# 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**

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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**.

**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**

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

**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---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 2

#### Competition key ---we make monocultures effective.

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

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

A. Cybersecurity as Competitive Value-Add

Competition enhances national security by reducing the incidence of technical vulnerabilities. That effect is especially important for security-sensitive systems such as mobile telecommunications.

Intuitively, a causal chain from competition to cybersecurity makes logical sense. Computer security is a value-added benefit to consumers, so firms in competitive markets are likely to use security to gain an edge over their competitors.158 In monopolized markets, though, there may be less external impetus to test products for flaws, and the monopolist may choose to focus less on security and more on new product features or increased product quality.

Economic research confirms these hypotheses about competition leading to better cybersecurity. A 2009 empirical study of web browsers considered the impact of market concentration on the amount of time that vendors took to fix security vulnerabilities as they were discovered.159 The study found that the presence of more competitors correlated with faster cybersecurity response—a reduction of 8–10 days in response time per additional market rival.160 Similarly, business researchers in 2005 modeled incentives for firms to engage in sharing of cybersecurity information, and concluded that the “inclination to share information and invest in security technologies increases as the degree of competitiveness in an industry increases.”161 Another study found that, where two software firms are in competition, at least one will be willing to take on some degree of risk and responsibility for cybersecurity, whereas a monopoly software firm will consistently fail to accept such responsibility.162 To be sure, an unpublished study from 2017 found that some market concentration can make firms more responsive to cybersecurity issues, but only to a point: “being in a dominant position reduces the positive effect of having less competitors on the responsiveness of the vendor,” and indeed the “more dominant the firm is, the less rapid it is in releasing security patches.”163 This research confirms that competition is more conducive to cybersecurity.

It is not hard to see how this applies to emerging communication technologies markets. In the absence of competition, the above research suggests that device manufacturers, chip makers, and software developers will lack incentives to respond to vulnerabilities, to share information about cybersecurity practices and issues, and to take responsibility for security matters. Mobile phone chips have had their share of cybersecurity failures already.164 The best way to flush out ongoing and future cybersecurity issues is to maintain competitive pressure at all levels of the supply chain.

### 2AC---T-Courts

#### Courts are T---they expand scope and make law.

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

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

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

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

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

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

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

### 2AC---Across Board

#### 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.”

### 2AC---Taxes CP

#### Perm: do the CP. THEY OVERTURN AMEX! Treble damages are just penalties—aff effectively same as CP mechanism

Lande, Associate Professor, University of Baltimore School of Law, ‘93

(Robert, Are Antitrust “Treble” Damages Really Single Damages?, 54 Ohio St. L.J. 115)

The legislative history27 and case law28 indicate that compensation is a goal, perhaps even the dominant goal, of antitrust's damages remedy. Moreover, the underlying substantive provision's primary aim was to prevent wealth transfers from victims to firms with market power29 -a concept analogous to that of compensating victims.30 The decision of Congress to award "treble damages" might suggest that at least two-thirds of damages were intended to be for punitive purposes or deterrence. It is possible, however, that even this portion was intended to compensate plaintiffs for such unawarded harms as the lack of prejudgment interest and such difficult to quantify damage elements as the value of plaintiff's time expended pursuing the case.31

[begin fn31]

31 Professor Void explored this possibility:

In other words, closely analyzed, the threefold damage provision is remedial to the plaintiff, compensatory in its nature in liquidating compensation for accumulative intangible harm incurred outside of and beyond the ordinarily recoverable legal damages to the business or property. It is a penalty upon the defendant only in the loose sense of penalty as signifying a burden encountered by the defendant as a consequence of his wrongdoing. In that broad sense of penalty this provision of course is a burden to the defendant in requiring him to make compensation for damage wrongfully caused, comparable to the burden that is imposed by every provision which imposes legal liability to make compensation to the injured party. The three-fold damage provision is a provision for liquidated compensation for accumulative harm, largely intangible in its nature, which is so conspicuous part of the loss suffered when a going business is destroyed in violation of the anti-trust act. Lawrence Void, Are Threefold Damages Under the Antitrust Aa Penal or Compensatory? 28 KY. L.J. 117, 157-58 (1940). Criminal penalties, including fines and prison, probably are better at deterrence. Thus Congress's decision to award to plaintiffs the relief obtained could imply a compensation goal.

[end fn31]

#### Taxes can’t address all disparate platform conduct, AND if they do it’s overly broad and chills innovation.

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

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

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

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

### 2AC---States CP

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

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

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

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

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

State Levels of Adherence

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

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

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

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

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

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

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

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

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

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

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

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

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

State Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

Workarounds

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

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

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

State-to-State Conflicts

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

A Case Study

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

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

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

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

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

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

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

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

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

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

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

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

#### FTC essential to predictability and business signaling—states destroy it

Wilks, Professor in the School of Public Policy and Administration Carleton University and Joint Research Chair in Public Policy in the Politics Department, ‘96

(Stephen, *Comparative Competition Policy: National Institutions in a Global Market*, Clarendon Press)

We will be concentrating on the formal role of the Antitrust Division and the Federal Trade Commission in enforcing competition law, but there is an important informal element as well. Most issues in competition policy never reach the courts or these agencies, but are instead self-enforced through corporate attorneys who advise their clients what is possible under law and practice and what is not. Therefore, the signals that the two government institutions send to the corporate and legal communities are important for determining what will happen. For example, the 'nonenforcement rhetoric' during the l980s was important in defining how the corporate community would proceed with its merger and pricing acrivities.3  Further, the use of guidelines and formal rules from the FTC can give to private attorneys additional guidance concerning what actions are likely to trigger the interests of regulators.

As noted above, the federal nature of US politics brings into play other actors concerned with competition policy. In some ways this statement may appear unlikely, given the apparent federal monopoly over the regulation of interstate commerce. The federal government certainly does have a dominant position in this area, but the states have managed to a,ct also. In fact, the level of state activity in antitrust has been increasing. This is in part a function of the populist appeal of this activity and the political capital it can build for state attorneys general (elective officials in almost all states). These public officials have begun to file cases of potential national significance in state courts, a practice that could fragment national policy and make the environment of business very uncertain.

The states have been acting to limit competition at least as often as they have acted to promote it. For example, states (and counties and cities) often have laws requiring giving preference on public contracts to vendors coming from inside their political unit. It is not uncommon for these policies to create local monopolies or oligopolies, and perhaps also to create higher costs for the government imposing the policy. These policies do, of course, preserve local employment opportunities. Businesses can also gain protection from federal antitrust competition by accepting more friendly state regulation. On the other hand, through state corporation commissions and similar regulatory bodies, state governments also exercise some sub-national control over concentrations of commerdal power, although in a limited geographical area and subject to local pressures tnat are often not as pro-competitive as national policies tend to be.31

### 2AC---Reg Neg

### 2AC---Innovation DA

#### a) 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.

#### b) Our AFF is a pre-req to military AI applications.

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

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

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

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

#### No link: 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.

#### 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.

#### 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.

#### Turn—economic theory is aff—unchecked concentration net worse for innovation

Horton, Professor of Law and Heidepriem Trial Advocacy Fellow, the University of South Dakota Knudson School of Law, ‘21

(Thomas J., “Innovation and Antitrust: An Evolutionary and Historical Perspective,” in *The Dean of American Antitrust Law*, Concurrences)

A number of legal and business scholars have similarly attacked Schumpeter’s thesis that increased concentration enables and buttresses innovation. Professor Marina Lao, for example, argues that “economic theory does not clearly show that market concentration increases innovation, or that consistently resolving [antitrust] ambiguities in favor of dominant firms would enhance (rather than reduce) net industry innovation.”82

[Begin fn82]

Lao, supra note 35, at 194. Professor Lao adds:

Also, very little or no empirical data exists to support the argument that prohibiting exclusionary conduct with inconclusive efficiency effects would over-deter innovation. In fact, a recent commentator has persuasively argued the reverse: that in winner-take-all markets (as when network effects are important), a policy preventing dominant firm exclusion of fringe firms should increase net innovation, by encouraging fringe firm innovation while not deterring too much dominant firm innovation efforts. Dominant firms are unlikely to be discouraged by some antitrust constraints in these markets because of the potential winner-take-all prize.

Id. at 194–95 (citing Jonathon B. Baker, Promoting Innovation Competition Through the Aspen/Kodak Rule,

7 Geo. Mason L. Rev. 495, 511–15 (1999)).

[End fn82]

Professor Lao contends that in new technology markets, “protecting competition may be inseparable from protecting competitors in these markets.”83 Business Professor Gregory Day, citing to 60 years of merger analysis, similarly posits that “based upon these findings, the major conclusion is that antitrust’s most powerful means of promoting innovation and scientific progress is by preserving the number of firms competing in a market.”84 Numerous other recent commentators have presented similar arguments.85 In the words of John Mauldin of Mauldin Economics: “without competition, you end up with bloated monopolies that may be highly profitable for the owners, but don’t serve the greater cause of economic growth.”86

#### 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

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

#### 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.

### 2AC---BizCon DA

#### AFF outweighs: Concentration turns economic growth.

Wessel, senior fellow in economic studies at the Brookings Institution and director of the Hutchins Center on Fiscal and Monetary Policy, ‘18

(David, “Is Lack of Competition Strangling the U.S. Economy?” March-April, https://hbr.org/2018/03/is-lack-of-competition-strangling-the-u-s-economy)

High and rising profits in an increasingly concentrated market are typically a sign of lessening competition and increased market power by dominant firms. Today, profits are up in industries in which a shrinking number of players have a growing share of the business. Recent research suggests that the average markup — the difference between the prices firms charge and products’ marginal cost — is rising in American business and rising fastest for the most profitable firms. Using data for all publicly traded U.S. firms from 1950 to 2014, Jan De Loecker of Princeton and Jan Eeckhout of University College London found that markups rose from about 18% in 1980 to 67% in 2014. That’s good for shareholders, of course, but it’s not so good for consumers or the overall economy.

Investment.

Another signal of declining competitive pressure is firms’ ability to increase profits without much investment; in competitive markets, companies are driven to invest more to stay ahead of their rivals. Business investment across the economy has perked up lately, but it is not as robust as one might expect given the surge in profits, the extraordinarily low-cost of equity and debt, and the amount of cash on corporate balance sheets. Measured against GDP, corporate after-tax profits are almost double what they were 25 years ago — and higher than at any time since World War II — yet business investment as a share of GDP is up only 13% over the same period. “Investment is weak relative to profitability and valuation,” NYU’s Thomas Philippon and German Gutierrez concluded in a 2017 analysis built on the historical relationship between investment and the ratio of the market value of a company’s debt and equity to the replacement cost of its assets.

Business dynamism.

In a healthy economy, companies continually are born, fail, expand, and contract, while new jobs are created and others are destroyed. A slowdown in business dynamism means that entrenched firms have less to fear from upstarts; as a result, the economy suffers as innovation slows and job growth stalls. In the U.S., the rate of birth of new firms (as a percentage of all firms) fell from above 13% in the late 1980s to around 8% in 2015, according to the most recent official data. The number of jobs created by businesses less than a year old dropped from a peak of 4.7 million in the late 1990s to 3 million in 2015.

John Haltiwanger, a University of Maryland economist, notes that the decline in dynamism in the U.S. originated in the retail sector in the 1980s and 1990s. But even as the number of retailers starting up and dying off plunged, the industry became more productive. This was dubbed “the Walmart effect,” because of the impact of the giant retailer not only on the efficiency of its industry but on the entire U.S. economy. Lately, though, declining dynamism has spread to the tech sector. That’s more worrisome, Haltiwanger says, because it portends slower productivity growth.

#### BizCon low---new 2022 trends.

**Mourgelas 2-7** --- Research analyst with Chief Executive Group.

Isabella, "CEO Confidence Index: Proportion of CEOs Planning To Increase Hiring Highest We've Seen," ChiefExecutive.net, https://chiefexecutive.net/proportion-of-ceos-planning-to-increase-hiring-highest-on-record/

After a strong start to the year, CEOs’ confidence in the future of business conditions dropped this month on uncertainty in the supply chain and labor market. This comes at a time when demand has not yet receded and the need for workers has only increased. CEOs are also concerned that increasing interest rates, inflation driving up material costs and decreasing consumer spending power, and instability in domestic and international politics will worsen business conditions. Despite their qualms, CEOs still expect Covid-19 to have a reduced impact on the overall economy by the time 2023 rolls around.

Those are the key findings from Chief Executive’s latest poll of 457 U.S. CEOs, fielded February 1 through 3, which asks America’s business chiefs to rate the environment today and 12 months out based on their assessment of business conditions—and forecast the impact on their company’s growth.

CEOs’ rating of future business conditions fell by less than 5 percent this month, down to 6.6 out of 10 from last month’s rating of 7. Their rating of current business conditions remained stable, however, hovering at 6.7 out of 10. Over the last six months, CEOs’ rating of current conditions has remained steadier compared to their forecast for the future, signaling resiliency in their ability to do business and uncertainty over what’s to come.

#### Extreme uncertainty now---new merger approaches upend decades-old policies.

**Reinhart 2-7** --- [Skadden, Arps, Slate, Meagher & Flom LLP](https://www.jdsupra.com/profile/skadden_arps_slate_meagher_flom_docs/)

Tara, 2-7-2022, "Biden’s Broad Mandate Has Altered the Antitrust Landscape, Making Merger Clearance Process Less Predictable," JD Supra, https://www.jdsupra.com/legalnews/biden-s-broad-mandate-has-altered-the-1446913/

The Administration’s ‘Whole-of-Government’ Approach to Antitrust

In [a July 2021 executive order](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/), President Joe Biden articulated the administration’s broad antitrust policy. That order instructed the antitrust agencies to increase enforcement to prevent a rise in consumer prices and competitive harm in labor markets, and preserve nascent competition. Additionally, in what the order calls a “whole-of-government competition policy,” it charged more than a dozen other agencies to protect competition using their authority under a range of statutes.

This approach allows the administration to challenge conduct it deems anticompetitive or unfair without having to resort to suits under the antitrust statutes. For example, in a town hall meeting in December 2021, Mr. Wu criticized distribution practices that allegedly favor large alcohol suppliers over small ones and called on the U.S. Department of the Treasury’s Alcohol and Tobacco Tax and Trade Bureau to address them through rulemaking or regulation.

Former FTC Commissioner Rohit Chopra, now director of the Consumer Financial Protection Bureau, has advocated that his new agency’s mandate be expanded to cover antitrust and “abuses of dominance,” which traditionally would require a DOJ investigation and lawsuit alleging violations of the Sherman Act, such as monopolization or illegal agreements that foreclose competition.

The order instructs agencies to take additional steps, some directed toward specific outcomes, to promote competition and prevent “unfairness” by competitors in the marketplace. We expect agencies to use their separate statutory authorities under this whole-of-government approach to advance the administration’s antitrust goals in priority sectors such as financial services, health care, transportation, agriculture and telecommunications.

Changes in Policy and Process Further the Administration’s Goals

Mr. Kanter’s time as assistant attorney general has been too brief to provide clear insights into the Antitrust Division’s new enforcement priorities. But Ms. Khan’s first six months as chair of the FTC make the commission’s new direction plain. A string of moves either on a 3-2 party line commission vote or through process changes by the FTC’s director of the Bureau of Competition, have undone decades-old policies and practices and replaced them with aggressive approaches that add uncertainty to the deal process and bring additional administrative burdens.

Vertical mergers: The commission abandoned the Vertical Merger Guidelines, which for years had embraced the principle that most vertical tie-ups are pro-competitive and should not be challenged. The Khan commission advocates scrutiny of vertical mergers, considering, in particular, potential harms in the context of “modern firms,” as well as harms to labor markets. In December 2021, for example, the FTC sued to block Nvidia’s takeover of chipmaker Arm, asserting that the vertical merger would allow the combined entity to unfairly undermine competitors.

Prior approvals: The commission adopted a policy to include in merger consent orders a provision requiring firms to obtain approval before consummating future deals.

Individual commissioners can seek compulsory process: The commission adopted a resolution to authorize compulsory process — a demand for documents or testimony enforceable in federal court — at the request of a single commissioner.

Second requests: The Bureau of Competition director modified second-request requirements, making the process lengthier, and giving the FTC more time and leverage to challenge mergers.

Other process changes include the suspension of the Hart-Scott-Rodino Act early termination option, which allows deals to close before the end of the statutory waiting period with the FTC's consent, and the adoption of a practice of sending letters to merging parties warning them that the FTC will continue to investigate and reserves the right to challenge the deal after it closes.

#### Turn---AFF increases predictability for all parties.

**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

On June 25, 2018, the U.S. Supreme Court issued what may be the worst antitrust decision in many decades: Ohio v. American Express Co. (“Amex”).1 In an opinion authored by Justice Thomas for a bare majority—and over an incredulous dissent—the Court dismissed an antitrust challenge to American Express’s “antisteering” rules, despite ample evidence of harm furnished by a lengthy trial, as well as the teachings of economic theory. In doing so, the Court upended a series of legal fundamentals, inverted accepted practices in the interpretation of evidence, and plunged platform antitrust into confusion.

2 The Court’s tortured analysis has left courts, agencies, and businesses facing a host of puzzles; triggered a flurry of scholarship and commentary, mostly very critical; 3 and invited a flurry of ill-conceived litigation arguments. 4 The practical inheritance of Amex is plain to see: the burdens faced by plaintiffs have been needlessly increased, and enforcement efforts have been obstructed and deterred. 5 At least one high-profile merger challenge has already failed as a direct result of Amex’s legacy of confusion

#### Confidence not key to economy.

Bagrie 18 --- Managing Director of Bagrie Economics.

Cameron, “Business confidence is a hopeless indicator. But that doesn't mean the economy isn't in trouble,” Spinoff, 8-9-2018, https://thespinoff.co.nz/business/09-08-2018/business-confidence-is-bullshit-but-that-doesnt-mean-the-economy-isnt-in-trouble/

The good news is that business confidence is hopeless as an economic indicator. The correlation with economic growth is poor and I largely ignore business confidence readings. Changes in direction can provide some insightful information – whether things are picking up or slowing down, but not the levels.

Businesses tend to be more upbeat regarding general confidence about the economy under a blue flag as opposed to a red one. Business confidence averaged minus 18 between 2000 and 2007. The economy (measured by real gross domestic product) grew on average by more than 3.5% per year. Yep, confidence was negative, but growth was positive. So, we ignore business confidence as an economic indicator. This is nothing new. It’s surprising headline business confidence figures receive so much attention.

## 1AR

### Reg Neg CP

#### No follow on legislation

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

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

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

— American exceptionalism —

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

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

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

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

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

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

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

— Hunting for bipartisan consensus —

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

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

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

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

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

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

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

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

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

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

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

— 'Big tech is out to get conservatives' —

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

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

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

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

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

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

#### AND, courts won’t listen.

Widiss ’20 - Professor of Law, Associate Dean for Research and Faculty Affairs, and Ira C. Batman Faculty Fellow at the Indiana University Maurer School of Law

Deborah Widiss, “Communication Breakdown: How Courts Do - and Don't - Respond to Statutory Overrides” 104 Judicature 50 (2020), <https://www.repository.law.indiana.edu/facpub/2938/>

Note: Courts overturn precedent – Congress overrides precedent

Earlier commentators, including many well-respected judges, have offered thoughtful suggestions for facilitating communication from courts to Congress about problems in statutes that Congress might want to address.2 My research explores the opposite question. How effective is communication from Congress back to courts? The answer is: Not very.3 Even when Congress enacts overrides, courts frequently continue to follow the prior judicial precedent. This is likely due more to information failure than willful disregard of controlling law. Nonetheless, a key aspect of the separation of powers is broken.

My research shows that when the Supreme Court overrules a prior decision, lower courts quickly decrease their reliance on the old precedent and begin to apply the new rule. By contrast, when Congress enacts an override, citation patterns to the prior precedent change very little. Even a decade later, many overridden precedents, or what I have called “shadow precedents,” are still routinely cited as controlling precedent.

#### Best studies prove.

Widiss ’20 - Professor of Law, Associate Dean for Research and Faculty Affairs, and Ira C. Batman Faculty Fellow at the Indiana University Maurer School of Law

Deborah Widiss, “Communication Breakdown: How Courts Do - and Don't - Respond to Statutory Overrides” 104 Judicature 50 (2020), <https://www.repository.law.indiana.edu/facpub/2938/>

Note: Courts overturn precedent – Congress overrides precedent

Courts Often Rely on Overridden Precedents

Congressional overrides are typically described as the legislative equivalent of a judicial overruling. My study with Professor Brian Broughman was the first to empirically test this characterization. We constructed a database of Supreme Court decisions that had been overruled by later Supreme Court decisions; Supreme Court decisions that had been overridden by later statutory amendments; and a “control” group of Supreme Court decisions that were similar (in terms of subject matter, year of decision, and other factors) to the overruled and overridden decisions but that had not been repudiated by subsequent judicial or legislative actions.4 We then used Lexis’s Shepard’s service to assess how often each Supreme Court case in our database was cited by other courts, generally looking at a 15-year window that spanned from five years prior to the superseding “event” — either overruling or overriding — to ten years after it.5 Although citation counts are admittedly a somewhat blunt measure, they are frequently used in legal and political science studies as a rough gauge of the ongoing precedential weight of a prior decision. By collecting citation data from several years before the superseding event, we were able to establish a “baseline” citation pattern, which we could then compare to citation levels after the overruling or the override. We hypothesized that citation patterns could be expected to change in two different ways: “positive” or “neutral” citations would be expected to decline, and “negative” citations, such as an indication that the prior decision had been fully or partially overruled or superseded, would be expected to increase. To capture both of these effects, we developed a measure we called “net citations,” which we defined as the number of positive or neutral citations to a decision, minus the number of warning or other negative citations.6 We then compared the average number of net citations a case received each year after the event to the average number of net citations the case received before the event; this ratio measures how much effect the overruling or override had on citation levels.

Our findings were striking. As shown in Figure 1 below, after a judicial overruling, net citations to the prior decision drop rapidly when compared to the preevent baseline. The citation patterns for cases in our “overridden” category, by contrast, are very similar to those of our control group. Overall levels of citations drop, but in a gradual fashion that is typical of the natural “depreciation” that decisions generally experience over time.7

Even ten years after an override is enacted, most overridden precedents are still widely cited as controlling precedent.

Degree of Overruling or Override.

We recognize that an override may supersede some, but not all, of the analysis in a prior decision, meaning other aspects of the decision remain controlling. The same, of course, is true for a judicial overruling. To assess whether this affected our results, the cases were assigned a “depth” measure that evaluated how completely the overruling Supreme Court decision or overriding legislation rejected the prior opinion,8 as well as an “explicitness” measure that evaluated how explicit the Court or Congress was about its disapproval of the prior opinion. We found that for both sets of cases, greater “depth” was associated with a larger decline in citations; however, at each level of “depth,” citations to overruled cases declined more dramatically than citations to the overridden cases. The same was true for “explicitness.” Thus, our findings are not the result of comparing deep and explicit overrulings to shallow and non-explicit overrides. Rather, even when we control for these factors, we find that judicial overrulings have considerably more effect on future citations than legislative overrides.

As an additional robustness check, for a randomly selected subset of cases in both groups, we hand-coded individual headnotes to distinguish between headnotes identifying portions of the prior decision that had been superseded and those that had not. Since Lexis’s Shepard’s service tracks citations to each headnote in a case, this allowed us to assess in a more finegrained manner which propositions within each case were being referenced when later decisions cited to the earlier precedents. For both groups of cases, we found a notable decline in net citations to the headnotes associated with specific propositions within the cases that had been superseded, but again this decrease was much more pronounced for the overruled cases than the overridden cases. Additionally, we assessed the extent to which ideological preferences might explain ongoing citation of overridden precedents, but our data did not suggest a judge’s ideology was the driving factor.9

**Specific to their mechanism**

**Crane 10** – Professor of Law, UMich

Daniel A. Crane, Professor of Law, University of Michigan, Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel, Competition Pol'y Int'l Antitrust Chron. 2, no. 2 (2010), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles>

III. SIX PRINCIPLES FOR SOUND DEPLOYMENT OF AN INDEPENDENT SECTION 5

This section outlines six principles for development of a strong and viable **independent Section 5**. Adherence to all six principles is not necessarily essential for a successful (meaning both conceptually-sound and review-proof) enforcement action, nor is adherence to all six principles a guarantee of success. However, the greater the adherence to the principles, the greater the likelihood of success. The Intel enforcement action violates all six principles. In such a case, there is a **very strong likelihood of reversal** in the courts.

A. **Do Not** invoke Section 5 in **Paradigmatic Sherman Act Cases**

Courts are **most** likely to defer to administrative agency judgments in cases involving commercial practices about which the courts have **not** developed a deeply rooted body of **precedent**. In such cases, the courts may allow some administrative experimentation and testing, even though they might not have reached the same result as the agency if they had analogized to conduct already covered by established liability norms. **Conversely**, courts are **least likely to defer** **when they have already spoken to the exact practice** on many occasions and developed a timetested **body of liability rules to govern it**. **Refusal by the agency** to **honor the judicially created precedents** may look—to judges at least—like **intransigence**.22 It is human nature (and judges are human after all) to be more open to an idea on which one has not yet expressed an opinion than to approve of an idea that contradicts one’s prior assertion.

An **example** of such judicial hostility to an agency decision recently appeared in **ScheringPlough**, where the Eleventh Circuit **testily rebuked the Commission** for failing to follow its Valley Drug decision on patent settlements.23 The court took umbrage at the Commission’s failure to adhere to Valley Drug’s legal framework in a private Sherman Act case when deciding a very similar issue in an adjudicative proceeding. The Commission should **avoid** similar judicial confrontation by **declining to assert Section 5 independence** in cases where the **courts have recently decided precisely the same questions under the Sherman Act** and decided, as a policy matter, to confine the liability rule in a particular way.

The bulk of the Intel enforcement action is a challenge to commercial practices about which there is paradigmatic Sherman Act precedent. Much of the case challenges Intel’s pricing/rebating behavior. The Complaint acknowledges that that these practices are akin to predatory pricing, but then **proposes tests** that are at odds with well-established Sherman Act precedents. For example, the Complaint includes sunk costs in the appropriate measure of cost and says that the Commission need not prove the possibility of recoupment24—both assertions are **directly at odds with the Supreme Court’s** insistence that predatory pricing plaintiffs show pricing below an appropriate measure of incremental cost and the dangerous probability of recoupment.25

The Complaint also makes assertions about Intel’s alleged exclusive dealing or exclusive dealing-like contracts.26 Like predatory pricing, exclusive dealing is subject to well-established judicial liability norms.27 The last major Justice Department monopolization case was an exclusive dealing matter.28 Whether or not the Commission can satisfy those norms as to Intel, exclusive dealing claims are very familiar to the courts.

The Complaint also asserts that Intel had a “duty to deal” with its competitors.29 Such an allegation waves a red flag in the face of the courts, which have been **sharply cutting back** on the duty to deal since Aspen Skiing30 narrowly opened the door to the duty. In Trinko, 31 the Supreme Court declared Aspen “at or near the outer boundary of § 2 liability” and, in its most recent Section 2 decision—linkLine32—continued to cast aspersions on any duty to deal. It would be **very surprising** to see the courts passively defer to an independent Section 5 evaluation of refusal to deal claims when they have spent **so much time and energy analyzing** such claims in **recent years**. For virtually every practice alleged in the Complaint, there is a **well-developed body of Sherman Act precedent** that will **naturally** become the **focus of legal argumentation on appeal**. **Convincing a reviewing court** to **defer** to the Commission’s prophylactic interpretation of Section 5 **where courts already have honed legal tests for the relevant conduct** will be a **very tough sale**.

### Innovation DA

#### Small firms are key—large firms won’t contract.

Foster & Arnold 20 – J.D. Candidate at Stanford Law School, Former Visiting Researcher at the Center for Security and Emerging Technology; Legislative Fellow at United States Senate Committee on Foreign Relations, Research Fellow at the Center for Security and Emerging Technology

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

In order to use AI for America’s strategic advantage, the Pentagon requires more than an innovative private sector. It must induce private companies to build defense-relevant AI products, acquire those AI innovations through procurement, and prevent those same products from diffusing to U.S. adversaries. In other technological domains, such as aerospace, the Pentagon has long relied on the private sector for procurement and holds significant leverage over industry. Its sheer scale and budget make it the defense industry’s primary consumer. In 2017, for example, 70 percent of Lockheed Martin’s sales went to the U.S. federal government.26 Historically, this financial leverage has incentivized companies to meet the Pentagon’s demands and build to its requirements.27

But these incentives do not exist with AI: while AI is a priority for the Pentagon, the Pentagon is not a priority for AI companies. In general, the largest U.S. tech companies do not rely on government contracts and have relatively little need for Pentagon funding.28 [FOOTNOTE 28 STARTS] Even though large tech companies do not need large government contracts, they still compete for them and recognize that government contracts constitute a sizeable market. Some companies, like Amazon and Microsoft, have recently moved to expand their share in this market. Despite these moves, Pentagon contracts remain relatively insignificant for large tech companies, which distinguishes them from traditional Defense Department vendors. See Brett Bachman, “The U.S. Government Is The World’s Largest Purchaser Of Consumer Goods. Amazon Wants A Piece,” Vox, May 1, 2019, https://www.vox.com/thegoods/2019/5/1/18524111/amazon-business-government-purchasing-state-city-local; Cat Zakrzewski, “The Technology 202: Satya Nadella Wants Microsoft To Be The Tech Company The Government Trusts--And Buys From,” Washington Post, October 8, 2019, https://www.washingtonpost.com/news/powerpost/paloma/the-technology202/2019/10/08/the-technology-202-satya-nadella-wants-microsoft-to-be-the-techcompany-the-government-trusts-and-buys-from/5d9b661e88e0fa747e6d5168/; Jon Banister, “Facebook, Silicon Valley Quietly Growing D.C. Office Footprint Amid Federal Scrutiny,” Bisnow, April 11, 2018, <https://www.bisnow.com/washingtondc/news/office/facebook-silicon-valley-quietly-growing-dc-office-footprint-amid-federalscrutiny-87210>. [FOOTNOTE 28 ENDS] As a result, their research and products do not reflect defense priorities, and they have relatively little incentive to engage deeply in the government procurement process. Even in a future, AI-centric world, we expect large-scale, commercially oriented tech companies to play a critical role in AI innovation, and the Pentagon to remain a minor customer. As such, the Pentagon may rely on other firms—from defense-focused startups to traditional defense contractors—to translate general AI advances into defense-relevant products.

The Pentagon’s access to these cutting-edge, national security-relevant AI products hinges on private sector cooperation. This willingness will drive whether it sells to the Pentagon, shapes its technologies in accordance with DOD priorities, and complies with DOD terms of acquisition—including, potentially, by safeguarding the same products from U.S. competitors and adversaries.29 We need to understand how antitrust enforcement might affect these dynamics, as well as private-sector innovation more broadly.

**Amex is wrong.**

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

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

This suggests that, so long as we are cognizant of the market's two-sidedness, an inquiry focusing on the platform's dealings within one side is not such a futile approach. By contrast, some supporters of the Supreme Court's AmEx III decision suggest that we just cannot learn anything about the restraint's overall impact **without netting the competitive effects** across the two sides. For example, a group of amici academics supporting AmEx III wrote that:

One side of the market may experience some burden from a rule or practice, but a significant benefit on the other may more than offset this burden; conversely, one side might experience modest benefits while the other is significantly hurt.... In other words, **the economics literature does not support** the proposition that demonstrating harm on one side of a two-sided platform is **sufficient to establish any presumption that market-wide consumer welfare decreased.** 185

With due respect, this overstates the scope of the potential asymmetries. To the extent the restraint does produce an asymmetry, **this generally arises on a per-transaction basis,** such as by raising the usage fee on one side. But if the restraint is indeed procompetitive, then there is a countervailing volume increase that will tend to allay antitrust concerns and make inter-side balancing unnecessary.

In most cases where a restraint is deemed to have a procompetitive justification, it is because it actually enhances output in the very market where the plaintiff alleges an injury to competition. 186 The same logic applies here. In the case of a restraint imposed by a transaction platform, this **must show up on both sides of the market**. That means that when we focus on how a restraint is likely to affect total platform usage by just one side of the market (again, considering potential reasons relating to the market's two-sidedness), we can rest assured that a finding of a likely rise or fall must be mirrored exactly on the other side.

**New Facebook ruling opened all tech platforms to massive antitrust risk.**

**Edelman 1/12** ---Senior writer for WIRED, covering the intersection of tech, politics, and law. Before that, he was executive editor of the Washington Monthly. He has a degree from Yale Law School

Gilad, “The Antitrust Case Against Facebook Draws Blood,” Wired, https://www.wired.com/story/facebook-ftc-antitrust-non-price-theory/

ON TUESDAY, FEDERAL judge James E. Boasberg ruled that the Federal Trade Commission’s effort to break up Facebook could **move forward.** The case itself is far from decided. **But** by **blessing** the **FTC’s theory** that a monopoly can **harm consumers** even when its product is **free**, the judge has **signaled** that Facebook—and **other tech platforms**—**are not invincible.**

It’s a **big turnaround** from last summer. In June, Boasberg, a judge on the United States District Court for the District of Columbia, granted Facebook’s motion to dismiss the case. (The company has since rebranded itself as Meta Platforms, but Facebook remains the named defendant.) The problem, he held, was that the FTC—which is seeking to reverse Facebook’s acquisitions of Instagram and WhatsApp—hadn’t provided any evidence that the company was a monopoly. But in that same ruling, Boasberg gave a clear blueprint for how to revive the case. All the government had to do was provide evidence that Facebook has a dominant share of the social networking market.

Two months later, the agency filed a new complaint stuffed with data points from Comscore, an analytics firm that Facebook itself uses, suggesting that the company dominates the market under a variety of metrics: daily active users, monthly active users, and user time spent. The new evidence seems to have impressed Boasberg. “In short,” he writes in the latest ruling, “the FTC has done its homework this time around.”

The market-share data doesn’t quite settle matters on its own. The FTC, Boasberg notes, also has to show that Facebook’s alleged monopoly has been bad for consumers. This is where the ruling gets interesting. From the beginning, the movement to wield antitrust law against companies like Facebook and Google has faced a major obstacle: How do you show that consumers are harmed by companies whose core offerings are free? (Or, in Amazon’s case, famously cheap?) Antitrust law is **technically not about prices**, but since the late 1970s, judges have tended to interpret it as if it were. The standard way to argue against a corporate merger is to show that it will lead to higher prices. (See, for example, the beef industry.)

In recent years, legal thinkers, including FTC chair Lina Khan, have been developing another way to think about the harms of tech monopolies: When there’s no competition, companies will be free to do things that users don’t like, and will feel less pressure to improve their products. The scholar Dina Srinivasan, for example, has argued that Facebook lowered its user privacy standards once it defeated early rivals like MySpace. The FTC included that theory in its brief, plus several others. Facebook’s dominance, it argued, has also allowed the company to pack users’ feeds with more ads. And, the FTC noted, Facebook killed its own in-house photo-sharing app once it purchased Instagram, suggesting that consumers would have more choices if the two companies had remained rivals.

**Until now**, it has been an **open question** whether these **non-price theories** will **succeed in court.** Which is why it’s a **big deal** that Boasberg seems to have **accepted them**. “In short,” he wrote, “the FTC alleges that **even though** Facebook’s acquisitions of Instagram and WhatsApp did not lead to **higher prices**, they **did** lead to **poorer services** and **less choice** for consumers.”

That’s a pretty dry sentence, but it **could turn out to be a milestone.**

“It is a really prominent, important, and uncommon **endorsement** of that **non-price market idea**,” said Rebecca Allensworth, a professor at Vanderbilt Law School. “I think it’s pretty **devastating for Facebook**.”

**9th Circuit decision in SRP set important new antitrust precedent.**

**Penrod 2-2** --- Journalist for Utility Dive.

Emma, 2-2-2022, "Appeals court decision opens door to sue public power utilities for rooftop solar fees under antitrust law," Utility Dive, https://www.utilitydive.com/news/appeals-court-decision-opens-door-to-sue-public-power-utilities-for-rooftop/618147/

The **court rejected a defense raised by SRP**, which argued that its actions did not violate antitrust law because the rooftop solar industry is thriving in Arizona in spite of the rate increase. Writing for the court, Judge Eric D. Miller noted that SRP's decision to raise rates could represent "**coercive activity**" intended to render independent solar systems uneconomical — activity that could warrant litigation. And because SRP's board of directors is not subject to oversight by the Arizona Corporation Commission, the state law that protects regulated utilities from antitrust litigation does not apply to SRP, Miller concluded.

Miller also noted that SRP had previously created financial incentives for customers who installed solar panels. However, these incentives were eliminated and rates raised after SRP's own attempts to enter the solar energy market did not bear fruit.

The ruling did, however, affirm the previous court's finding that the Local Government Antitrust Act shields SRP from federal antitrust damages — a positive outcome from SRP's perspective.

"With regard to the few remaining claims that were remanded to Judge [Susan] Brnovich [of the Arizona district court] for additional proceedings, SRP is confident that the SRP Board actions...will be determined to have been rationally considered and adopted, and not in violation of any law or statute," SRP spokesperson Scott Harelson said in a statement. "SRP believes that the few remaining claims in the plaintiff's allegations are without merit and that SRP will ultimately prevail in this matter."

**But whether or not they do prevail** in the long run, the **9th Circuit decision** could **establish an important precedent for future cases**, according to Rich.

"It's been completely obvious for a decade now that utilities are ganging up on rooftop solar," Rich said. "If that's not antitrust, I don't know what is. This decision makes it easier to get a remedy and will hopefully make utilities think twice about their monopolistic actions."

**New plaintiff-favoring standard in antitrust case expanded scope of liability across the board.**

**Brody 1-26** --- Senior reporter at Protocol focusing on how Congress, courts and agencies affect the online world we live in.

Ben, 1-26-2022, "The FTC's antitrust case against Meta could be great for privacy," Protocol — The people, power and politics of tech, https://www.protocol.com/policy/ftc-meta-privacy-antitrust

Right after Thanksgiving in 2011, the Federal Trade Commission [announced](https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep) it had caught Facebook in several lies about privacy occurring over the prior two years. The company, it said, had agreed to a settlement and would be making [changes](https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf) going forward to protect users’ data.

The agreement, to put it mildly, doesn’t seem to have gone as the FTC planned. One $5 billion [fine](https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions) for privacy abuses and an unending stream of [scandals](https://www.protocol.com/policy/haugen-facebook-eight-takeaways) later, the FTC is in the middle of litigation with the company now known as Meta over alleged antitrust violations, which were long thought to belong to an entirely separate area of law.

In a **judge’s recent**[**ruling**](https://www.protocol.com/bulletins/ftc-antitrust-meta-proceed) in the competition case, though, the FTC may have found a **surprising lever** to get a handle on Big Tech’s data practices.

On Jan. 11, Judge James Boasberg denied Meta’s motion to dismiss the suit, essentially finding that if everything in the FTC’s complaint turns out to be true, the commission has put together a legally sound case. **It’s an admittedly plaintiff-friendly standard** and proving all the claims are indeed true may well still be a “tall task” for the FTC once Meta can present its own evidence and arguments, Boasberg wrote. Still, at least as far as he was concerned, the FTC wasn’t invoking absurd or discredited legal theories.

That’s where privacy comes in: While the FTC alleges that Meta's acquisitions of Instagram and WhatsApp were anticompetitive, the commission also contends that the company’s **shoddy privacy record arose** because it **faces no meaningful competition** from rivals that might offer better data protections.

Other antitrust cases have looked at data as an asset, or [complained](https://www.protocol.com/policy/facebook-privacy-competition) that privacy protections are a [pretext](https://www.theverge.com/2019/9/10/20859399/linkedin-hiq-data-scraping-cfaa-lawsuit-ninth-circuit-ruling) for anticompetitive behavior. In the lead-up to the FTC’s [filing](https://www.protocol.com/bulletins/facebook-antitrust-lawsuit) of the case in 2020, though, antitrust traditionalists and even some sympathetic experts essentially dismissed the novel notion that an enforcer could invoke privacy as a casualty of tech consolidation. They said it was academic at best — and at worst, a harebrained effort to cram the two main objections to Big Tech into one case.

Since the 1980s, judges in antitrust cases have looked for plaintiffs to focus on measurable price increases to consumers or, occasionally, to quantifiably decreased output. Privacy is neither, traditionalists pointed out, though it could be theoretically possible to analyze privacy as a type of product quality, and plaintiffs do sometimes invoke worse offerings to show harm. But even then, traditionalists said courts haven’t liked substituting their judgments about product quality for consumers’ opinions.

Jim Tierney, who had previously spent a decade overseeing tech-sector antitrust enforcement at the Justice Department, [said](https://www.bloomberg.com/news/articles/2019-11-25/privacy-lapses-could-be-part-of-google-facebook-antitrust-cases) at the time that a lawsuit “based on a data privacy theory of harm is not in the cards.” (Tierney was in private practice, and his law firm, Orrick Herrington & Sutcliffe, did work for Facebook, though he said he in particular didn’t.)

The FTC didn’t listen to the naysayers. In its original [complaint](https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.3.0_2.pdf), which was filed by a Republican-led commission during the Trump administration, the FTC cited potential benefits of more competition, including a boost in the “availability, quality, and variety of data protection privacy options for users, including, but not limited to, options regarding data gathering and data usage practices.”

Boasberg eventually [dismissed](https://www.protocol.com/facebook-ftc-complaint-dismissed) that complaint, though he let the FTC try again and expressed no concerns about the claims regarding data protection. In the meantime, [Lina Khan](https://www.protocol.com/tag/lina-khan), a well-known critic of tech companies — and of the bipartisan focus, dating to the Reagan era, on prices in antitrust cases — had taken over the commission as chair.

Khan [made clear](https://www.protocol.com/policy/lina-khan-privacy) in her academic writing, before joining the FTC, that she sees a nexus between privacy and competition. In fact, academics in general had been [interested](https://www.nytimes.com/2020/12/20/technology/antitrust-case-google-facebook.html) in the link between competition and privacy. Even some Republican enforcers — like Makan Delrahim, head of the DOJ Antitrust Division during the Trump administration — [floated](https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition) similar notions, which found their way into the antitrust [complaint](https://storage.courtlistener.com/recap/gov.uscourts.dcd.223205/gov.uscourts.dcd.223205.1.0_4.pdf) he [filed](https://www.protocol.com/google-justice-department-lawsuit-antitrust) against Google.

The [revised FTC complaint](https://www.protocol.com/bulletins/ftc-new-facebook-complaint), which Khan led, landed last summer and [zeroed](https://digiday.com/media/facebook-fights-ftcs-new-privacy-themes-in-revised-antitrust-case/) in on these issues, detailing how Facebook allegedly worsened privacy among other, more traditional harms.

“Facebook has also engaged in other activities that have degraded the user experience, including the misusing or mishandling of user data,” the revised complaint [said](https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.82.0.pdf), citing both the FTC’s 2011 privacy order and the 2019 mega-fine. “Facebook’s ability to harm users by decreasing product quality, without losing significant user engagement, indicates that Facebook has market power.”

‘Consumers care’

Despite the academic interest, and prosecutors’ claims in their lawsuits, **there isn’t much modern precedent** in the U.S. directly justifying Khan’s move. Even in the EU, where antitrust enforcement is relatively stronger, especially against tech, the [question](https://techcrunch.com/2021/03/24/competition-challenge-to-facebooks-superprofiling-of-users-sparks-referral-to-europes-top-court/) is [fraught](https://www.reuters.com/business/legal/german-court-turns-top-european-judges-help-facebook-data-case-2021-03-24/).

Meta wasn’t shy about pointing out the lack of prior rulings. “No court has ever endorsed the theory the FTC espouses here: that the amount of ‘privacy’ on a service can demonstrate monopoly power,” the company [wrote](https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.83.1_3.pdf) when asking to have the new complaint dismissed. Indeed, Meta suggested, privacy can’t even be measured, and consumers have proven they like the status quo of free, ad-powered services.

That’s the **motion that failed earlier** this month when Boasberg said **the FTC’s case could continue**.

Boasberg cited existing statutes relating to spam to point out that actually, people might care deeply about such things. “The advent of federal legislation addressing various privacy and advertising concerns related to consumer technology is consistent with the intuitive notion that consumers care about these issues and may prefer stronger protections” in social networking, he [wrote](https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.90.0_2.pdf).

His ruling doesn’t seem to have been a one-off in federal courts, either. Three days after it came down, a U.S. judge in California [denied](https://storage.courtlistener.com/recap/gov.uscourts.cand.369872/gov.uscourts.cand.369872.214.0.pdf) part of Meta’s motion to dismiss a different antitrust lawsuit. That complaint comes from a group of consumers and advertisers whose allegations, as Judge Lucy Koh put it, include the notion that, “without competition, Facebook can extract additional ‘personal information and attention’ from users.”

Koh, too, allowed the privacy claims to proceed, writing: “Consumers have adequately alleged that their injury ‘flows’ from Facebook’s anticompetitive conduct.”

Alex Harman, competition policy advocate at liberal consumer advocacy group Public Citizen, said the FTC’s handling of privacy in the Meta case shows why enforcers should push the boundaries of competition law rather than relying on old interpretations that might not account for current business models.

“You might lose, but you might also win, and then you expand the coverage of the law,” he said, adding that the U.S. might have stopped Google’s [acquisition](https://www.bbc.com/news/technology-55662659) of Fitbit and other deals if there had been better precedent.

Harman said that if that part of the FTC’s case ultimately prevails (in what could be a years-long [process](https://www.protocol.com/policy/tech-lawsuits-22)), it could be a **boon** not only to enforcers and other plaintiffs who want to bring cases based on privacy concerns with Big Tech, but also all kinds of product issues.

“The **implication is far beyond just the biggest tech companies**,” he said. “You could sub in any feature or benefit that is being anticompetitively squeezed out as a result of a consolidation.”

**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.

**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.

**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.

**The FTC’s aggressive stance has already sent chills through the markets**

**McLaughlin and Davis 21** – Reporter for Bloomberg News covering antitrust, economic power, finance, and M&A; Reporter at Bloomberg News covering M&A in healthcare as well as acquisition finance

David McLaughlin and Michelle F. Davis, "Record M&A Boom Risks Running Afoul of Biden’s Antitrust Cops," Bloomberg, 8-13-2021, <https://www.bloomberg.com/news/articles/2021-08-13/record-m-a-boom-collides-with-biden-s-get-tough-antitrust-stand>

A runaway 2021 merger boom with almost $1 trillion of pending deals in the U.S. threatens to **run headlong** into the Biden administration’s **new, tougher antitrust regime.**

Federal Trade Commission Chair Lina Khan’s warning of a more **aggressive stance** to block deals, disclosed Thursday in a letter to Senator Elizabeth Warren, is the **newest signal** of a **far more restrictive environment** for mergers and acquisitions, according to lawyers and bankers.

“The new administration has made it clear that prior administrations -- both Democratic and Republican -- may have been **overly permissive** on mergers,” said James Fishkin, an antitrust attorney at Dechert LLP in Washington. “Lina Khan’s position is quite clear that she intends to **bring more cases**, and I expect to see the same at DOJ.”

The stepped-up scrutiny comes as global dealmaking has already surpassed $3 trillion in total value this year, putting 2021 on track to be the most active year for mergers and acquisitions, according to data compiled by Bloomberg. This year’s deals include pending mergers and acquisitions worth $984 billion involving a U.S. buyer or target company, according to data compiled by Bloomberg.

The list includes AT&T Inc.’s $43 billion deal to merge its WarnerMedia unit with Discovery Inc. to create a new independent company, and Canadian National Railway Co.’s $30 billion takeover bid for Kansas City Southern.

Khan’s FTC is investigating Amazon.com Inc.’s agreement to buy movie studio Metro-Goldwyn-Mayer, Nvidia Corp.’s acquisition of Arm Ltd., and Lockheed Martin Corp.’s deal to purchase Aerojet Rocketdyne Holdings Inc.

At the Justice Department, which shares antitrust enforcement duties with the FTC, officials are reviewing UnitedHealth Group Inc.’s proposed takeover of Change Healthcare Inc. and Bertelsmann SE’s $2.18 billion takeover of the Simon & Schuster book-publishing business from ViacomCBS Inc.

“I think **it is real** that they want to **increase merger oversight**, which is consistent with what’s happening in the U.K. and other foreign jurisdictions where they’re being much more aggressive **even** on deals where antitrust practitioners” **didn’t foresee** **them** asserting jurisdiction, said Raaj Narayan, a corporate partner at Wachtell, Lipton, Rosen & Katz.

The new environment is taking shape as President Joe Biden is moving to promote greater competition in the U.S. economy. He tapped Khan to run the FTC in June and announced last month that he was nominating Jonathan Kanter to run the Justice Department’s antitrust division. If Kanter is confirmed by the Senate, the two antitrust agencies would be led by advocates for a more forceful antitrust agenda than past administrations. Biden last month also issued an executive order calling on federal agencies to use regulatory and enforcement powers to boost competition in industries that have experienced rising consolidation.

What Bloomberg Intelligence Says:

The FTC’s more **aggressive stance** is likely to lead to **unpredictable and lengthier** M&A reviews, expanded remedies and **more court challenges. Any large deal** before the agency may be affected, though pharma, tech M&A and vertical deals may be in the greatest jeopardy. -Jennifer Rie and Sophia Isani, litigation analysts.

One investment banker who works on pharmaceutical deals and declined to be named said **companies are worried** about doing deals and facing a challenge by the FTC. A mergers and acquisitions lawyer at a top firm who spends most of his time in health care said he’s already seeing **a chilling effect** on deals because of antitrust risk.

Earlier this month, Khan’s FTC announced that companies may face extended merger reviews after they close their deals even when they comply with a required 30-day waiting period before completing transactions. The agency is telling companies that they are closing “**at their own risk.**”

The long-standing practice at the FTC and the Justice Department has been to give reported deals an initial 30-day review and either allow them to close at the expiration of the waiting period or open an in-depth investigation by issuing a so-called second request to the companies for more information.

Fishkin said the letters are **unprecedented** for the FTC and create **new uncertainty** for companies by exposing them to a **costly investigation** and the possibility that the agency later tries to **unwind the deal**, he said. The letters could end up **deterring some mergers** and prompt buyers to include terms in deal documents that allow them to **abandon a transaction** if the agency issues a letter, according to Fishkin.

Republican FTC Commissioner Christine Wilson criticized the warning letters and other actions by Khan to change the process for reviewing and clearing deals.

“Collectively, these actions **raise the costs** of pursuing mergers and **threaten to chill** harmful and **beneficial deals** alike,” Wilson said on Twitter.

This week, food delivery company Performance Food Group Co. disclosed to investors that it received a warning letter from the FTC about its agreement to buy Core-Mark Holding Co. but that it intended to close the deal by September.

“Many executives and their boards contemplating transactions will at the margin be **deterred** from going forward until we know more about the direction that merger policy will take,” Terry Calvani, a former FTC commissioner, said in an interview.

#### Companies will have to deal with the costs of litigation no matter what

Bridgeline, The “New” Antitrust, and Why Law Firms and Corporations Should Pay Attention, 2021, <https://bridgelinesolutions.com/the-new-antitrust-and-why-law-firms-and-corporations-should-pay-attention/>

To be sure, seasoned antitrust lawyers will challenge any expanded enforcement of Section 5 of the FTC Act, perhaps all the way to the U.S. Supreme Court. In the meantime, however — and for years to come — many companies will find themselves subject to intrusive FTC investigations and enforcement via administrative proceedings. Indeed, the FTC on July 1 authorized FTC Staff to use compulsory process (subject to approval by a single Commissioner) to investigate a wide range of industries and conduct, including technology companies, digital platforms, and healthcare businesses (such as pharmaceutical companies, PBMs and hospitals).

Moreover, arguments that existing case law limits antitrust enforcement may not apply directly to the FTC’s use of its rulemaking authority to prohibit categories of business practices as “unfair methods of competition.” Similarly, such arguments may not apply to the ability of other federal agencies to use non-antitrust laws and regulations to achieve the EO’s broad objectives. Significantly, Section 2(c) of the Competition EO states that “in addition to the traditional antitrust laws, the Congress has also enacted industry-specific fair competition and anti-monopolization laws that provide additional protections.” The EO also expressly authorizes the following agencies to use their individual authority to issue new rules and regulations concerning a broad array of business practices: (1) the Department of Agriculture; (2) the Department of Treasury (which includes the alcohol and tobacco industries); (3) the Federal Communications Commission; (4) the Department of Transportation (which includes the airline industry); (5) the Surface Transportation Board (which includes the rail industry); (6) the Federal Maritime Commission; (7) the Department of Health and Human Services (which includes prescription drug pricing); (8) the Department of Commerce; (9) the Department of Defense; and (10) the Consumer Financial Protection Bureau.

The breadth of the Competition EO’s scope is so great that it’s hard to think of a single unaffected industry. In the coming months, law firms and in-house legal departments will likely need to devote substantial resources to re-evaluating current business practices — such as IP licenses and employment agreements — in order to anticipate the myriad legal issues raised by the Competition EO (as well as the FTC’s new enforcement agenda). Not to mention that the DOJ’s and FTC’s merger enforcement is bound to become more aggressive (even reaching consummated mergers) than under the prior Administration.