effects on future innovation. One concern is that antitrust interventions in these settings are counterproductive, because they reduce the global ex ante incentives for innovation.258 While antitrust interventions reduce a potential monopolist’s incentive to innovate in theory, questions remain regarding the size and overall impact of the interventions in practice. Many observers, for example, believe that the effect of small antitrust policy changes has no appreciable effect on innovation incentives and, in any event, has not been empirically established.259 Furthermore, anticompetitive effects also affect the innovation by their rivals, either by suppressing rivals’ actual innovation or by reducing rivals’ incentives to innovate.260 The innovation embodied in the product redesign, therefore, is not the only innovation effect at issue. Thus the link between anticompetitive conduct and rival innovation suggests that assessments regarding innovation effects that focus solely upon the defendant’s innovations may be incomplete.261

#### Covid destroyed the Ag industry.

Jankowicz ’20 [Mia; April 27; News Reporter at Insider's London office; *Business Insider,* “Farmers are Destroying their Own Crops After the Coronavirus Ravaged the Food Market — and Say USDA Failed to Help Them Get It to Hungry Americans in Time,” <https://www.businessinsider.com/food-destroyed-farms-amid-covid-19-struggling-families-go-hungry-2020-4>; KS]

Millions of pounds of food is being wasted on US farms after demand collapsed because of the coronavirus pandemic, according to multiple reports.

Farmers are pouring thousands of gallons of milk down the drain, and crushing ripe fruit and vegetables back into the soil with heavy machinery because they have no way to put it on the market for a profit.

The waste is due to a collapse in parts of the service industry forced to close because of the virus. It means buyers like restaurants, hotels, schools, and sports venues no longer need ingredients, which has in turn caused demand to plummet in some cases to half its regular levels, according to The Guardian.

The federal government launched a program to redistribute this food, setting aside $3 billion for the US Department of Agriculture (USDA) to buy it up and send it to struggling Americans.

However, industry leaders and lawmakers have complained that USDA failed to launch the program quick enough, leaving producers with no choice but to waste huge quantities of food, Politico reported.

Surplus fruit and vegetables have been plowed back into the ground in a process known as "re-mulching." This prevents the crops rotting in the field and attracting pests.

Producers in some states have been asked by the cooperative Dairy Farmers of America to dump thousands of gallons of milk which is now un-sellable, according to the Milwaukee Journal Sentinel.

One typical dairy in Wisconsin, the Golden E Dairy has been pouring up to 25,000 gallons of milk down the drain, reported the paper.

Although the co-op has paid for the wastage so far, it's unclear how long this can continue.

At the same time, there is increased demand at food banks as newly furloughed or laid-off workers struggle to feed their families.

One of the country's leading food bank networks, Feeding America, released a report on April 22 which said that the virus could cause a record number of children to go without proper food.

Tom Vilsack, the former secretary of agriculture under the Obama administration, told Politico: "It's not a lack of food, it's that the food is in one place and the demand is somewhere else and they haven't been able to connect the dots."

Back in March, industry leaders and lawmakers called on USDA to step in by buying up the surplus and redistributing it to food banks, according to Politico.

In Florida, Commissioner of Agriculture Nikki Fried, a Democratic representative, led congressional calls to USDA to take action.

But it was not until around a month later, on April 17, that President Donald Trump directed USDA to launch its $19 billion Coronavirus Food Assistance Program.

The program is meant to provide direct support to farmers and devote $3 billion to buying up fresh fruits and vegetables, meat, and dairy products, at a rate of around $300 million a month.

This food will then be redistributed to food banks, faith organizations and other nonprofits.

However, it may have come too late. According to Politico, federal officials think the process of buying up and redistributing the food could take another month, by which time peak season will have passed.

Brittany Lee, a blueberry farmer and executive director of the Blueberry Growers Association, told Politico that the help would come too late for Florida farmers.

Commissioner Fried called the move "too little, too late" in a letter to USDA on April 22, which said that the USDA plan would cover little of Florida's forecast $522 million agriculture losses.

"There are serious concerns over payment caps that cover just a small fraction of losses our producers have already experienced," she said in a letter to USDA.

"For weeks, we have called for immediate federal purchases to help our fresh fruit and vegetable producers mitigate these losses, but the purchases coming now may be too late in the season for Florida farmers to benefit."

Business Insider has approached the USDA for comment. The department told Politico in a statement that it had moved quickly to avert the situation.

#### No impact.

Buhaug et al, PhDs, 15

(Halvard, Political Science from NTNU, Tor A Benjaminsen, Human Geography from Roskilde, Espen Sjaastad, Resource Economics from NMBU, and Ole Magnus Theisen, Political Science from NTNU, Climate variability, food production shocks, and violent conflict in Sub-Saharan Africa, Environmental Research Letters 10(12)) BW

Across all models, we find relatively weak and insignificant effects for domestic food production and we also note that the sign of the coefficients shifts between outcome types. In this sense, table 1 implicitly contrasts both claims that political violence is more prevalent when basic needs are met (Salehyan and Hendrix 2014) and claims that agricultural income shocks increase civil conflict risk (von Uexkull 2014). The results are consistent with Koubi et al (2012) and van Weezel (2015), however, who conclude that rainfall—a significant determinant of yields in SSA—has little impact on conflict either directly or through economic performance. The covariate that best and most consistently explains temporal variation in political violence is the time-lagged conflict incidence indicator. Models 1–2 show that a new civil conflict is unlikely to break out if another one is already ongoing in the same country whereas Models 3–6, which capture the occurrence of less organized conflict, demonstrate that violence begets violence. Coups d’état (Models 7–8) exhibit a comparatively weak temporal correlation pattern in our data and are generally regarded as a highly unpredictable phenomenon (Luttwak 1979). Next, we estimate the same set of models on a subsample of 14 countries in SSA where rainfall has a large and significant positive effect on food production (figure 2(b); see supplementary information, section B for details). To better capture the influence of climate variability and reduce concerns with endogeneity, we further replace the standard OLS model with twostage instrumental variable regression. The first stage in this model estimates the joint influence of annual rainfall (linear and squared terms) and temperature (linear) on contemporaneous food production. This effect then constitutes the exogenous instrument for food production in the second stage. The results are reported in table 2. Mirroring the results presented above, we fail to uncover a robust signal for agricultural performance, although the sign of the coefficient for food production now remains negative in seven of the eight specifications. Food production shocks may have different consequences depending on the socioeconomic context, so next we consider a series of interactive relationships. Specifically, we investigate the joint effect of food production and (i) low level of development, (ii) extent of discriminatory political system, and (iii) economic dependence on agriculture; three conditions whereby loss of income from agriculture might constitute a particular challenge to society. To model these interactions, we include time-varying regressors instead of country-fixed effects where (i) is represented by infant mortality rate (IMR; World Bank 2014), (ii) is captured using the Ethnic Power Relations v.1.1 data (Cederman et al 2010), while (iii) uses an index of agricultural contribution to GDP (World Bank 2014). Moreover, to preserve focus on temporal dynamics, food production is now operationalized as yearly deviation from the country mean, 1961–2009. We use additive inverse deviation values to ensure theoretical consistency among the components in the interaction terms. All models control for (ln) population size, conflict history, and a common time trend, and models without IMR and agricultural dependence additionally control for (ln) GDP per capita. The results are presented in table 3. Again, we are unsuccessful in establishing a consistent covariation pattern between agricultural performance and political violence. Interpreting the combined effect of interaction terms with continuous parameters is inherently difficult but figure 4 shows that food production is insignificantly related to all conflict outcomes across levels of socioeconomic development for all three interaction terms. The sole exception is the result in Model 24, where lower food production in highly discriminatory societies is negatively associated with non-state conflict. This result would seem to contradict the standard scarcity thesis (Homer-Dixon 1999) although it is consistent with observations that conflict is more prevalent during surplus years (Witsenburg and Adano 2009, Salehyan and Hendrix 2014). Mirroring earlier research, ethnopolitical exclusion is strongly related to higher civil conflict risk, but not necessarily to other forms of political violence. Infant mortality rate and economic dependence on agriculture appear largely irrelevant. While this may come as a surprise, recall that most countries in SSA are characterized by underdevelopment and a large agricultural sector, implying that the variation in values on these indicators is modest. Large parameter uncertainties and p-values above the conventional significance threshold (5%) may disguise substantively important effects (Ward et al 2010). Accordingly, as a final assessment, we conduct a set of out-of-sample simulations and compare predictions for models with and without food production. The models are estimated on a subset of the full sample, in this case all years before 2000, and the estimated effects are then used to predict conflict outcomes out of sample, i.e., the 2000–09 period. Figure 5 shows the predicted values from four pairs of models that are specified similarly to Models 17, 20, 23, and 26, except for the shorter time period and the fact that one model in each pair drops the food production deviation variable. For civil conflict and social unrest, the models generate very similar predictions, signaling that agricultural performance adds little to the models’ predictive power. There is more spread in the predictions for the remaining two outcome categories. Puzzlingly, the model without food production performs better in both cases—i.e., the Receiver Operating Characteristics curves have higher ‘Area Under the Curve’ scores. We hesitate to put too much emphasis on the ROC tests, given the rareness of the outcomes(notably Models 17 and 26) and the relatively small training samples (Models 20 and 23), but nonetheless the patterns observed in the out-of-sample simulations substantiate the regression results reported above; fluctuations in agricultural output explain little of the observed variation in political violence in post-colonial Sub-Saharan Africa. 5. Concluding remarks Emerging evidence suggests that food price shocks are associated with an increase in social unrest (Smith 2014, Bellemare 2015, Hendrix and Haggard 2015, Weinberg and Bakker 2015). Yet, the robust ‘non-finding’ presented here implies that so-called ‘food riots’ play out largely isolated from climate-sensitive production dynamics in the affected countries. Likewise, claims that adverse weather and harvest failure drive contemporary violence in Africa (e.g., Hsiang et al 2013, IFPRI 2015) are not supported by our analysis. Instead, social protest and rebellion during times of food price spikes may be better understood as reactions to poor and unjust government policies, corruption, repression, and market failure (e.g., Bush 2010, Buhaug and Urdal 2013, Sneyd et al 2013, Chenoweth and Ulfelder 2015).

### 2AC---Agency Trade-Off

#### Non-unique and turn—defense-friendly standards increases cost and reduces impact of agency enforcement

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

Measures to expand federal antitrust intervention dramatically—through the prosecution of lawsuits or the promulgation of trade regulation rules—will face arduous opposition from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (again, we assume that legislation to change the doctrinal status quo will not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies will create a serious gap between the teams assembled for the prosecution and defense, respectively. Although therefore the public agencies can match the private sector punch for the punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases, seeking powerful remedies upon global giants.

#### No uniqueness---FTC attacking tech NOW---only question of relative probability of success.

**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.

#### Turn—*Amex* requirement eats up agency resources

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

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

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

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

#### No internal link—agency resources ineffective --- drive away the best talent

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

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

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

Our second caution is that severe restrictions on the revolving door could deny the federal agencies access to skills they will need to carry out a major expansion of anti

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

#### No tradeoff – newest resolution creates more capacity

Gehl 9-24 (Kate, Senior Counsel for Foley and Lardner LLP, Elizabeth A. N. Haas, Partner, Alan D. Rutenberg, Partner, H. Holden Brooks, Partner, Benjamin R. Dryden, Partner, Foley and Lardner LLP“A Divided FTC Approves Omnibus Resolutions to Step Up Enforcement Actions and Votes to Withdraw the 2020 Vertical Merger Guidelines” [https://www.foley.com/en/insights/publications/2021/09/divided-ftc-approves-omnibus-resolutions Published 9-24-2021](https://www.foley.com/en/insights/publications/2021/09/divided-ftc-approves-omnibus-resolutions%20Published%209-24-2021), MSU-MJS)

According to the FTC’s press release, the resolutions are aimed at broadening its ability “to obtain evidence in critical investigations on key areas where the FTC’s work can make the most impact.” The resolutions also will purportedly permit the FTC to “better utilize its limited resources” to quickly investigate potential misconduct. The FTC views the resolutions as one method to increase efficiency at the FTC, which certain Commissioners believe has become necessary due to the “increased volume of investigatory work” caused by a “surge” in merger filings in recent months.

In practice, these resolutions allow a single Commissioner, instead of a majority of sitting Commissioners, to approve compulsory process requests in

any investigation within the scope of the resolution for the next 10 years. What practical effect these resolutions will have remains to be seen; however, businesses engaged in conduct that may be implicated by the resolutions should be aware that FTC staff will now have an expedited ability to carry out compulsory process requests, which will very likely increase the number and scope of investigations conducted by the FTC.

#### Funding is normal means – AND boosts are coming

Byers 21 (Dylan Byers, senior media reporter for NBC News; **internally citing George Washington University professor and former FTC chair William Kovacic**; “Is Facebook untouchable? It's complicated,” NBC News, 7-1-2021, https://www.nbcnews.com/tech/tech-news/facebook-untouchable-complicated-rcna1323)

The House Judiciary Committee recently advanced six bills that would bolster the government's ability to regulate Big Tech. They range from simple budgeting measures — one would give more funding to the FTC and the Department of Justice for their antitrust enforcement efforts — to profound reforms — one that would stop platform companies from preferencing their products over those of their competitors and another that would make it illegal for companies to eliminate competitors through acquisitions.

This legislative package faces an arduous road ahead. House Majority Leader Steny Hoyer, who sets the House floor schedule, has said none of the six bills are ready for a vote, which suggests they don't have broad bipartisan support. If and when they do make it through the House, they face an even harder battle in the Senate.

"It's hard to imagine that the larger legislative package is accomplished this year," Kovacic said, though he predicted a few of the less-threatening bills — budgeting, for example — are likely to pass on their own.

"The funding for the FTC and DOJ antitrust divisions, it's nearly 100 percent likely that Congress will pass that law," he said. He said another bill, which would block the tech firms from moving court hearings to more favorable states, was also likely to pass.

#### Pounder—FTCs new rulemaking agenda overstretches the agency—merger review + tons of new rules

Wilson, FTC Commissioner, ‘12/10/21

(Christine S., Dissenting Statement of Commissioner Christine S. Wilson

Annual Regulatory Plan and Semi-Annual Regulatory Agenda, <https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf>)

The context in which the Commission announces this ambitious and resource-intensive rulemaking agenda gives independent cause for concern. The “surge in merger filings” has been a central focus of Chair Khan since her arrival at the agency.2 To address the uptick in merger filings, staff from many non-merger divisions throughout the agency have been commandeered to review pre-merger notification materials.3 These filings are subject to statutory timeframes, but the FTC has struggled to meet its timing obligations.4 Consequently, the FTC’s Bureau of Competition is now sending warning letters to merging parties whose statutory timeframes have expired, warning that the agency’s investigations continue and threatening that if they proceed to consummate their transactions, they do so at their own peril.5 It is puzzling that we would unleash an avalanche of rulemakings while also confronting a tsunami of merger filings.

Merger wave or no merger wave, my Democrat colleagues have long aspired to a more expansive rulemaking agenda for the agency.6 This year, they began taking steps to implement that goal. Acting Chairwoman Slaughter created a new rulemaking group within the FTC’s Office of General Counsel to “help build [the] Commission’s rulemaking capacity and agenda for unfair or deceptive practices and unfair methods of competition.”7 She also launched a review of the Commission’s Rules of Practice to “streamline” rulemaking procedures under Section 18 of the FTC Act.8 Chair Khan then ushered those changes across the finish line.9 While the Annual Regulatory Plan and Semi-Regulatory Agenda characterize those changes to our Rules of Practice as “eliminating extra bureaucratic steps and unnecessary formalities,” in reality those changes fast-track regulation at the expense of public input, objectivity, and a full evidentiary record.10 The Statement of the Commission issued in conjunction with those rule changes confirmed a desire for an ambitious rulemaking agenda,11 which predictably is reflected in this plan.

The regulatory plan identifies many rulemakings that will be launched in the coming months, including a trade regulation rule on commercial surveillance “to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision making does not result in unlawful discrimination.”12 This rule may implicate competition as well as consumer protection issues, as the Statement of Regulatory Priorities notes that “surveillance-based business models” impact not just consumers but competition.13

And taking a big step into uncharted waters, the plan states that “the Commission will also explore whether rules defining certain ‘unfair methods of competition’ prohibited by Section 5 of the FTC Act would promote competition and provide greater clarity to the market.”14 In deference to President Biden’s recent Executive Order,15 the Commission may consider competition rulemakings relating to “non-compete clauses, surveillance, the right to repair, payfor-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.”16 As if this list is insufficiently lengthy, the plan observes that “[t]he Commission will explore the benefits and costs of these and other competition rulemaking ideas.”17 In the absence of further detail, the reader is left to daydream about the additional rulemaking adventures that await.

1. **Impact non-unique and turn --- platform monopoly enables algorithmic discrimination.**

**Noble**, PhD, Associate Professor of Gender Studies and African American Studies at the University of California, **‘18**

(Safiya Umoja, *Algorithms of Oppression: How Search Engines Reinforce Racism*, New York University Press, p. 36–38)

Google has become a **ubiquitous entity** that is synonymous for many everyday users with “the Internet” itself. From serving as a browser of the Internet to handling personal email or establishing Wi- Fi networks and broadband projects in municipalities across the United States, Google, unlike traditional telecommunications companies, has **unprecedented access** to the **collection** and **provision of data across** a **variety of platforms** in a highly unregulated marketplace and policy environment. We must continue to study the implications of engagement with commercial entities such as Google and what makes them so desirable to consumers, as their use is not without consequences of increased surveillance and privacy invasions and participation in hidden labor practices. Each of these enhances the business model of Google’s parent company, Alphabet, and **reinforces its market dominance** across a **host of vertical and horizontal markets**.22 In 2011, the Federal Trade Commission started looking into Google’s near- monopoly status and market dominance and the harm this could cause consumers. By March 16, 2012, Google was trading on NASDAQ at $625.04 a share, with a market capitalization of just over $203 billion. At the time of the hearings, Google’s latest income statement, for December 2011, showed gross profit at $24.7 billion. It had $43.3 billion cash on hand and just $6.21 billion in debt. Google held 66.2% of the search engine market industry in 2012. Google Search’s profits have only continued to grow, and its holdings have become so significant that the larger company has renamed itself Alphabet, with Google Search as but one of many holdings. By the final writing of this book in August 2017, Alphabet was trading at $936.38 on NASDAQ, with a market capitalization of $649.49 billion.

The public is aware of the role of search in everyday life, and people’s opinions on search are alarming. Recent data from tracking surveys and consumer- behavior trends by the comScore Media Metrix consumer panel conducted by the Pew Internet and American Life Project show that search engines are as important to Internet users as email is. Over sixty million Americans engage in search, and for the most part, people report that they are satisfied with the results they find in search engines. The 2005 and 2012 Pew reports on “search engine use” reveal that 73% of all Americans have used a search engine, and 59% report using a search engine every day.23 In 2012, 83% of search engine users used Google. But Google Search prioritizes its own interests, and this is something far less visible to the public. Most people surveyed could not tell the difference between paid advertising and “genuine” results.

If search is so trusted, then why is a study such as this one needed? The exploration beyond that first simple search is the substance of this book. Throughout the discussion of these and other results, I want to emphasize the main point: there is a **missing social context in commercial digital media platforms**, and it matters, particularly **for marginalized groups** that are problematically represented in stereotypical or pornographic ways, for those who are bullied, and for those who are **consistently targeted**. I use only a handful of illustrative searches to underscore the point and to raise awareness— and hopefully intervention— of how important what we find on the web through commercial search engines is to society.

Google’s **monopoly status**,25 coupled with its **algorithmic practices** of biasing information toward the interests of the **neoliberal capital** and **social elites** in the United States, has resulted in a provision of information that **purports to be credible** but is actually a reflection of **advertising interests**. Stated another way, it can be argued that Google functions in the interests of its most influential paid advertisers or through an intersection of popular and commercial interests. Yet Google’s users think of it as a public resource, generally free from commercial interest. Further complicating the ability to contextualize Google’s results is the power of **its social hegemony**.26 Google benefits directly and materially from what can be called the “labortainment”27 of users, when users consent to freely give away their labor and personal data for the use of Google and its products, resulting in incredible profit for the company.

There are many cases that could be made to show how overreliance on commercial search by the public, including librarians, information professionals, and knowledge managers— all of whom are susceptible to overuse of or even replacement by search engines— is something that we must pay closer attention to right now. Under the current algorithmic constraints or limitations, commercial search does not provide appropriate social, historical, and contextual meaning to already **overracialized** and **hypersexualized** people who materially **suffer along multiple axes**. In the research presented in this study, the reader will find a more meaningful understanding of the kind of harm that such limitations can cause for users reliant on the web as an artifact of both formal and informal culture.28 In sum, search results play a **powerful role in providing fact and authority** to those who see them, and as such, they must be examined carefully. Google has become a central object of study for digital media scholars,29 due to recognition on these scholars’ parts of the power and impact wielded by the necessity to begin most engagements with social media via a search process and the **near universality** with which Google has been adopted and embedded into all aspects of the digital media landscape to respond to that need. This work is addressing a gap in scholarship on how search works and what it biases, public trust in search, the relationship of search to information studies, and the ways in which African Americans, among others, are mediated and commodified in Google.

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#### 2NC cross ex says that aff needs to affect all markets---here ya go

**Frankel 18** --- President of Coherent Economics, LLC, and has served as an expert in competition law matters involving payment system on behalf of merchants or competition authorities in many jurisdictions.

Alan S., 2018, “Another Side to the Story: American Express and the Quest for Efficient Payments Systems,” 33 Antitrust 44, https://heinonline.org/HOL/Page?handle=hein.journals/antitruma33&div=13&id=&page=&collection=journals

Controversies regarding payment systems were neither born with nor will be laid to rest by Ohio v. American Express. 1 In the United States, money and payment systems have been at the center of intense policy disputes since long before the establishment of antitrust laws, and, indeed, before the establishment of the United States. The reason is simple: virtually all other markets depend on payment systems to complete transactions. The exercise of market power in payment system markets is akin to the imposition of a privately collected excise tax that distorts markets throughout the economy. With retail sales approaching $6 trillion annually in the United States, the ability to impose and maintain an anticompetitive tax of even a fraction of one percent on the value of retail payments can generate harm to the public which likely dwarfs that involved in any other antitrust dispute.

#### Antitrust is a type of regulation – regulation is any review by government actors

Hovenkamp 20 – James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School. He is a Fellow of the American Academy of Arts and Sciences, and in 2008 won the Justice Department’s John Sherman Award for his lifetime contributions to antitrust law.

Herbert Hovenkamp, “Antitrust and Regulation Over Time,” *The Regulatory Review*, 1 October 2020, https://www.theregreview.org/2020/10/01/hovenkamp-antitrust-regulation-over-time/.

Antitrust law is a residual regulator, picking up where legislative regulation leaves off. The relationship between antitrust law and regulation at any given time depends on perceptions about what a regulatory regime leaves for the free market.

These issues arose following New Deal era expansions of federal regulation. The U.S. Supreme Court recognized an immunity from antitrust laws only if Congress expressly authorized it. That was the Court’s principal holding in its 1939 United States v. Borden decision, which involved the Agricultural Marketing Agreement Act, and again in its 1945 Georgia v. Pennsylvania Railroad decision, which involved the Interstate Commerce Act. Neither statute expressly provided an antitrust immunity, and the Court found this conclusive.

In the 1960s, however, the Supreme Court began worrying that conflicts would emerge if antitrust laws were applied in situations where regulation was pervasive—that is, if a regulatory agency comprehensively controlled a firm’s market behavior. For example, in its 1963 Pan American World Airways v. United States decision, the Supreme Court found that the Civil Aeronautics Board had “broad jurisdiction” over the behavior of airlines. As a result, antitrust law had no authority to police airline cartels, even though the Federal Aviation Act said nothing about antitrust immunity. This doctrine came to be called “implied antitrust immunity.”

The Pan Am model was very optimistic about the efficacy and scope of regulation, envisioning it as a complete substitute for free market forces. The reality is quite different. Regulatory provisions never reach every competition-affecting thing that a regulated firm does. Within the Pan Am mindset that was regarded as a shortcoming, but today we are more likely to regard it as good and necessary. Given regulation’s poor track record in mimicking competitive behavior, perhaps the best approach is to regulate narrowly, only for proven market failure, and let the market and thus antitrust policy control the rest.

A competing line of thinking emerged that antitrust should fill regulatory gaps, of which there were many. For example, in United States v. Philadelphia National Bank, the Court held that, although banking regulators had the power to approve bank mergers, they did not evaluate competitive effects as antitrust law did. As a result, antitrust merger law could be applied to bank mergers. In the 1973 Otter Tail Power v. United States case, the government accused the defendant of refusing to wholesale, or “wheel,” power to other utilities. The then-existing Federal Power Commission controlled retail distribution but had no authority over wheeling. The Court responded that antitrust law should fill this gap.

These “gap-filling” decisions paved the way for today’s more “transactional” approach to the relationship between regulation and antitrust. Rather than considering regulation as a whole, the court should focus more narrowly on the challenged conduct. If the conduct was under the agency’s control and the agency was supervising it adequately rather than rubber-stamping anticompetitive behavior, then no room remained for antitrust. “Even when an industry is regulated substantially,” the Supreme Court concluded in 1981, that does not entail “an intent to repeal the antitrust laws with respect to every action…taken within the industry.” Rather, immunity is called for “when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge.”

One consequence of deregulation since the 1980s has been the gradual expansion of antitrust law to fill the expanding amount of empty regulatory space. For example, the airlines, once declared immune from the antitrust laws, are readily subject to them today.

Within this framework, it is not antitrust’s purpose to “fix” regulation. Even if a regulation reflects industry capture at consumers’ expense, antitrust can do no more than follow the regulatory mandate. What it can do, however, is ensure that a challenged action is really “regulated,” meaning that it has been authorized and reviewed by governmental actors and is not an act of unsupervised private discretion. This approach also explains why antitrust law’s petitioning immunity protects from antitrust attack people who lobby the government for or against regulations in ways that might serve private interests rather than those of the public.

#### Antitrust laws’ can target any interference with competition.

Collins ’12 [Collins English Dictionary; carbon dated April 18, 2012; “antitrust,” https://www.collinsdictionary.com/dictionary/english/antitrust]

In the United States, antitrust laws are intended to stop large firms taking over their competitors, fixing prices with their competitors, or interfering with free competition in any way.

#### ‘Anticompetitive practices’ include single firm conduct.

FTC ’13 [Federal Trade Commission; carbon dated November 19, 2013; “Anticompetitive Practices,” https://www.ftc.gov/enforcement/anticompetitive-practices]

Anticompetitive Practices

The FTC takes action to stop and prevent unfair business practices that are likely to reduce competition and lead to higher prices, reduced quality or levels of service, or less innovation. Anticompetitive practices include activities like price fixing, group boycotts, and exclusionary exclusive dealing contracts or trade association rules, and are generally grouped into two types:

agreements between competitors, also referred to as horizontal conduct

monopolization, also referred to as single firm conduct

The FTC generally pursues anticompetitive conduct as violations of Section 5 of the Federal Trade Commission Act, which bans “unfair methods of competition” and “unfair or deceptive acts or practices.”

#### “Substantial” includes subsets and can be either quantitative or qualitative.

Sotomayor ’17 [Sonya; February 22; Justice of the Supreme Court of the United States, J.D. from Yale University, A.B. in History from Princeton University; Justia, “Life Technologies Corp. v. Promega Corp., 580 U.S. \_\_\_ (2017),” <https://supreme.justia.com/cases/federal/us/580/14-1538/#tab-opinion-3694340>]

The threshold determination to be made is whether §271(f)(2)’s requirement of “a substantial portion” of the components of a patented invention refers to a quantitative or qualitative measurement. Life Technologies and the United States argue that the text of §271(f)(1) establishes a quantitative threshold, and that the threshold must be greater than one. Promega defends the Federal Circuit’s reading of the statute, arguing that a “substantial portion” of the components includes a single component if that component is sufficiently important to the invention.

We look first to the text of the statute. Sebelius v. Cloer, 569 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 6). The Patent Act itself does not define the term “substantial,” and so we turn to its ordinary meaning. Ibid. Here we find little help. All agree the term is ambiguous and, taken in isolation, might refer to an important portion or to a large portion. Brief for Petitioners 16; Brief for Respondent 18; Brief for United States as Amicus Curiae 12. “Substantial,” as it is commonly understood, may refer either to qualitative importance or to quantitatively large size. See, e.g., Webster’s Third New International Dictionary 2280 (defs. 1c, 2c) (1981) (Webster’s Third) (“important, essential,” or “considerable in amount, value, or worth”); 17 Oxford English Dictionary 67 (defs. 5a, 9) (2d ed. 1989) (OED) (“That is, constitutes, or involves an essential part, point, or feature; essential, material,” or “Of ample or considerable amount, quantity, or dimensions”).

### Chilling DA

**The Illumina-Grail merger block is a canary in the coal mine for a new era of antitrust enforcement**

**Epstein and Mossoff 1/30** – law professor at New York University, a senior fellow at the Hoover Institution, and a senior lecturer at the University of Chicago; law professor at George Mason University and a senior fellow at the Hudson Institute

Richard Epstein and Adam Mossoff, "FTC enforcement stifles biotech innovation," New York Daily News, 1-30-2022, https://www.nydailynews.com/opinion/ny-oped-ftc-enforcement-stifles-biotech-innovation-20220130-mxwc6gixdfavdjfuod54yl42sa-story.html

In Illumina, the evident weakness of the FTC’s own theory of competitive harm calls for a forceful response. Stiffing other firms gives up substantial licensing fees that could exceed Illumina’s revenues from working as the sole manufacturer and seller of the genetic tests. For this reason, patent licensing is very common in the biopharmaceutical sector — think the BioNTech-Pfizer licensing deal behind one of the key mRNA vaccines for COVID-19. In seeking to undo the Illumina-Grail merger, the FTC simply asserts as speculative conjecture that the combined company would act economically irrationally, a point we explained in our amicus brief.

In addition, this antitrust attack threatens further sensible transactions going forward. There were no reasons to block Illumina’s original spin-off of Grail, which was done to promote the efficient, early development of cancer-testing technology. By seeking to undo Illumina’s reacquisition of Grail, the FTC puts an antitrust pall over the biopharmaceutical sector. Small biotech companies are often acquired by large companies that have the capital and infrastructure to efficiently scale commercialization of innovative healthcare treatments that benefit patients.

Khan’s view of the FTC’s powers to engage in industrial and social policy writ large has blinded the FTC to the many legitimate reasons for corporate mergers. The petty decision to block the filing of a run-of-the-mill amicus brief is the canary in the mine. The FTC’s enforcement monopoly should be broken up on constitutional due process grounds before it inflicts any further damage on healthcare innovators and the U.S. innovation economy more generally.

**Guidelines thump---they’ll increase enforcement, change antitrust principles, and influence the courts**

**Browdie et al. 22** – Megan Browdie is a partner with Cooley LLP; Jacqueline Grise is chair of Cooley's antitrust and competition practice group; Tanisha James is a partner with Cooley LLP; Howard Morse is a partner in and former chair of Cooley's Antitrust & Competition practice group; Rubin Waranch is an associate in Cooley's antitrust and competition practice

Megan Browdie, Jacqueline Grise, Tanisha James, Howard Morse, and Rubin Waranch, "US Antitrust Enforcers Take Next Steps to Strengthen Merger Enforcement," JD Supra, 2-2-2022, https://www.jdsupra.com/legalnews/us-antitrust-enforcers-take-next-steps-2227009/

To strengthen enforcement, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) are undertaking a review of the Horizontal Merger Guidelines, last revised by the Obama administration in 2010, and the Vertical Merger Guidelines, issued in 2020 by the Trump administration.

The Biden DOJ and FTC on January 18, 2022, jointly issued a request for information (RFI), soliciting public comment on revisions to “modernize” the analytical framework used to assess mergers. Comments are due March 21, after which the agencies have said they will publish proposed guidelines for further comment, with a goal of finalizing new guidelines before the end of 2022.

This process follows President Joe Biden’s July 2021 issuance of an executive order, which called on the antitrust agencies to evaluate whether the Horizontal and Vertical Merger Guidelines required revision.

In announcing the RFI, the DOJ and the FTC said the objective is to “strengthen enforcement against illegal mergers” and combat “mounting concerns” that “many industries across the economy are becoming more concentrated and less competitive.”

This joint effort is the latest example of the antitrust agencies’ efforts to aggressively enforce antitrust law, announce enforcement principles and influence the courts when they challenge mergers in court.

Role of the merger guidelines

Both sets of guidelines lay out how the antitrust agencies will approach merger enforcement. As the current Horizontal Merger Guidelines put it, the guidelines “outline the principal analytical techniques, practices, and the enforcement policy of the [DOJ] and [FTC] with respect to mergers and acquisitions.” Historically, they have been important in influencing merger case law, and federal courts have often cited the guidelines in ruling on merger challenges.

The current Horizontal Merger Guidelines were last published in 2010 jointly by the DOJ and the FTC. The current Vertical Merger Guidelines were published jointly in 2020, but the FTC withdrew from those guidelines in September 2021. While the DOJ did not withdraw at the same time, DOJ Assistant Attorney General Jonathan Kanter has said that “too much has been made of the purported divergence between the DOJ and the FTC on the treatment of vertical mergers.” He also said that the Antitrust Division “shares the FTC’s substantive concerns” that the guidelines overstate potential efficiencies and fail to identify important relevant theories of harm.

What might change?

The RFI seeks public comments on 15 categories of questions which, according to Kanter, are an attempt to “understand why so many industries have too few competitors, and to think carefully about how to ensure our merger enforcement tools are fit for purpose in the modern economy.”

Kanter and FTC Chair Lina Khan homed in on specific categories of interest in their public statements announcing the review. Kanter highlighted a desire to explore whether the “framing of horizontal versus vertical analysis” implicitly limits the agencies to analyzing transactions in a “two-dimensional view” that may not reflect complex markets. He also indicated the agencies will be looking at tools that may be used to assess potential harms from mergers aside from “market definition.”

Khan questioned whether the guidelines are “adequately attentive to the range of business strategies and incentives that might drive acquisitions,” including “data aggregation strategies” and “roll-up plays by private equity firms.” She also questioned whether the current guidelines take into account harm to competition in labor markets, which is an enforcement priority for the Biden administration.

Of particular interest, the agencies are focusing on aspects of what they have said are “unique aspects of digital markets,” highlighting characteristics such as zero-price products, multisided markets and data aggregation, while asking questions about the impact of network effects and interoperability.

The agencies will also be examining:

* The adequacy of the presumptions in the merger guidelines regarding unlawful transactions, suggesting they may strengthen presumptions based on concentration, which currently are really just a starting point for analysis.
* The need to develop a formalized process for divestitures and other remedies that are not currently addressed by the guidelines.
* The weight efficiencies should have on merger review, suggesting the DOJ and FTC are likely to downplay efficiencies.

The FTC’s Republican commissioners, Noah Phillips and Christine Wilson, issued a statement welcoming review and lauding the benefits of administrability, predictability and credibility that guidelines offer, but suggested skepticism, noting that some questions the agencies are raising “appear to be premised on debatable assumptions” and that “much of the legal authority cited … is nearly or more than half a century old.” They suggested that asking for examples of mergers that “made it more difficult for rivals to compete with the merged firm” may equate harm to competitors with harm to competition, which would conflict with the oft-cited mantra that antitrust law protects “competition, not competitors.”

Guidelines review follows 2021 procedural changes to merger review

The announcement that the agencies intend to revise the guidelines follows efforts over the past year to amp up the merger review process. Noteworthy developments to the merger review process over the past year include:

* “Temporary” suspension of early termination: Since February 2021, the antitrust enforcers have suspended granting early termination for transactions subject to Hart-Scott-Rodino Act (HSR) filings.
* Rescinded 1995 policy statement: In July 2021, the FTC rescinded a 1995 Clinton administration Policy Statement on Prior Approval and Prior Notice Provisions. The FTC is now requiring prior approval and prior notice provisions for mergers subject to consent decrees, though the scope of such approvals remains unclear.
* Warning letters following expiration of the HSR waiting period: The FTC began sending letters to merging companies in August 2021 warning that the agency’s decision not to issue second requests to investigate a transaction does not indicate approval and that consummation of the transaction would be at the parties’ “own risk.” These letters also indicate that the FTC’s investigation would continue, though few if any investigations have in fact continued after the transactions subject to such letters have been consummated.

Looking forward

The RFI and statements by the antitrust enforcers reflect a desire to update the merger guidelines to “accurately reflect modern market realities,” and to equip the DOJ and FTC to aggressively enforce antitrust law. Revisions to the guidelines are likely to alter merger review and lead to challenges on new theories of harm. How significant those changes will be, and whether courts would be willing to adopt substantial changes in merger case law, remains to be seen.

**It’s a “perfect storm” for antitrust enforcement---investigations and blockages are increasing across the board**

**Volkov 2/1** – CEO of the Volkov Law Group

Michael Volkov, "The New “Era” of Antitrust Enforcement (Part I of III)," JD Supra, 2-1-2022, https://www.jdsupra.com/legalnews/the-new-era-of-antitrust-enforcement-8298078/

There is no question but we are in the “perfect storm” for antitrust enforcement. Antitrust enforcement is fast-becoming an area of rare “bipartisanship.” Republicans resent the growing power and influence of technology and social media companies. Democrats are concerned about the growth of the rich, large companies and political influence.

Jonathan Kanter, the confirmed Assistant Attorney General of the Antitrust Division, has already signaled that enforcement changes are coming. He received bipartisan support in his confirmation, reflecting the expectation of aggressive enforcement. At the same time, Congressional attempts to address antitrust issues in the marketplace are gaining steam.

Lina Kahn, the FTC Chairperson, has been a little bit more controversial, given her prior statements opposing Google and Facebook. Since her initial controversy, the FTC is settling down to business and continuing its enforcement action against Facebook in federal court.

Kanter gave a speech recently before the New York Bar Association at which he outlined his vision for enforcement and the need to update antitrust perspectives beyond the limited view of the past three decades. In recognition of the new era, the Justice Department and the FTC have initiated a review of both the Merger Guidelines and Vertical Conduct Guidelines. These revisions are expected to significantly alter DOJ’s and the FTC’s approach to merger and civil enforcement.

Kanter’s speech outlined a fresh approach to merger reviews. While noting that last year resulted in a record number of Hart-Scott-Rodino merger pre-notification filings, Kanter explained the need for a broader inquiry into the effect a proposed merger. With a broad analysis of potential anti-competitive effects, antitrust enforcement is expected to undergo changes in merger review to consider issues such as labor markets, consumer benefits, and anticipated reductions in competition among the remaining companies.

In another part of the speech, Kanter expressed reservations relating to prior antitrust settlements that permitted transactions to go forward with divestitures of overlapping operations and/or conduct-based prohibitions. Each of these approaches, in Kanter’s view, were questionable in effectiveness. Kanter may apply a simple view in future enforcement actions – if DOJ seeks to block a merger, the merger should not happen under any conditions. Again, this would be a significant departure from past approaches, although the last AAG Makan Delrahim, strongly advocated against merger settlements involving “conduct-based” settlements. Delrahim relied more often on structural changes to proposed mergers that incorporate divestitures. Kanter made clear he is not a big fan of divestitures since he questioned whether the divested assets were ever utilized to increase or restore a particular level of competition that existed in the market prior to the merger.

The Justice Department’s new approach to mergers and aggressive civil enforcement issues raise real risks to companies, particularly those operating in concentrated markets. The U.S. economy while growing has been rapidly shrinking in competition, particularly in various markets critical to the economy. Kanter’s fresh perspective on the value of “competition” as a driver of economic growth, consumer benefits, and innovation means more enforcement risks for companies in these concentrated markets, especially where a market leader has a dominant market share and influence.

**Recent FTC lawsuits prove a new wave of enforcement now---Activision, Nvidia, Aerojet, and Meta all prove**

**Mathews 2/1** – writer for Fortune covering brokerages and investments, IPOs, crypto, and financial regulation

Jessica Mathews, "Why the FTC’s antitrust investigation could spell trouble for Microsoft’s Activision Blizzard acquisition," Fortune, 2-1-2022, https://fortune.com/2022/02/01/ftc-antitrust-investigation-microsoft-activision-blizzard-acquisition/

January delivered three enormous deals: most notably, Microsoft’s $68.7 billion acquisition of Activision Blizzard, the gaming studio behind Call of Duty and Candy Crush. Then there was Take Two Interactive’s $11 billion deal for Zynga (yay Farmville!). And just yesterday, Sony said it would buy Bungie, the video game company behind Destiny and Halo, for $3.6 billion.

It’s been a whirlwind of activity for gamers to keep up with, though it’s unlikely how much it will disrupt day-to-day play, with Microsoft saying they plan to honor pre-existing contracts for games like Call of Duty, and the company owning the rights to Halo.

But it looks as if the Federal Trade Commission could throw a wrench in the mix. Yesterday evening Bloomberg reported, citing a person familiar with the matter, that the FTC has opted to take on the Microsoft-Activision Blizzard investigation, rather than the Justice Department.

That could spell bad news for Microsoft. The FTC, led by Big Tech critic Lina Khan, has planned to take a more aggressive approach to antitrust policy. So far, the FTC has blocked the Nvidia-Arm acquisition as well as filed a lawsuit to stop Lockheed Martin’s proposed deal with Aerojet Rocketdyne Holdings. It’s currently trying to win a case that would force Meta Platforms to sell WhatsApp and Instagram. Now the FTC has Microsoft’s largest acquisition ever under the microscope—one that would establish the company as the third-largest games publisher in the industry. A deal would also up Microsoft’s subscription offering and better position it for the new frontier in gaming: the metaverse. That is, if it all goes as planned.

The FTC’s Activision investigation will focus on the unity of Microsoft’s consoles and hardware with Activision’s games, and may hone in on whether competitors have access to its games, per Bloomberg. That might be a non-issue if Microsoft does indeed honor all of Activision’s existing agreements and allow gamers to play their titles on Sony’s PlayStation, as it and Sony say.

Regulators in the U.S. and outside of it didn't take issue with Microsoft’s last deal for ZeniMax Media. But that was before, and regulators say they plan to be more aggressive with M&A and ballooning tech companies these days.

**Incoming non-antitrust regulations thump business confidence**

**Mullins and Tracy 2/7** – investigative reporter in the Washington D.C. bureau of The Wall Street Journal, covers technology policy for The Wall Street Journal

Brody Mullins and Ryan Tracy, "Biden’s Regulatory Drive Sparks Pushback From Business Lobbyists ," Wall Street Journal, 2-7-2022, https://www.wsj.com/articles/bidens-regulatory-drive-sparks-pushback-from-business-lobbyists-11644229802

WASHINGTON—The Biden administration is preparing a wave of new regulations as it embarks on its second year, sparking resistance campaigns from business lobbyists representing financial services, agribusiness, medical-device makers and others.

Lobbyists and business groups are responding to what some describe as the federal government’s most concerted regulatory push since the Obama administration. Some Democrats hope the regulatory effort will deliver some policy wins for progressives and union activists ahead of November’s midterm elections, especially now that President Biden’s congressional agenda has stalled amid infighting within the Democratic Party.

The White House’s newly installed chiefs at regulatory agencies are rolling out a lengthy list of new rules. Financial-services regulators are advancing measures seeking to address climate change and workplace diversity, crack down on Wall Street profiteering and reduce credit-card and banking fees for consumers.

Consumer-protection agencies are making a broad push to reduce corporate consolidation, especially in Silicon Valley and on Wall Street. Other agencies are readying new health and safety regulations for the medical-device industry, railroads, interstate gas pipelines, hospitals and power plants.

Taken together, the moves have alarmed businesses and prompted them to launch lobbying efforts to enlist allies in Congress.

“There’s growing concern within the business community that there has been a rush to regulate without fully factoring in the negative effects on industry and the economy,” said Ken Spain, a Washington strategist who is helping to coordinate the industry defense.

“With the election year upon us and the administration’s agenda stalling, the pace is expected to accelerate,” he said.